DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jorja McGennan
v
Angela Joy Park
(U2023/5979)

DEPUTY PRESIDENT LAKE BRISBANE, 31 JANUARY 2024

Application for an unfair dismissal remedy – hair salon gossip – jurisdictional objection raised – applicant dismissed – dismissal not compliant with Small Business Fair Dismissal Code – jurisdictional objection dismissed – unfair dismissal – remedy to be determined.

[1] Ms Jorja McGennan (the **Applicant**) lodged an application with the Fair Work Commission (the **Commission**) seeking a remedy pursuant to s.394 of the *Fair Work Act 2009* (the **Act**) in relation her dismissal by Ms Angela Joy Park (the **Respondent**).

[2] A conciliation was held on 19 September 2023. Directions were provided to the parties and the matter was listed for hearing on 24 October 2023. The Applicant was self-represented, and the Respondent sought to be represented by Ms Melissa Guilfoyle. The Applicant did not oppose representation. I exercised my discretion and granted permission for the Respondent to be represented pursuant to s.596(2) of the Act.

[3] The Respondent disputes two of the four specified matters before considering the merits of the matter under s.396 of the Act. The Respondent raises that the Applicant was not dismissed, or in the alternative, the Applicant was dismissed in accordance with the Small Business Fair Dismissal Code. I have considered all the evidence provided before me and provide my consideration below.

Background

[4] The Applicant commenced her employment with Summer Jade Hair Salon as an Apprentice in April 2021. Ms Park owns the salon.

[5] During the Applicant's employment, the Respondent states that the Applicant had received numerous verbal warnings about the quality of her work, her work performance, client complaints, mobile phone usage and interaction with clients.

[6] On 13 May 2023, the Applicant submits that the Respondent had spoken negatively about her to one of the Respondent's long-term clients while she was sick. The Respondent acknowledged in her witness statement that she did express disappointment with the

Applicant's conduct because her actions put pressure on the team and made clients feel uncomfortable, but it was not negative.[1]

[7] On 17 June 2023, the long-term client returned to the hair salon for a hair appointment with the Applicant. The Applicant and this client had discussed what was said by Ms Park on 13 May 2023. [2]

[8] On 20 June 2023, the Respondent and the long-term client had a discussion regarding what was said on 17 June 2023. [3]

[9] On 21 June 2023, the Respondent and Applicant had a conversation about what was discussed on 17 June 2023. Ms Park stated that she thought the long-term client had a misunderstanding and asked the Applicant to explain this to the client and offer an apology for this issue to be resolved. [4]

[10] On 25 June 2023, the client stated she felt uncomfortable returning to the salon while the Applicant was at the salon after the miscommunication.

[11] On 28 June 2023, the Applicant had a conversation with the salon manager, Ms Shnay Carey regarding the incident.

[12] On 3 July 2023, Ms Park sent a text message stating '*Hey, Can you try and meet me at the salon in the morning about 8:45[am]?*' The Applicant responded *'yeh shouldn't be a problem. Is everything okay?'* to which the Respondent replied *'Just need to chat. Thanks c u tomorrow'*.[5]

[13] On 4 July 2023, a meeting was held with the Applicant and Respondent. During this meeting, the Respondent stated that the Applicant was disengaged and did not take responsibility for the issues identified and would not sign off on the written warning as she did not want to provide a client with an apology or acknowledge that she had done anything wrong. The Applicant stated she would be leaving the Respondent on 13 October 2023 at the conclusion of her apprenticeship.

[14] The Respondent had provided the following warnings:

- 'Happy to lose one of Summer Jade Hair Salons top 10 highest paying clients for 10 years, because you think you are right with no ramifications'
- Using your mobile phone during work hours and not related to work (5 verbal warnings prior)
- 'Quality of work not up to standard and not taking ownership of mistakes, always blaming others'
- 'Clients not wanting to return to the salon because of your attitude and quality of work and care'
- 'Taking sick days without doctor certificates'
- 'Talking about yourself to clients, when the clients are there to relax and enjoy their experience in the salon (2 verbal warnings prior)'.[6]

[15] This was the Applicant's first official warning letter, and it was noted that if she did not improve on these matters that her employment may be terminated. Another review of the Applicant's performance would be undertaken on 11 July 2023.

[16] The Applicant sent a text at 9.59am the same day asking for a photo of the formal letter, to which Ms Park responded that she did not have to give the Applicant a copy of the letter as she did not agree to the conditions.

[17] The Respondent sent the following text sent at 12.35pm:

> "*Clearly this is going nowhere. I believe the best thing is for me to give you two weeks notice. I've come to this conclusion because the problems aren't being rectified. It's going round and round with no outcome. Your final date will be Saturday 15th July. Sorry it has come to this.*"[7]

[18] The Applicant sent an email containing a medical certificate. The Applicant sent a text at 7.17pm asking if Ms Park had received this, and that paperwork for her apprenticeship would be sent. [8]

[19] The Respondent sent a message asking if the Applicant was resigning and self-replied to text message at 12.35pm, following up regarding two weeks' notice to leave. The Applicant sought clarification of whether her employment would be terminated.[9]

[20] The Respondent stated that the Applicant had quit, replying as follows:

> "*You quit first then I said no let's think about this logically. Then I thought about it and have given you two weeks notice to finish up. Because this is clearly not working. Not fired [nor] made redundant. Just given you two weeks notice. You can leave after that.*"[10]

[21] The Applicant responded:

> "*I have not resigned or quit, therefore I can stay for the rest of my apprenticeship or you can terminate me. I have no intention to cease my employment this close to my apprenticeship completion date.*"[11]

[22] The Respondent had confirmed the termination of employment stating:

> "*Ok jorja*
> *I have given you two weeks notice to terminate your employment.*"[12]

[23] The Applicant had subsequently lodged an unfair dismissal application on the same day.

Was the Applicant dismissed in accordance with s.386 of the Act?

[24] Section 396(b) requires a consideration of whether the person is protected from unfair dismissal. To be eligible to make an unfair dismissal claim, the Applicant must establish that they were dismissed.

[25] Section 386(1) of the Act relevantly provides that 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.

[26] The Full Bench in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* outlined the relevant authorities with respect to what it means for an employee to be terminated at the initiative of the employer.[13] In short, it is not sufficient to simply demonstrate that the employee did not voluntarily leave their employment.[14]

[27] While it may be that some action on the part of the employer is intended to bring the employment to an end, it is not necessary to show the employer held that intention.[15] It is sufficient that the employer's conduct, would, on any reasonable view, be likely to bring the employment relationship to an end.[16]

[28] All the circumstances – including the conduct of both the employer and employee – must be examined.[17] In other words, it must be shown that "the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship."[18]

[29] Where a resignation is given in the heat of the moment or under extreme pressure, special circumstances may arise.[19] In special circumstances an employer may be required to allow a reasonable period of time to pass. The employer may have a duty to confirm the intention to resign if, during that time, they are put on notice that the resignation was not intended.[20]

[30] The Applicant had an intention to resign at the end of her apprenticeship. However, it appeared to be a 'heat of the moment' resignation resulting from the argument raised by the Applicant and Respondent. This is supported through a text message that was subsequently sent after the meeting on 4 July 2023 when the Applicant stated she did not intend to resign or quit in a text message.

[31] The employment relationship ended at the initiative of the employer when the Respondent had texted the Applicant that she had '*two weeks notice to terminate [her] employment.'*

[32] The Respondent referred to TikTok clip reposted by the Applicant on 18 July 2023, which referenced quitting a toxic job, as evidence that the Applicant resigned. Although the Applicant acknowledged this was an unwise decision, it did not change the fact that the employment relationship was ended by the Respondent via text on 4 July 2023.

[33] Section 386 is clear that a person is dismissed when they are terminated on the employer's initiative. The Applicant was not expected to return to work as a result of the text

message sent by Ms Park. The Respondent had no intention to continue the employment relationship past 15 July 2023.

[34] The Applicant was dismissed within the definition of s.386 of the Act and is a person protected from unfair dismissal.

Was the Applicant dismissed in accordance with the Small Business Fair Dismissal Code?

[35] The Respondent states that there were only 5 employees at the time of the Applicant's dismissal. This was not contested by the Applicant. The Respondent states that she complied with the Small Business Fair Dismissal Code.

[36] The Small Business Fair Dismissal Code states the following:

> "*Other Dismissal*
>
> *In non-summary dismissal cases, the employee must be warned that if there is no improvement to their conduct or capacity, they could be dismissed.*
>
> *The employee must be given a reason as to why their employment is at risk and the reason must be a valid reason based on their conduct or capacity to do the job.*
>
> *The employer must give the employee an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.*
>
> *Procedural matters*
>
> *In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.*
>
> *A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements*."

[37] Although I acknowledge the frustration of the Respondent of losing a long-term client, the incident could have been better managed.

[38] The nature of the industry requires communication skills with clients who may raise an array of topics. A topic raised in this instance was a discussion about a workplace situation. It is likely that Ms Park's comment to the long-term client on 13 June 2023 may have been a passing comment which was misinterpreted by the client. The comments became a misunderstanding through gossip shared between the Applicant and the long-term client. The

Applicant may not have had the context when hearing about the comments from the long-term client which led to tension between the Applicant and the Respondent.

[39] The Applicant received a formal warning on 4 July 2023, and did not have an opportunity to improve. Although Ms McGennan had refused to apologise to the client on this day, alternative solutions could have been proposed by the Respondent before considering dismissal. If it was regarding her communication style, this should have been reevaluated on 11 July 2023 as stated in the written warning notice.

[40] It was hasty to press the Applicant in apologising to the client and asking her to sign off on the written notice without doing a proper inquiry with the Applicant. In order to assist the Applicant in rectifying the problem, the written notice should have been provided instead of it being read out to her, and a period of time (such as a day) could have been provided for her to consider the notice.

[41] As a result, the Respondent failed to comply with the following part of the Small Business Fair Dismissal Code, and the Applicant was not dismissed in accordance with the Code:

> *The employer must give the employee an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.*

[42] As a result, I am required to consider whether the dismissal was harsh, unjust or unreasonable under s.387 of the Act.

Was the Applicant unfairly dismissed?

[43] Section 387 of the Act provides the criteria and considerations the Commission must take into account when deciding if the dismissal was harsh, unjust, or unreasonable. As required by the Act, I consider the following:

(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.

(a) valid reason for the dismissal

[44] It is well established that the factual basis for the reason for dismissal will not of itself demonstrate the existence of a valid reason.[21] It must, as s.387(a) makes clear, be a valid reason for dismissal. To be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[22] and should not be "capricious, fanciful, spiteful or prejudiced."[23] As summarised by Deputy President Asbury in *Smith v Bank of Queensland Ltd* a "dismissal must be a justifiable response to the relevant conduct or issue of capacity".[24] The Commission must consider the entire factual matrix in determining whether an employee's termination was for a valid reason.[25]

[45] It appears that the Respondent was frustrated with the Applicant's work performance and attitude. However, the reason provided appeared to be somewhat spiteful and capricious. The written reason for the warning, and the eventual reason for dismissal, was the following:

> "*Happy to lose one of Summer Jade Hair Salons top 10 highest paying clients for 10 years, because you think you are right with no ramifications*".

[46] However, the other issues that were raised such as using her mobile phone inappropriately during work hours, quality of work not up to standard, and poor attitude resulting in a loss of business which are valid reasons for dismissal. These factors could have been contributing factors to the dismissal. I accept that there is a valid reason for the dismissal in considering all reasons provided.

(b) whether the Applicant was notified of the reason for dismissal

[47] 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,[26] and in explicit[27] plain and clear terms.[28]

[48] I am not satisfied that the Applicant was sufficiently notified regarding the reasons for dismissal before the decision was made. The Applicant was not provided sufficient notice of the reason for dismissal in explicit, plain and clear terms.

[49] On the notice, it was made clear that if the Applicant did not improve on the issues provided by the Respondent, her employment would be terminated. However, the Applicant was not put on notice that she would be terminated on the same day she received the warning notice especially when it stated that her conduct would be reviewed on 11 July 2023. Furthermore, the Respondent failed to provide the Applicant written notice when she asked.

[50] The Fair Work Ombudsman template for the warning letter which the Respondent relied on makes clear that the warning letter should contain a reasonable timeframe in which the changes need to occur. If the Respondent had intended to terminate the Applicant based on the conversation earlier on 4 July 2023, this should have been reflected in the written notice and provided to the Applicant that day. Had the Respondent reviewed the Applicant's conduct as proposed on the written notice on 11 July 2023, I would have been satisfied that the Applicant was put on notice. However, this was not the case.

[51] I am not satisfied that there was proper notice provided to the Applicant regarding her reason for termination.

(c) whether the Applicant was given an opportunity to respond to any reason related to the capacity or conduct of the person

[52] To be given an opportunity to respond, the employee must be made aware of allegations concerning the employee's conduct or capacity so as to be able to respond to them and must be given an opportunity to defend themselves. As Justice Moore has stated: [29]

> "…***the opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance.*** *An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That… does not constitute an opportunity to defend.*"
>
> (emphasis added)

[53] The requirements of s.387(c) of the Act will be satisfied "[w]here 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…"[30]

[54] The Full Bench of the Fair Work Commission has held that s.387(c) of the FW Act is to be applied in a common sense way to ensure that the Applicant has been treated fairly and does not necessarily require formality in the sense of conducting a meeting with the employee to inform the employee of the reasons for the proposed dismissal or providing the employee with an opportunity to address the employer's concerns in writing.[31]

[55] The Applicant was not provided the full opportunity to respond to the employer's concern. The written notice, and what was likely communicated to Ms McGennan, was an instruction to rectify the problem with the long-term client, message an apology, and return to the salon. It was communicated as a command without an opportunity for the Applicant to respond. Although Ms McGennan was highly emotional, this could have been better addressed by providing a cool-down period for the Applicant to provide a response the next day.

[56] An opportunity to respond was not provided.

(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

[57] There is no evidence to suggest that there was an unreasonable refusal by the employer to allow the person to have a support person present.

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal

[58] The Applicant's dismissal was related to unsatisfactory performance. The Respondent was not satisfied with the Applicant's communication with the long-term client. As a result, a meeting was arranged, and a formal warning was provided.

[59] The Applicant was given opportunities to improve through informal verbal warnings. However, the Applicant was not given another chance when a formal warning was provided. The written notice stated that the Applicant's conduct would be reviewed on 11 July 2023. This never occurred as the Applicant was dismissed on the same day the written notice was issued via text message.

(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

[60] The Respondent has 5 employees in the hairdressing salon. I do take into account the busy nature of the Respondent as a small business and that the Applicant's attitude could have caused additional strain which impacted the procedures following the dismissal.

[61] The Respondent made efforts to search for resources on providing proper written notice. However, the notice was not executed properly, and it is clear in this instance, that the absence of dedicated human resources impacted the nature of the dismissal. I take this factor into account in determining whether there is unfair dismissal.

(h) any other matters that the FWC considers relevant

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

1) Breakdown of the employment relationship

[63] The Applicant was a young apprentice who appeared to have limited work experience prior to being engaged with the Respondent. The Applicant was getting her Diploma in Hairdressing and indicated that she would quit once her apprenticeship ended. The incident surrounding the salon gossip may have fast forwarded the relationship breakdown between Ms McGennan and Ms Park.

[64] The Respondent and the long-term client were contributing factors to the incident and could have better addressed the situation. The Applicant is not blameless in the relationship breakdown as this could have better handled the situation through discussing the incident with the client and figuring out an alternative solution.

[65] I understand the concerns of Ms Park if an employee lacks commitment to the business and wished to let the Applicant go if the Applicant could not be trusted to represent the business positively. The Respondent is a small business dealing with a high volume of work, and the loss of an employee would cause an additional burden as the Applicant had three months of bookings lined up. The resources and skills in a small business means that decisions regarding these types of matters occur generally rapidly.

[66] Considering this, it is understandable why the Respondent felt that the Applicant's dismissal would be appropriate in this circumstance and contributes to finding that the dismissal was not harsh, unjust or unreasonable.

Conclusion

[67] In weighing up all the factors above, it is acknowledged that the Respondent faces challenges being a small business, while facing some difficulties with the Applicant's attitude, and a breakdown of the relationship which would make the dismissal less unreasonable. I note that Applicant could have dealt with the situation more professionally. The Applicant appears to be new to the workforce and there are going to be situations where it may be disagreeable to her. The Applicant could have at least discussed the misunderstanding and ask the long-term client to come back to the hair salon.

[68] However, the number of procedural deficiencies cannot be overlooked and support the finding that the Applicant's dismissal was harsh, unjust or unreasonable. The Applicant was not given an opportunity to improve regarding her written warning, especially when a date for review was provided. The issue of the long-term client was escalated too quickly, and the issue could have been better resolved if more time and consideration was put to addressing the long-term client. What should have been done was to conduct a review of the Applicant's performance on 11 July 2023 and give the Applicant a cooling-off period in addressing the long-term client, instead of deciding to dismiss her on the day she received the written notice.

[69] As a result, I am satisfied that the Applicant was unfairly dismissed under s.394 of the Act and is entitled to a remedy under this provision. I will conduct another hearing to determine an appropriate remedy.

DEPUTY PRESIDENT

Appearances:

J. McGennan appearing for herself as the Applicant.
M. Guilfoyle appearing on behalf of the Respondent from The Firm on The Avenue.

Hearing details:

24 October 2023
Brisbane
Hearing via Microsoft Teams

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[1] Witness Statement of Angela Joy Park, para c.

[2] Ibid, para e.

[3] Ibid, para h.

[4] Ibid.

[5] Applicant's Form F2; Witness Statement of Angela Joy Park, Annexure 2.

[6] Witness Statement of Angela Joy Park, Appendix 1.

[7] Applicant's Form F2, Witness Statement of Angela Joy Park Appendix 2.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941.

[14] Ibid.

[15] Ibid; see also *Rheinberger v Huxley Marketing Pty Limited* (1996) 67 IR 154, 160-161; see also *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496 (11 August 2006); *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200.

[16] *Rheinberger v Huxley Marketing Pty Limited* (1996) 67 IR 154, 160-161 cited in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941 at [31].

[17] *Whirisky v DivaT Home Care* [2021] FWC 650at [77].

[18] *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200 and *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941 at [28].

[19] *Ngo v Link Printing Pty Ltd* Print R7005 (AIRCFB, McIntyre VP, Marsh SDP, Harrison C, 7 July 1999) at para. 12, [(1999) 94 IR 375]; citing *Kwik-Fit (GB) Ltd v Lineham* [1991] UKEAT 250_91_2410 (24 October 1991), [[1992] ICR 183 at p. 191].

[20] *Ngo v Link Printing Pty Ltd* Print R7005 (AIRCFB, McIntyre VP, Marsh SDP, Harrison C, 7 July 1999) at para. 12, [(1999) 94 IR 375]; citing *Kwik-Fit (GB) Ltd v Lineham* [1991] UKEAT 250_91_2410 (24 October 1991), [[1992] ICR 183 at p. 191].

[21] *Raj Bista v Group Pty Ltd t/a Glad Commercial Cleaning* [2016] FWC 3009.

[22] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[23] Ibid.

[24] [2021] FWC 4 at 118.

[25] *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWCFB 4185, [46] citing *Allied Express Transport Pty Ltd v Anderson (*1998) 81 IR 410, 413

[26] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[27] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[28] Ibid.

[29] *Wadey v YMCA Canberra* [1996] IRCA 568.

[30] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[31] *Pitts v AGC Industries* [2013] FWCFB 9196, [54] referring also to *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1; cited and adopted in *RMIT v Asher* (2010) 194 IR 1.