DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Terry Jackson
v
Bulk Frozen Foods Pty. Ltd. T/A Tasfresh Foodservice, Tasfresh Fresh And Specialty Foods, No Frills Foodmarket And Robbies' Wholesale
(U2023/10848)

COMMISSIONER CIRKOVIC MELBOURNE, 19 MARCH 2024

Application for an unfair dismissal remedy – conditional resignation – condition rejected by employer – termination on the employer's initiative – dismissal unfair – compensation ordered.

[1] Mr Terry Jackson (the Applicant) has applied under s.394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy (application). The Applicant submitted that he had been dismissed by Bulk Frozen Foods Pty. Ltd. T/A Tasfresh Foodservice, Tasfresh Fresh And Specialty Foods, No Frills Foodmarket And Robbies' Wholesale (the Respondent) on 13 October 2023.

[2] In the *Form F3 – Employer Response to Unfair Dismissal Application* (Form F3), the Respondent raised the jurisdictional objection that there was no dismissal. The Respondent claims the Applicant voluntarily resigned his employment on 9 October 2023.

[3] The matter did not resolve at conciliation and proceeded to hearing before me on 12 February 2024. Both parties sought permission under s.596 of the Act to be legally represented. Having weighed the considerations in s.596 of the Act and the circumstances before me, I granted permission to the parties to be represented.

Background

[4] The following facts are not seriously in dispute between the parties:

- The Applicant commenced employment with the Respondent on 15 August 2022 as a Delivery Driver and Storeman.[1]

- On 9 October 2023 at 4.50pm, the Applicant submitted his resignation from the Respondent by email.[2] This email was sent to Mr Shane Russell, General Manager of the Respondent and stated:

"Shane I wish to tender my resignation from TasFresh as Truck Driver/Storeman as of 9/10/2023. I am giving two weeks notice as required finishing on 20/10/2023.

Regards,

Terry Jackson".

- On 9 October 2023 at 6.22pm, Mr Russell responded to the Applicant by email.[3] This email stated:

"Hi Terry,

Resignation is accepted will fill out paperwork tomorrow Shane."

- On 12 October 2023, the Applicant and Mr Russell had a conversation in person in the crib room. The contents of this conversation are in dispute as it pertains to the working out of the Applicant's notice period.

[5] The Applicant's submissions and evidence as to the 12 October 2023 conversation can be distilled as follows:

- On 12 October 2023, the Applicant spoke to Mr Russell in the crib room of the Respondent.[4]
- Mr Russell told him that he could finish his employment on 13 October 2023.[5] The Applicant told Mr Russell that he would prefer to work the extra week as stated in his resignation letter, telling Mr Russell that "No I'll work the extra week".[6]
- Mr Russell then replied "Take a look around. There's not enough work to do".[7]
- The Applicant then replied: "I assume I will be paid for next week", before Mr Russell then said "No because you're not working".[8]
- The Applicant states that he was not given any choice as to whether he would work the following week or not. [9]
- On 13 October 2023, the Applicant attended a medical appointment before attending work for the remainder of the day. At the end of the day, the Applicant handed his uniform in.[10]
- The Applicant states that he was only paid up until 13 October 2023 and he was not paid the correct amounts of annual leave.[11] Further, the Applicant states that it was not until 26 October 2023 that he received payment from the Respondent.[12]
- On 3 November 2023, the Applicant submitted his unfair dismissal application.[13]

- On 9 November 2023, the Applicant received a further payslip from the Respondent with an amended annual leave payment.[14]

[6] In essence, the Applicant submits that he was dismissed from his employment at the initiative of the Respondent on 13 October 2023 during his notice period. Further, the Applicant submits that he was "not paid for the second week of his notice period during which he did not attend work at the request of the Respondent".[15]

Respondent's submissions and evidence.

[7] The Respondent's submissions and evidence can be distilled as follows:

- On 10 October 2023, Mr Russell had a telephone conversation with Mr Frith, Managing Director of the Respondent.[16] During this conversation, Mr Russell enquired as to whether it is necessary for the Applicant to work his full notice period as Mr Russell "felt that as it was quiet, he could get by without the extra labour".[17]

- Mr Frith told Mr Russell that the Applicant's active worker's compensation claim prevented the Respondent from providing a shorter notice period and that when the Applicant was cleared to return to full duties and the worker's compensation claim had come to an end, the option to discuss a shorter notice period with the Applicant would become available.[18] Mr Frith also told Mr Russell that the minimum period of notice under the National Employment Standards is 2 weeks but that a shorter period could be agreed between the parties once the Applicant was cleared to return to full duties.[19]

- On 12 October 2023, Mr Russell enquired with the Applicant as to the status of his worker's compensation claim.[20] The Applicant informed him that he was due to attend a medical review on 13 October 2023.[21]

- During the conversation, Mr Russell also informed the Applicant that if he was fully cleared at the medical review, and wished to do so, the Respondent was content for him to provide less than two weeks' notice and make the date his resignation takes effect 13 October 2023.[22] The Applicant's only concern was that he would be "penalised" for not serving his full notice period.[23] Mr Russell advised the Applicant that he did not believe that this would be the case.[24] The Applicant indicated that he was happy with that course of action.[25]

- On 12 October 2023, Ms Lobb, Human Resources Officer of the Respondent had a conversation with Mr Russell. Mr Russell informed her that he had told the Applicant earlier that day that the Respondent would not be enforcing the Applicant's two week notice period requirement and that once clearance from the Applicant's worker's compensation claim had arrived, he did not have to work the two weeks' notice period and could finish early if he wanted to.[26] Mr Russell also informed Ms Lobb that the Applicant was concerned about being penalised for not giving proper notice and that he would not be paid his annual

leave entitlements he was owed if he left early.[27] Ms Lobb assured Mr Russell that if the shorter notice period was agreed to by the Respondent and the Applicant returned his uniforms, he would not be charged for it in his final pay.[28] Mr Russell told Ms Lobb he would let the Applicant know.[29]

- On 13 October 2023, Mr Russell states that the Applicant attended work after attending a medical appointment.[30] Mr Russell states the Applicant informed him that he had received a full medical clearance to return to full duties provided him with a worker's compensation medical certificate as requested and returned his uniform at the end of the shift that day.[31] Mr Russell regarded this as further confirmation that the Applicant was happy to "leave" and "to forego that second week not working".[32]

- On the afternoon of 13 October 2023, Mr Frith and Mr Russell had a conversation where Mr Russell advised Mr Frith the Applicant had received a full medical clearance for his worker's compensation claim, and that the Applicant had accepted the offer to reduce his notice period and would finish up that afternoon on 13 October 2023 after having worked one week's notice.[33] Mr Frith then advised Mr Russell that he considered this to be a good outcome, and that he would need to advise Ms Lobb of the change in finish date so the Applicant's final pay could be calculated correctly.[34]

[8] The Applicant's representative contends that the Applicant was dismissed pursuant to s.386(1) because his employment was terminated during the notice period on the initiative of the employer. The Applicant disputes that the shortening of the notice period from two weeks to one was by mutual agreement.[35]

[9] The Respondent states that the Applicant agreed to "forego that second week not working".[36] Further, the Respondent submits that the Applicant resigned on 9 October 2023 and as such, there was no unilateral decision made by the Respondent that would justify a finding that there was a termination of the Applicant's employment at the initiative of the Employer within the meaning of s.386(1).

Consideration

[10] An unfair dismissal is set out in s.385 of the Act as follows:

"**385 What is an unfair dismissal**

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

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

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

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

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388."

[11] Dismissed is defined in s.386(1) of the Act as follows:

"(1) A person has been dismissed if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

[12] Section 386(1) operates subject to certain exceptions in s.386(2) which are not presently relevant.

[13] If the Applicant was not dismissed by the Respondent within the meaning of s.386(1) of the Act, there is no jurisdictional basis for him to pursue his unfair dismissal application. That is to say, if the Applicant's employment was not terminated at the initiative of the Respondent (s.386(1)(a) of the Act), or if it is not found that he was forced to resign because of conduct or a course of conduct engaged in by the Respondent (s.386(1)(b) of the Act), there is no jurisdictional basis for him to pursue the application.

[14] The Applicant referred me to the decision of Deputy President Anderson in *Mr Christopher Patterson v Re-Engage Youth Services Incorporated T/A Re-Engage Youth Services*[37] in which the Deputy President sets out the authorities that guide the approach of the Commission in determining the meaning of s.386(1). I have had regard to those authorities in coming to my decision and note in particular the Full Bench decision in *ABB Engineering Construction Pty Ltd v Doumit*[38] where the Bench said:

"In the circumstances, whether the termination of any connection between Mr Doumit and the company on 15 May 1996 was a termination at the initiative of the employer depends on whether there was any relationship to terminate after the company received the resignation.

…..

The effect of giving of notice is summarised by Gray J in the Federal Court in *Birrell v Australian National Airlines Commission*:

"The giving of notice of termination of a contract, in accordance with the terms of that contract, is a unilateral right. Its exercise does not depend in any way on the acceptance or rejection of the notice by the other party to the contract. The giving of such a notice operates to determine the contract by effluxion of the period of notice."

McCarry "*Termination of Employment Contracts by Notice*" sums up his view of the situation as:

> "A valid notice of termination, once received, will operate to end the contract of employment when the period of notice expires or is due to expire, unless in the meantime the contract is ended by some other independent cause. The employer/employee relationship will end with the contract, if it has not ended earlier, but aspects of the contract can still be enforced thereafter."
>
> The employer took no issue with the notice and acted, or at least intended to act, in accord with the contract by giving pay in lieu of notice. It proffered the payment in lieu because it considered that the contract had been terminated. That was a reaction. It was not an initiative to terminate the employment so as to bring the termination under Part VIA Division 3 of the Act as a termination at the initiative of the employer. In the employer's perspective, its actions did not substitute a fresh termination for that which was initiated by Mr Doumit. However, the employer's action did operate to substitute an earlier termination of the employment relationship than that initiated by Mr Doumit. The employer's action operated to reduce some of the benefits that would have accrued if Mr Doumit had worked out the notice period.
>
> We consider that having regard to all relevant circumstances and particularly the length of the notice period, and the scale of payment to Mr Doumit, the company's action to bring forward the date of effect may and should be conceived as consequential to the resignation. In our view the circumstances of the case do not establish matters of fact or degree that would justify our finding that the employer took advantage of the resignation to in effect substitute a termination of the employment of its own initiative. We do not preclude the possibility of there being such a case, particularly in circumstances where a long period of notice is given in the form of a resignation. But this is not such a case."

[15] In this matter, the parties are in dispute as to the verbal communications that took place between the Applicant and Mr Russell as to the shortening of the Applicant's notice period from two weeks to one. The Respondent maintains that the Applicant agreed to shorten the period and the Applicant disagrees.

[16] I have formed a view that the witnesses gave their evidence by and large in a forthright manner and that any divergence was a result of a fading recollection of events rather than deliberate evasiveness.

[17] In my view, the Applicant's version is preferred for the following reasons. First, the Applicant was unwilling to suffer any "penalty" by reason of a shortening of the period of notice. Mr Russell for the Respondent concedes as much in his statement that the Applicant expressed "concern about finishing up earlier was that he would be penalised for not serving his full notice period"[39], and in Ms Lobb's statement that the Applicant was "worried if he left early, he would be penalised for not giving proper notice and would not be paid his annual leave entitlements that he was owed".[40] Second, I accept the evidence of the Applicant that he had decided to resign at that time to "limit the time I would be without any pay"[41] as he had "financial commitments to meet"[42] and was concerned that if he did not work out the notice period, he would be "penalised".[43] Third, Mr Russell concedes that he discussed the shorter notice period with the Applicant as "if he didn't wish to work the second week of the notice

period, there was no necessity to do so because we were quiet at the time as he could see and that was the conversation”.[44]

[18] On the basis of the evidence before me, I am satisfied that the Applicant intended to work out the notice period as stated in his resignation and did not agree to reduce his notice period and not be paid for the week of notice.[45] I find the Respondent took the unilateral action to shorten the notice period by one week. On that basis, I am satisfied that the actions of the Respondent support a conclusion that there was a termination on the Employer’s initiative.

Conclusion on jurisdictional issue

[19] I found that the Applicant was dismissed. I reject the Respondent’s jurisdictional objection.

[20] Next is the question of whether the Applicant’s dismissal by the Respondent was unfair. There was no valid reason for the dismissal, because the Respondent did not have any such reason (s387(a)). The Applicant was not notified of a reason for dismissal or given an opportunity to respond for any reason for dismissal related to performance or conduct (ss387(b) and (c)). I do not consider the matters referred to in ss 387 (d), (e), (f), (g) or (h) affect the analysis of whether the dismissal was unfair in this case.

[21] Taking into account the matters in s.387, and in all the circumstances, I consider that the Applicant’s dismissal by the Respondent was unreasonable, and therefore unfair (see s 385). His offer to resign was subject to the condition he would finish on 20 October 2023. Instead, the Respondent ended his employment on 13 October 2023. On the evidence before me I am satisfied the Respondent brought the Applicant’s employment to an end against his wishes and without a valid reason.

Remedy

[22] Section 390 of the Act sets out the circumstances in which I may make an order for reinstatement or compensation:

> “**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 Commission may make the order only if the person has made an application under section 394.
>
> (3) The Commission 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."

[23] I have already dealt with the issues at s.390(1)(a)–(b) above. I am satisfied that the Applicant was protected from unfair dismissal pursuant to s.382 of the Act and he was dismissed unfairly. Accordingly, I am required to determine whether to order the reinstatement of the Applicant or, in circumstances where reinstatement is inappropriate, an order for compensation if it is satisfied such an order is appropriate in all the circumstances.

Reinstatement

[24] The Applicant seeks financial compensation in lieu of reinstatement as he has commenced another position as of 1 November 2023 and does not seek to be reinstated with the Respondent.[46] Regardless of the remedy sought by the Applicant, s.390 of the Act requires I first determine whether reinstatement is appropriate before I may consider an order for compensation.

[25] In *Regional Express Holdings Ltd T/A Rex Airlines*[47] a Full Bench of Fair Work Australia considered what factors may be taken into account when considering if reinstatement is inappropriate under s.390(3)(a) of the Act:[48]

> "**[26]** Whenever an employer dismisses an employee for misconduct, assuming the employer is acting honestly, there is an implied loss of trust and confidence in the employee. If it is subsequently found that the termination was harsh, unjust or unreasonable it is appropriate to consider whether the relationship can be restored if the employee is reinstated. That question cannot be answered solely by reference to the views of management witnesses. All of the circumstances should be taken into account. In this case there are a number of relevant matters. They include the fact that not all of the conduct alleged against the respondent has been proven, the respondent's apparently unblemished record in the performance of his flying duties over a period of 14 years, the fact that the misconduct is not directly related to the performance of the respondent's professional duties as a first officer and Rex's failure to pursue any substantial disciplinary action against another pilot who, it is alleged, has been guilty of misconduct at least as serious as that of which the respondent was accused. The significance of the last consideration is that the pilot in question is still carrying out the full range of his duties, despite allegations of conduct of a kind which, in the respondent's case, is said to have led to an irrevocable loss of trust and confidence. Assuming a positive approach on both sides we find there is a reasonable chance that the employment relationship can be restored with the necessary level of mutual trust."

[26] In the circumstances I am satisfied that reinstatement is inappropriate.

[27] Having decided reinstatement is not appropriate in this case, I must decide the terms in which an order may be made.

Compensation

[28] Section 390(3)(b) provides the Commission may only issue an order for compensation to the Applicant if it is appropriate in all the circumstances.

[29] I now turn to the issue of compensation.

[30] Section 392 of the Act provides as follows:

"**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."

[31] I now consider each of the criteria in section 392 of the Act.

Viability: section 392(2)(a)

[32] There is no evidence before me to suggest that a compensation order would affect the viability of the Respondent.

Length of service: section (section 392(2)(b))

[33] The Applicant had worked for the Respondent since 15 August 2022. In the context of this matter, length of past service is not a relevant factor to the compensation order.

Remuneration that would have been received: section 392(2)(c)

[34] It is not in contest that the Applicant offered his resignation on 9 October 2023 to take effect on 20 October 2023. This has the effect of limiting the compensation order I consider appropriate. Had he not been dismissed, he would have worked until 20 October 2023 per his notice of resignation. He would have earned one weeks' pay from 13 October 2023 to 20 October 2023. He has suffered one week's loss of earnings as a consequence of the employer's dismissal. On the material before me, he earned $1144.92 per week gross plus applicable superannuation[49] at the date of dismissal. I find 11% superannuation[50] to be $125.72.

[35] The Applicant states that he was paid his outstanding entitlements including annual leave on 9 November 2023,[51] and submits that the late payment of his entitlements should go towards the harshness of the dismissal and increase the amount of compensation by an additional week's pay.[52] As the Applicant has already been paid his entitlements, I do not find this to be a relevant consideration.

[36] I find that $1142.92 plus applicable superannuation payments of $125.72 would have been received by the Applicant.

Mitigating efforts: section 392(2)(d)

[37] I make no reduction on account of this factor.

Remuneration earned: section 392(2)(e)

[38] The Applicant was paid one week in lieu of notice but did not earn remuneration in the week from 13 to 20 October 2023. I make no deduction on account of this factor.

Income likely to be earned: section 392(2)(f)

[39] The week from 13 October 2023 to 20 October 2023 has passed. This factor is not relevant to a compensation order limited to this period.

Other matters: section 392(2)(g)

[40] There are no other matters or contingencies that need to be provided for.

Misconduct: section 392(3)

[41] I do not consider that discount to the compensation order, for the short period in issue, is warranted. The discount factor on this account is zero.

Shock, Distress: section 392(4)

[42] I note that the amount of compensation allowable by the statute does not include a component for shock, humiliation or distress. Nor does it include any basis for punitive damages.

Compensation cap: section 392(5)

[43] The amount of compensation I will order does not exceed the six-month compensation cap.

Payment by instalments: section 393

[44] Given the amount I will order is small, I will provide 14 days for the employer to give effect to my order. In these circumstances, no order for payment by instalments will be made.

Conclusion

[45] Having regard to the matter set out above I have concluded that it is appropriate to award the Applicant one week's compensation. This represents the amount he would have earned had he remained employed with the Respondent. I therefore order the Respondent pay the Applicant $1142.92 less tax according to law plus applicable superannuation payments of $125.72. The monies are to be paid within 14 days of the making of this order. An order has been issued separately in PR772472.

COMMISSIONER

Appearances:

Ms Mueller, with permission, for the Applicant.
Mr Tonks, with permission, for the Respondent.

Hearing details:
2024.
Melbourne (by Video using Microsoft Teams)

12 February.

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<PR772452>

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[1] Digital Hearing Book (DHB) p12, p51.

[2] DHB p104, p156.

[3] DHB p105, p157.

[4] Witness Statement of Terrence Jackson.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Ibid.

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[14] Ibid.

[15] Ibid, Transcript PN459-460.

[16] DHB p181.

[17] DHB p190.

[18] Ibid.

[19] DHB p190.

[20] DHB p182.

[21] Ibid.

[22] Ibid, PN222.

[23] DHB p183.

[24] Ibid.

[25] Ibid, PN223.

[26] DHB p188, Transcript PN293-299.

[27] DHB p183, 188.

[28] Ibid.

[29] DHB p188.

[30] DHB p182.

[31] Ibid.

[32] Transcript PN248.

[33] DHB p191.

[34] Ibid.

[35] Transcript PN144.

[36] Transcript PN248.

[37] [2018] FWC 20.

[38] Print N6999.

[39] DHB p183.

[40] DHB p188.

[41] DHB p62.

[42] Ibid.

[43] DHB p183.

[44] Transcript PN238.

[45] Transcript PN143-144.

[46] Transcript PN392

[47] [2010] FWAFB 8753.

[48] Ibid at [26].

[49] DHB at p18, p110.

[50] DHB p68. 11% superannuation is in accordance with the Superannuation Guarantee from 1 July 2023 – 30 June 2024.

[51] DHB p63,

[52] Transcript PN452-468.