DECISION

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

Troy Peters
v
Drewmaster Pty. Ltd.
(U2023/7336)

COMMISSIONER RIORDAN SYDNEY, 2 FEBRUARY 2024

Application for an unfair dismissal remedy

[1] On 11 August 2023, Mr Troy Peters (**the Applicant**) filed an application with the Fair Work Commission (**the Commission**) seeking a remedy for an alleged unfair dismissal pursuant to section 394 of the *Fair Work Act 2009* (**the FW Act**). The Applicant was dismissed by Drewmaster Pty Ltd (**the Respondent**) on 8 August 2023.

[2] The Respondent dismissed 125 employees around the time of the Applicant's dismissal. Of those 125 employees, 47 employees made unfair dismissal applications which were allocated to me. Four of those matters have proceeded to hearing.

[3] The Applicant was employed by the Respondent as an electrician, from 22 March 2021 until the date of his dismissal, primarily at the Palmer Coolum Resort (**the Resort**).

[4] The Applicant's employment was covered by the *Building and Construction General On-Site Award 2020.*

[5] The Applicant was dismissed by way of Termination Letter, sent by email on 8 August 2023, which stated:

> "Dear Troy
>
> We are aware that you attended the Palmer Coolum Resort ("Company") site this morning and attended a toolbox meeting near the site office.
>
> At this meeting, Management was informed that the work force including yourself did not intend on working the required site hours. We note that you did not voice any opposition to this.
>
> All workers onsite are paid far in excess of the award wage.

At this stage, we also advise you that a substantial site investigation is underway including fraud, theft and other matters of dishonesty.

As the investigation has uncovered a large amount of dishonesty and theft, work on the site must be in accordance with normal industry work time. No decision has been made by Management as yet to report the matter to police.

Unfortunately, we have no other choice but to terminate your employment, effective today, for refusing to carry out your duties as directed. We are very disappointed by this and the actions of all construction employees. The Company will write to you in respect of your accrued leave entitlements as soon as possible. It is the Company's intention to pay all leave entitlements as soon as possible.

Please accept this letter as notice of termination of your employment. Your employment will now finish as of Monday 7th August 2023.

Thank you

Martin Brewster
Director
Drewmaster Pty Ltd"

[6] The matter was heard in Brisbane on Tuesday, 28 November 2023. The Applicant was self-represented at the Hearing. The Respondent was represented by Mr Thomas Browning, Legal Counsel, Drewmaster Pty Ltd.

[7] The Applicant gave evidence on his own behalf at the Hearing. Mr Benjamin Wood, Acting General Manager of the Respondent, gave evidence for the Respondent at the Hearing.

Statutory Provisions

[8] The relevant sections of the FW Act relating to an unfair dismissal application are:

"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.

381 Object of this Part
(1) The object of this Part is:
(a) to establish a framework for dealing with unfair dismissal that balances:
(i) the needs of business (including small business); and
(ii) the needs of employees; and
(b) to establish procedures for dealing with unfair dismissal that:

(i) are quick, flexible and informal; and
(ii) address the needs of employers and employees; and
(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

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.

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 atthat time as an employee.

(2) However:

(a) 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 on a regular and systematic basis; 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; and
(b) if:
(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and
(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and
(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised; the period of service with the old employer does not count towards the employee's period of employment with the new employer.

385 What is an unfair dismissal

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

(a) the person has been dismissed; and
(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

see section 388.

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."

Applicant's Submissions

[9] The Applicant filed Submissions in accordance with the Directions. These Submissions were converted into a Witness Statement at the Hearing.

[10] The Applicant stated that from the first week of his employment with the Respondent, he was placed in a position of trust and given the "duty tech" keys which gave him access, to the best of his knowledge, to approximately 95% of the buildings and rooms throughout the Resort. The Applicant stated that he carried these keys for the entirety of his employment with the Respondent.

[11] The Applicant stated that he was working on the refurbishment project at the Resort (the "Project") but also performed maintenance work across the entire Resort as well as other electrical work at other properties owned by Mr Clive Palmer.

Concerns raised about new roster

[12] The Applicant stated that at the morning prestart meeting on Tuesday 08 August 2023, a dispute was raised with Management concerning the proposed new roster. The Applicant stated that this new roster had been changed and introduced by new Management on 7 August 2023 with no consultation with the workforce.

[13] The Applicant provided outlines of the old and new rosters as follows:

Old Roster: Monday – Thursday 6:30 to 4 – 20 min paid break (smoko) and 30 min lunch.
Friday 6:30 to 12:30 – 20 min paid break (smoko).

New Roster: Monday – Tuesday 7:00 to 5:00 – lunch 12 to 1.
Wednesday – Friday 7:00 to 4:00 – lunch 12 to 1.

[14] The Applicant stated that some of his concerns were: "*Why no smoko? Why 1hr lunch? What if we can't do the [new roster] because of commitments outside of work?*"

[15] The Applicant stated that after the concerns were raised at the meeting, someone who appeared to be a member of senior management from Drewmaster Pty Ltd, appeared and advised everyone on the construction team to go home. The Applicant stated that he did as advised and went home.

[16] The Applicant stated that at 8:01pm that night, he received email correspondence attaching his Termination Letter. He noted that the reason provided for his dismissal was 'refusing to carry out duties as directed'.

[17] The Applicant stated that at 8:20pm that night, he received another email from the Respondent titled 'Construction job Application', labelled 'Now hiring skilled construction workers'.

[18] The Applicant noted that in the Respondent's first Form F3 Employer Response, it stated that the Applicant was dismissed due to a refusal by the Applicant to adhere to the new work hours. The Applicant stated that this was incorrect, and that there was no refusal on his part. The Applicant stated that he simply raised some concerns which he sought to be addressed. However, the Applicant stated: "*It appeared they had no interest in addressing any of our concerns and thought [it] easier to terminate everybody's employment*."

[19] The Applicant noted that one of the concerns he had raised about the new roster was his inability to 'complete it'. He stated that from 1 July 2022, he was granted shared custody of his two primary school aged children. The Applicant stated that he had an agreement with the previous director of the Respondent to work a full roster one week and then a part-time roster every second week, to allow him to meet his commitments for his children. The Applicant stated that he typically managed to complete around 30 hours of work on a part-time week.

Timesheet issue

[20] The Applicant submitted that in its second Form F3 Employer Response, filed on 3 October 2023, the Respondent stated that the decision to dismiss staff was in response to an 'emergency' which coincided with the revised ordinary hours direction. The Applicant submitted that he understood the 'emergency' to relate to 5 issues outlined in the Form F3 response as follows:

"*a) Timesheet issue.*

b) Additional Paid Break Issue, stating I was having an extra 30min break at 2 pm from Monday to Thursday. This is simply not true.

c) Purchase order issue. Not relevant to me.

d)Destruction issue. Not relevant to me

e) Theft issue. Not relevant to me."

[21] As to the timesheet issue, the Applicant submitted that the Respondent's Form F3 states he did not adhere to the Tanda timesheet policy, by having employees log in for him when he did not attend work on the relevant date.

[22] The Applicant submitted that, according to the Respondent, he had a total of 27.5 unexplained absenteeism days and a net value overpayment of $10,576.92. The Applicant submitted that at no time during his employment with the Respondent did he have anybody log in or out for him.

[23] The Applicant submitted that on 6 October 2023, the Respondent sent out a revised spreadsheet of dates the Applicant was accused of not adhering to the Tanda app, which now totalled "*78 days net position $30,000*". The Applicant submitted that he found it "*unusual or even inconceivable that [he] could be terminated for one reason, then 2 months later terminated for a totally separate reason*".

[24] The Applicant submitted that the spreadsheet of 6 October 2023 appears to be "*incomplete and misleading*". The Applicant noted that the spreadsheet data is not linked to the Tanda app but was produced by somebody's interpretation of the information from the application. The Applicant submitted that the Tanda app is:

> "*a flawed system, consistently failing, with delays when taking photos, probably a lot of side on or just out of screen shots, glitches, poor connectivity, asking why I'm clocking out when I'm clocking in consistently, etc*."

[25] Further, the Applicant submitted that he requested his mobile phone provider to provide his phone records. He submitted that he was only able to secure these for the last two years, back to November 2021. The Applicant submitted that when calling from the Respondent's Project, the destination point is 'Point Arkwright'. He submitted that when cross-referencing the phone records to the spreadsheet provided by the Respondent, he located 18 days where he made calls from Point Arkwright during work hours on days that were scrutinised by the Tanda app. The Applicant submitted that he also identified a further 8 days where phone calls were made from destinations of Graceville, Taringa, and Bald Hills where he was working offside at Fig Tree Pocket on Drewmaster property.

[26] The Applicant submitted that the employees did not have access to the Tanda app screens when working offsite. He submitted that times were sent to Management or the Maintenance Coordinator on these occasions.

[27] The Applicant submitted that employees also signed on to prestart documents before shift, and at Management's request, completed a handwritten and dated daily task sheet at the end of every shift. This document itemised their duties and hours of work. The Applicant submitted that these documents were given to the Maintenance Coordinator for data entry. However, the Applicant noted that these documents were not available when working offsite.

[28] The Applicant further submitted that the Respondent's Resort had a number of security cameras, and therefore, he would have been seen coming in and out of the front or back entrance and working around site during the course of the day.

[29] As to the allegation that employees had signed in and out for each other at the Respondent's site, the Applicant submitted that if an employee had been found to be signing in or out for another employee, they would have been reported to Management. The Applicant submitted that the Respondent's site was a "*structured work place if people were caught doing the wrong thing people were reprimanded and disciplined*". The Applicant stated that he saw many people reprimanded and terminated for doing the wrong thing at the Respondent's workplace.

[30] In response to prestart documents provided by the Respondent, the Applicant submitted that every second week he was not present at the prestart due to his commitments with his children, and therefore didn't sign this document on those occasions.

[31] For all of the above reasons, the Applicant submitted that he was terminated without a valid reason.

[32] The Applicant submitted that he loved his job and saw a future at the Respondent's workplace. The Applicant submitted that he would not have done anything to jeopardise his future with the Respondent. He noted that he started on a salary of $63,000 which was increased to $100,000 from November 2021 for an extended week of 42hrs.

[33] The Applicant submitted that he is seeking compensation "*for not being paid [his] entitlements, for lost income since [his] termination and into the future…for the financial and emotional stress [he has suffered], for the time, effort anxiety and torment for having to defend [himself] against such wrongful accusations, and having to explain why to future employers as to why [he] was sacked from [the Respondent]*". The Applicant submitted that he has only been able to secure casual employment since his dismissal.

Respondent's Submissions

Compensation

[34] The Respondent submitted that its primary contention is that the Applicant was not unfairly dismissed from his employment with the Respondent.

[35] Further, the Respondent submitted that the Applicant should not be awarded any amount of compensation, on the basis that at no point in time has the Applicant provided any evidence of any employment earnings he has made or is currently making in his current casual

employment position, or of any deductions that need to be made, including any steps taken to mitigate his alleged loss of income.

[36] The Respondent noted that the Applicant has been paid out all of his entitlements that were owing from the Respondent, and that no outstanding entitlements remain.

[37] In response to any submissions by the Applicant that he seeks compensation for the emotional stress he and his family have suffered as a result of his dismissal, the Respondent relied on s.392(4) of the FW Act, which stated that any amount of compensation ordered by the Commission must not include a component for compensation for shock, distress or humiliation as a result of the dismissal.

[38] The Respondent relied on the evidence before the Commission that following the Applicant's dismissal, he was invited to re-apply for the same role with the Respondent, however, the Applicant chose not to accept that invitation.

[39] Further, the Respondent stated that, as an electrician, the Applicant would have been able to quickly and easily find the same or comparable employment with another employer.

[40] For the above reasons, the Respondent submitted that the Applicant has suffered no discernible loss for which compensation under the FW Act should be awarded.

[41] The Respondent noted that the Applicant was dismissed along with 125 other employees due to what has been explained by the Respondent to be an "*emergency situation with widespread theft, fraud and destruction by the workforce*". The Respondent submitted that it was not in a position to deal individually with every employee given the grave circumstances it faced.

[42] The Respondent maintained that the Applicant has been paid all of his entitlements, and in light of the above matters, no amount of compensation should be awarded to the Applicant in this matter.

Applicant's Submissions in Reply

[43] In response to the Respondent's submissions regarding termination of the Applicant's employment along with 125 other employees, the Applicant noted that in the Respondent's Form F3 Employer Response, it has stated that:

> "*A new builder was appointed to deal with the emergency on the 01 August 2023 . The new builder will provide evidence that he has never witnessed such large-scale fraud, dishonesty, vandalism and instances of workers deliberately abusing the workplace systems*."

[44] The Applicant submitted that he has not been provided with any evidence from this builder to support Drewmaster's accusations related to 'the emergency'. The Applicant submitted questions as follows:

> "*If the culture of the workforce was that severe and widespread, why would their (sic) be any offer for re-employment by Drewmaster to any ex-construction staff? In return why would I apply for a job with a company that refers to and treats their staff like destructive, fraudulent, dishonest, thieving vandals? Also, when in future will Drewmaster's management claim another "emergency" and find themselves in another "impossible situation" and have "no choice" but to terminate everybody's employment?*"

[45] As to his current situation, the Applicant re-stated that he is a single father with shared custody of his two primary school aged children. He takes care of his children on a '1 week on 1 week off' basis. The Applicant submitted that in light of his caring responsibilities, it is difficult, if not impossible, for him to work a full-time permanent role. He submitted that while he has 'vigorously' attempted to find work, he was unemployed following his dismissal by the Respondent for "1 day short of 6 weeks". The Applicant submitted that he was then able to secure casual employment, however, he does not have access to annual leave, sick leave or parental leave, and does not have the job security of a permanent role.

[46] The Applicant submitted that since starting his new role on 18 September 2023, he has averaged 26.7 hours per week at an hourly rate less than what he was receiving while employed by the Respondent. He submitted that during the upcoming Christmas school holidays, he will only be averaging around 15 – 20 hours per week.

[47] In response to the Respondent's submission that all of the Applicant's entitlements had been paid, the Applicant noted that he did not receive his final payslip until almost 3 months after his termination.

[48] The Applicant submitted that for all of the reasons outlined in his initial and reply submissions, he was unfairly dismissed by the Respondent and is therefore entitled to compensation.

Consideration

[49] I have taken into account all of the submissions that have been provided by the parties and I have attached the appropriate weight to the evidence of the witnesses.

[50] It is not in dispute, and I find, that the Applicant is protected from unfair dismissal, submitted his application within the statutory timeframe, was not made genuinely redundant and did not work for a Small Business.

[51] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines* (*Byrne*)[1] is of significance:

> "*It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap.* ***Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted,*** *may be unreasonable because it was decided upon inferences which could not reasonably have*

*been drawn from the material before the employer, **and may be harsh in its consequences for the personal and economic situation of the employee** or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted*."

(My emphasis)

[52] In analysing *Byrne*, a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* (*AMH*)[2] held:

"*The above extract is authority for the proposition that a termination of employment may be:*

- *unjust, because the employee was not guilty of the misconduct on which the employer acted;*
- *unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or*
- *harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct*".

[53] Further, a Full Bench of the AIRC in *King v Freshmore (Vic) Pty Ltd*[3] said:

"*[24] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination*".

.

[54] I now turn to the criteria for considering harshness as provided in s.387 of the Act.

Section 387(a) - Valid Reason

[55] The meaning of the phrase "valid reason" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:[4]

"*In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. ...*

In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed

on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…".

[56] In *Rode v Burwood Mitsubishi*,[5] a Full Bench of the Australian Industrial Relations Commission held:

> "*… the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason*."

[57] The Applicant was dismissed on 8 August 2023 by email at 8:01pm "for refusing to carry out your duties as directed". There is no evidence of the Applicant refusing such a direction. I have taken this into account.

[58] At 8:20pm, a new email was sent to the Applicant from the Respondent inviting him to apply for a new role for construction work at the Resort. In other words, despite being terminated at 8:01pm, the Applicant was invited to apply for a new role by the Respondent, at the same location, some 19 minutes later. I do not accept the Respondent's submission that this email was an opportunity for the Applicant to "re-apply" for the same employment. I note that the second email did not contain any actual wage rates, mention that it was for his old job or indicate that it was for a different employer. I have taken this into account.

[59] In response to a question from me, Mr Wood did not accept that the termination process was a sham. Seeking further explanation, Mr Wood accepted that the Resort, the Respondent and the new builder were all associated organisations owned by Mr Clive Palmer. I have taken this into account.

[60] I have taken into account that the Applicant has experienced numerous and regular problems in relation to either signing in or signing out using the Tanda system. The Applicant testified that he was never involved in, nor did he witness, any process when an employee would sign in or out for another employee. I do not accept the evidence of Mr Wood that the only reason Tanda would malfunction was due to human error. The Respondent provided no evidence in relation to the accuracy or functionality of the Tanda system.

[61] The first identified problem on the Tanda system for the Applicant was 22 July 2021, where the Applicant allegedly did not sign out or have his photo taken. By way of example, the Applicant had Tanda issues on 27 days from 22 July 2021 to 24 December 2021. It is not in dispute that the Applicant was not counselled, disciplined or warned in relation to his sign in or sign out irregularities. The Applicant was not questioned about his Tanda recordings at any stage during his employment. I have taken this into account.

[62] The Applicant completed a daily task sheet at the end of every working day. These documents were not produced by the Respondent. I assume that these documents have been somehow deleted or lost from the Respondent systems or were not supportive of the Respondent's position. No evidence was provided by the Respondent in relation to the deletion or disappearance of these files. I have taken this into account.

[63] I note that the Respondent relied on a computer-based process that was approved by the Applicant's supervisor in relation to the hours that were worked each fortnight by the Applicant when calculating the Applicant's fortnightly pay. No issues were ever raised with the Applicant by the Applicant's supervisor in relation to his working hours. I have taken this into account.

[64] I note that the Applicant was obviously considered to be a good employee by the Respondent. When the Applicant sought to work part time due to a change in his family circumstances regarding his school aged children, the Respondent readily and graciously agreed to his request. I have taken this into account.

[65] At my suggestion, the Applicant sought his detailed phone records from his provider. Of the 55 instances of Tanda issues, the Applicant was able to substantiate that he was at work, or in the proximity of his work location on 60% of these dates. Relevantly, of the 15 occasions where Tanda claimed that the Applicant did not sign in or sign out, the Applicant's telephone records show that he was either at work or in the vicinity of the workplace on 6 of these days. This additional unchallenged information identifies that there were technical issues with the Tanda system. A proper investigation by the Respondent, prior to the Applicant's termination, may have resulted in this technical difficulty being identified. I have taken this into account.

[66] Further, the Applicant occasionally worked off site at Mr Palmer's other properties where there were no Tanda machines. The Applicant would advise his Supervisor of the hours that he worked when he was working away from the Resort. I have taken this into account.

[67] The Respondent claims that it dismissed its construction workforce at the Resort due to an 'emergency'. No evidence was submitted by the Respondent as to the nature of this 'emergency' apart from the statements in the second F3 that was filed. In response to a question from me, Mr Wood accepted that the attendance on site of non-employees and the theft of materials from site is a security issue. I do not accept that a security issue of this nature warrants the mass sacking of employees, nor can it be described an 'emergency'. The Australian Concise Oxford Dictionary defines an emergency to mean:- "*a sudden state of danger, conflict, etc, requiring immediate action*". It is not in dispute that Mr Wood had already taken steps to resolve this 'emergency' by initiating the following procedures on 4 August 2023:

> "*MEMORANDUM*
>
> *To: Palmer Coolum Resort Employees*
> *Re: TANDA Login and & Construction Team Roster Changes*
> *Date: Friday 4th August 2023*
>
> *Payroll Update*
>
> *As of today all payroll functions will be completed remotely by our Brisbane Head Office.*
>
> *The following process will apply to all staff:*
> 1. *All staff must sign in and out via TANDA with the security guards at the gate.*
> 2. *Staff will be denied entry if they do not have a TANDA code- staff must advise if they do not have a code and this will be looking into.*

3. *There will be no exceptions to the above.*

Note: Staff will only be paid what is reflected & matched by Brisbane Office in TANDA clock in/clock out system."

I have taken this into account.

[68] The Applicant was not involved in any inappropriate conduct. He has not been accused of any form of misconduct, such as stealing or destroying the Respondent's property. I have taken this into account.

[69] The accusations in relation to timekeeping fraud have not been sustained. It is blatantly clear that the Tanda system did not work properly at the Resort. I accept that, in some part, this may be the result of human error, however, for the Applicant to go 2 years with regular timekeeping discrepancies shows that such discrepancies were accepted by the Respondent. No reminders or warnings were issued to the Applicant due to a single discrepancy. I have taken this into account.

[70] For the reasons identified above, I am satisfied and find that the Respondent did not have a valid reason to terminate the Applicant. The reasons for the Applicant's termination are not defensible or justifiable on any analysis of the relevant facts.

Section 387(b) - Notified of the Reason

[71] The Applicant was notified by email that he was terminated for refusing to carry out his duties as directed. The Respondent provided further reasons in their second Form F3 submitted by the Respondent on 3 October 2023. I have taken this into account.

Section 387(c) - Opportunity to Respond

[72] The Applicant was not given an opportunity to respond to the allegations. The Applicant, along with a large number of his colleagues, was dismissed by email at 8pm on 8 August 2023, having been sent home by the Respondent from the Resort earlier in the day. Relevantly, a Full Bench of the former Australian Industrial Relations Commission held in *Crozier v Palazzo Corporation Pty Limited* (*Crozier*)[6] (when considering a termination under the former *Workplace Relations Act 1996*):-

"*[75] Section 170CG(3)(c) provides that the Commission must have regard to "whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee". For the reasons we have set out in relation to s.70CG(3)(b) we think that the "opportunity to respond" referred to in s.170CG(3)(c) is a reference to any such opportunity which is provided before a decision is taken to terminate the employee's employment*."

I have taken this into account.

Section 387(d) - Any refusal of a support person

[73] The Respondent did not conduct any meetings with the Applicant, so this matter is not relevant.

Section 387(e) - Unsatisfactory performance

[74] The Applicant was not dismissed for unsatisfactory performance.

Section 387(f) - Size of Employer

[75] It is not in dispute that the Respondent and its related entities are a large and well-resourced organisation. I have taken this into account.

Section 387(g) - Dedicated HR specialists

[76] The Respondent terminated its 'on-site' HR specialist with its other employees. The Respondent's in-house lawyer conducted the Commission proceedings. I have taken this into account.

Section 387(h) - Any other matter

[77] There is no evidence of the Applicant being at any other location when he was not at work. The Respondent did not cross-examine the Applicant on this issue, nor did it request for him to produce his phone records. I have taken this into account.

[78] In relation to the second Form F3 submitted by the Respondent, the accusations directed at the Applicant are irrelevant apart from the timekeeping issue. I have taken this into account.

[79] I am satisfied that the Applicant's termination can be described as a sham process. The Respondent dismissed the Applicant by email. Twenty minutes later it sent him a further email asking him to apply for a job back with the Respondent at the Resort, even though the Respondent had been sacked as the builder and replaced by another one of Mr Palmer's building companies, Min Constructions Pty Ltd (**MCPL**). The new builder is not mentioned in this email. This scenario cannot simply be explained away as the Respondent doing MCPL a favour by sending out a job advertisement on their behalf. I have taken this into account.

[80] Further, I do not accept that there was "an emergency situation" at the Resort. Mr Wood had clearly taken steps to alleviate any issues in relation to theft of equipment or materials from the site on 4 August 2023. To then dismiss employees based on this alleged emergency situation, when there is no evidence that Mr Wood's direction had failed to achieve its desired outcome, is inconsistent with the principles of fairness or sound management practice. I have taken this into account.

[81] I note that the Applicant's termination was notified via letter sent to him by email. I agree with the decision of Commissioner Cambridge in *Knutson v Chesson Pty Ltd t/a Pay Per Click* [2018] FWC 2080 where at paragraph [47] he stated:

> "*[47] The employer provided notification of dismissal by email communication sent at 8.53pm on 6 November 2017. Notification of dismissal should not be made by email communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous. Even in circumstances where email or electronic communications are ordinarily used, the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation.*"

I have taken this into account.

[82] Finally, regarding the unchallenged evidence of the Applicant, I note that in the Full Bench decision of *INPEX Australia Pty Ltd v The Australian Workers' Union* (*INPEX*),[7] it was stated that:-

> "*[29] The Commission is not a court. It is not bound by the rules of evidence.6 It is required to perform its functions and exercise its powers in a manner that is quick, informal and avoids unnecessary technicalities.7 But when the Commission makes a finding of fact, it must proceed by reference to rationally probative material. 8 That material may include, inter alia, evidence or, in an appropriate case, submissions.* ***For example, it may be appropriate for a finding of fact to be made on the basis of an unchallenged submission made by one party, particularly when the other party is legally represented***."
>
> (My emphasis)

[83] Further, a Full Court of the Federal Court of Australia stated in *Ashby v Slipper*[8] that:-

> "*The second aspect, critical to this appeal, relates to the weight or cogency of the evidence: that is, as a general proposition,* ***evidence, which is not inherently incredible and which is unchallenged, ought to be accepted:*** *Precision Plastics Pty Limited v Demir [1975] HCA 27; (1975) 132 CLR 362 at 370-371 (per Gibbs J, Stephen J agreeing, Murphy J generally agreeing).* ***The evidence may of course be rejected if it is contradicted by facts otherwise established by the evidence or the particular circumstances point to its rejection***."
>
> (My emphasis)

[84] Adopting the obiter in *INPEX*, I accept the unchallenged evidence of the Applicant in its entirety. I have taken this into account.

Conclusion

[85] I find that the Applicant was a witness of credit. There is no evidence to the contrary.

[86] I have previously found that the Respondent did not have a valid reason to terminate the Applicant.

[87] It is settled law that a respondent can rely on any additional information that it discovers during any subsequent investigation after an employee has been terminated. I accept that the recently appointed Management team of the Respondent were not aware of the long-term operational issues with Tanda or the fact that the Applicant was never questioned about his Tanda time-keeping irregularities.

[88] However, the investigation undertaken by the Respondent in relation to the Tanda data was incomplete and unsatisfactory. Other documents existed which were under the Respondent's control, which would have helped substantiate the accusations which were levelled against the Applicant. This information, though, was either simply ignored or misplaced without explanation. On that basis, I am satisfied that the Applicant's evidence in relation to his attendance is accurate.

[89] I am satisfied and find that the Applicant was denied procedural fairness. The Applicant was not given an opportunity to respond to any allegation prior to his termination. Adopting the obiter in *Crozier*, this makes the Applicant's termination unjust.

[90] Mr Wood denied that the Applicant's termination was a sham. I make no finding on this issue. However, I note that the Applicant was sacked at the same time as 120 or so of his colleagues, in the same manner, using the same email. Some 20 minutes later, he was asked by his former employer to apply for a construction position back at the Resort. If nothing else, this one size fits all, scattergun approach to industrial relations is unconventional.

[91] The Applicant was working family-friendly hours in order to meet his family responsibilities. The loss of this flexible arrangement and the Applicant's inability to source a similar employment scenario makes his termination, following the obiter in *Byrne*, harsh. Further, on the basis that I do not accept that the Applicant is guilty of any misconduct, the Applicant's termination is unjust.

[92] Pursuant to s.381(2) of the FW Act, the Applicant was entitled to a "fair go". I am satisfied that the Respondent has not provided the Applicant with this statutory entitlement.

[93] I am satisfied and find that the Applicant's termination was harsh and unjust.

[94] As a result, and for the reasons identified above, I am satisfied and find that the Applicant has been unfairly dismissed.

Remedy

[95] Having found that the Applicant has been unfairly dismissed, I now turn to the issue of an appropriate remedy.

[96] The relevant provisions of the Act in relation to a remedy for an unfair dismissal are:

> "**390 When the FWC may order remedy for unfair dismissal**

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies."

"**391 Remedy—reinstatement etc.**

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

"**392 Remedy—compensation**

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

> (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
>
> (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[97] The Applicant seeks compensation for his termination. I am satisfied that, whilst reinstatement is the primary remedy under the Act, it would be very difficult to re-establish the necessary trust and confidence to re-create an employment relationship. I am satisfied and find that the payment of compensation is the appropriate remedy in this circumstance.

[98] The Applicant was employed on a permanent part time basis, working 42 hours in one week and approximately 30 hours in the following week. This flexible arrangement allowed the Applicant to appropriately supervise and care for his primary school aged children. Permanent employment also meant that the Applicant could accumulate personal leave and annual leave. I have taken this into account.

[99] The Applicant testified that he now works as a casual employee, with no certainty over the hours of his engagement, at a lower rate of pay. Further, he was unemployed for almost 6 weeks following his termination. I have taken this into account.

[100] I have taken into account that the construction industry is traditionally an itinerant industry where workers traditionally move from site to site upon completion of the site on which they are working. Mr Wood testified that the Resort is 4 months away from completion, even though it would not be fully completed by that date. Additional and extensive refurbishment work would still be required to be performed on the larger villas and suites. Surprisingly, for a person with Mr Wood's seniority and position, he was unable to advise the Commission when the rest of the Project would be completed. I have taken this into account.

[101] I note that the Applicant was terminated on 8 August 2023 and was paid 3 weeks' pay in lieu of notice. Taking into account the notice payment, the Applicant has been denied the opportunity to work for at least, according to Mr Wood, a further 7 months. During this time, the Applicant would have accrued further annual leave, sick leave, superannuation and portable long service leave payments. I have taken this into account.

[102] Further, the Applicant also performed electrical maintenance work on the site during the refurbishment/construction phase. There is no evidence to suggest that the Applicant would not have continued to be employed post March 2024 as a maintenance electrician for the Resort. I have taken this into account.

[103] The Respondent submitted that no compensation was payable on the basis that it had paid the Applicant notice in accordance with his contract. I have taken this into account.

[104] Section 392(2) of the Act identifies criteria that the Commission must taken into account in determining the appropriate level of compensation to be awarded to the Applicant.

Section 392(2)(a) – effect of order on employer's viability

[105] I am satisfied that my order will not have an adverse effect on the viability of the Respondent. I have taken this into account.

Section 392(2)(b) – length of service

[106] It is not in dispute that the Applicant was employed from 22 March 2021 to 8 August 2023, basically 2 ½ years. I have taken this into account.

Section 392(2)(c) – remuneration received if not dismissed

[107] The Applicant would have continued to be paid his regular fortnightly pay of 72 hours, had he not been dismissed. I have taken this into account.

Section 392(2)(d) – effort to mitigate loss

[108] The Applicant found casual employment 6 weeks after his termination. I have taken this into account.

Section 392(2)(e) – amount of remuneration received by the Applicant

[109] The Applicant has received an average of 26.7 hours' pay per week as a casual employee since 18 September 2023. The Applicant did not provide his hourly rate but testified that it was lower than his former salary. I have taken this into account.

Section 392(2)(f) – amount likely to be earned

[110] Being a casual employee, it is not possible to calculate with any degree of accuracy the quantum that the Applicant may have earned between the hearing of this matter and the date of this decision. Most building sites enjoy a closedown for two weeks over Christmas. The Applicant would not have received any payment for the public holidays that fell during this period as well. Further, school holidays would have also impacted on the Applicant's capacity to attend work due to his caring responsibilities. I have taken this into account.

Section 392(2)(g) – any other matter

[111] Relevantly, the Applicant has not been successful in finding permanent employment. Based on the Applicant's availability, this revelation is not a surprise. From my extensive experience in the electrical contracting/construction industry, employers want to maximise their electrical employees time at work, particularly in times of skill shortages. Family-friendly part-time arrangements are traditionally reserved for long-serving permanent employees. Opportunities for employees to work full-time one week and part-time the next are extremely rare for new employees for a plethora of reasons, including the obvious restrictions in relation to planning. As a result, the Applicant is entitled to be compensated due to the disruption and loss of his family-friendly employment. I have taken this into account.

[112] I am also required to have regard for the criteria known as the 'Sprigg formula' which emanates from the Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*.[9] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.[10]

[113] The approach in *Sprigg* is as follows:

> *Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).*
>
> *Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.*
>
> *Step 3: Discount the remaining amount for contingencies.*
>
> *Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.*

[114] In *Hanson Construction Materials v Pericich*,[11] a Full Bench of the Commission held that:

> "*[39]...Sprigg is a useful servant, but is not to be applied in a rigid determinative manner. In deciding the amount of a compensation order the Act directs that the Commission 'must take into account all of the circumstances of the case' including the particular matters set out at s.392(2)(a)to(g)*."

Consideration

[115] I have taken into account all of the parties' submissions in relation to remedy.

[116] The Applicant did not deserve to be in his current position. He was a hardworking and good employee. The Respondent was very generous in allowing him to work part time on a permanent basis. Obviously, they wanted to keep the Applicant in their employment by agreeing to this flexibility. If not for the mass sacking of the entire refurbishment workforce, including management, the Applicant would have maintained his employment with the Respondent.

[117] I do not accept that the Project will conclude in March 2024. Whilst the Resort may open in March/April 2024, it would be contrary to construction best practice principles to allow your skilled construction workforce to disperse to other employers whilst the Project has not been completed, especially when the tradespeople are directly employed by the Respondent rather than the traditional scenario of tradespeople being employed by a contractor. I have assessed that the Project will not be completed for a further 12 months. Further, the Applicant may have transferred to be a maintenance electrician for the Resort. The role of a maintenance electrician at the Resort would have been a perfect job for the Applicant and allowed him to maintain his family friendly hours whilst his children completed their primary school education.

I am satisfied and find that the Applicant would have been employed for a further 12-month period.

[118] I have taken into account that the Applicant has obtained casual employment. Casual work is by the hour/day. It is not the same as permanent employment. The Applicant has worked an average of 26 hours/week at a lower rate of pay. There is absolutely no guarantee when the Applicant's casual work may cease or diminish. I have assessed that the Applicant's casual role will only last for a 6-month period. I have also assessed, based on the failure of the Applicant to supply accurate information, that the Applicant is earning a similar rate of pay to his former role when including his casual loading. I have deducted the casual loading in my calculations below on the basis that if the Applicant had have remained employed, he would have continued to accrue the leave entitlements for which the casual loading is paid. I have also deducted an additional 20% for any further contingencies which may have applied.

[119] I am satisfied that the Applicant has attempted to mitigate his loss. As stated earlier, from my experience, it would be basically impossible for an electrician to find permanent employment in the construction industry where they work variable hours week to week.

[120] I have deducted a further 3 weeks for the notice period that has already been paid to the Applicant.

[121] I requested accurate information from the parties in relation to the Applicant's rate of pay when working his 72 hour fortnight. The Respondent responded that the Applicant was earning $100,000 per annum, however, the Applicant advised that his salary had been reduced to $92,000 per annum plus superannuation as a result of him working for only 30 hours or so every second week. I have used the lower figure supplied by the Applicant for my calculations.

Calculation

52 weeks ($92,000) - 3 weeks notice ($5,307.70)	=	$86,692.30
- 26 weeks at $1415.20 (25% casual loading reduction of $1769.23)	=	$36,795.20
Total	=	$49,897.10
- 20% contingency	=	$39,917.68

[122] In accordance with s.392(5), I note that this amount is less than half the amount of the high income threshold which is $167,500.

[123] In accordance with s.392(6)(a)(ii), I note that this amount is less than the 6 months' salary that the Applicant earned prior to his dismissal of $46,000.

Conclusion

[124] Having considered the criteria in section 392(2) and applying the Sprigg formula, I am satisfied that the Applicant should receive $39,917.68 (less appropriate tax) plus superannuation as compensation for his unfair dismissal. I note that this amount is less than the 6 months' salary that the Applicant earned prior to his termination.

[125] I so Order.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR770929>

---

[1] (1995) 185 CLR 410.

[2] (1998) 84 IR 1.

[3] [2000] AIRC 1019.

[4] (1995) 62 IR 371.

[5] PR4471.

[6] Print S5897.

[7] [2021] FWCFB 1038.

[8] [2014] FCAFC 15.

[9] (1998) 88 IR 21.

[10] [2012] FWCFB 431.

[11] [2018] FWCFB 5960.