DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Darren De La Rue
v
DPG Services Pty Ltd
(U2023/6816)

DEPUTY PRESIDENT CLANCY MELBOURNE, 4 APRIL 2024

Application for an unfair dismissal remedy - dismissal not unfair - application dismissed.

[1] Mr Darren De La Rue (**Applicant**) has made an unfair dismissal application pursuant to s.394 of the *Fair Work Act 2009* (**the Act**) which names as Respondent, DPG Services Pty Ltd (**Respondent**) and was the subject of a determinative conference on 7 December 2023. Witness evidence was received from Mr De La Rue and, for the Respondent, from Ms Karenne Hall (People and Culture Business Partner) and Ms Sue Truter (General Manager, Paynesville Garden Care Community).

Initial matters to be considered – s.396 of the Act

[2] The application was made within the 21-day period after the dismissal took effect required by s.394(2) of the Act (s.396(a)) and there is no dispute that the Applicant is a person protected from unfair dismissal because he had completed the minimum employment period and had an annual rate of earnings less than the high-income threshold (s.396(b)). Further, it is not disputed and I am satisfied that, the Respondent was not a small business employer, such that consideration of whether the dismissal was consistent with the Small Business Fair Dismissal Code (s.396(c)) is not required. Finally, it was not claimed by the Respondent and nor does the material before me suggest the dismissal was a case of genuine redundancy (s.396(d)).

Section 385 of the Act – was the dismissal unfair?

[3] As to the circumstances set out at s.385 of the Act, there is no question or dispute that the Applicant was dismissed (s.385(a)) and, as outlined above, this is not a matter that involves a small business and consequent consideration of whether the Applicant's dismissal was consistent with the Small Business Fair Dismissal Code (s.385(c)) or one where the Commission is required to consider whether or not the dismissal was a case of genuine redundancy (s.385(d)).

[4] This leaves s.385(b) and the requirement for the Commission to determine whether the dismissal was harsh, unjust or unreasonable. In considering this, I must take into account the criteria outlined in s.387 of the Act.

Background facts

[5] There are differing accounts of the Applicant's commencement date but nothing of significance turns on this. The Applicant outlined in the *Form F2 – Unfair dismissal application* form (**Form F2**) that his employment commenced on 3 January 2022, whereas the Respondent produced a letter of employment dated 25 May 2022 that had attached an Employment Agreement detailing a commencement date as Maintenance Officer at Lakes Entrance on 26 May 2022.[1] Additionally, Ms Hall gave evidence that the Applicant transferred to the position of Maintenance Officer at the Paynesville Gardens Care Community on 13 March 2023.[2]

[6] Ms Truter said that on Sunday 18 June 2023, she received two telephone calls from the weekend receptionist at the Paynesville Gardens Care Community, Ms Tracey Kuhnel. Ms Truter said that Ms Kuhnel told her that the police had telephoned regarding the Applicant and specifically, sought his contact details and inquired as to whether he was at work. Ms Truter also said that she received a second phone call from Ms Kuhnel, during which Ms Kuhnel told her that police had arrived at the workplace, handcuffed the Applicant and taken him away and further, that this scene, which had involved the Applicant being combative with the police, had been witnessed by residents and members of their families.[3] Ms Kuhnel also sent Ms Truter an email account going to the Applicant's arrest.[4]

[7] On 19 June 2023, the Applicant sent a text message to Mr Truter stating that he would be in at 7am that day for normal duties. Ms Truter sent a text message in reply informing the Applicant that he was not permitted to do so and further, a report would be required concerning the events of the previous day. Later on 19 July 2023, Ms Truter sent the Applicant a letter via email that stated:

> "We are aware that on Sunday 18 June 2023 you were arrested by police whilst on the premises of Paynesville Gardens Care Community. We believe this matter may affect your suitability to perform your position as Maintenance Officer.
>
> As per the Aged Care Act 1997, there are convictions that preclude a person from employment within the Aged Care facilities. Considering the nature of your arrest we are not in a position to ascertain whether you meet the requirements to retain your employment.
>
> The terms of your employment contract requires you to disclose any matters that could give rise to a change in your police check. Until such time that you make this disclosure, it is deemed that you are not meeting the inherent requirements of your position and are therefore not able to attend the workplace.
>
> You will remain on leave without pay until you provide evidence that you continue to meet the inherent requirements to be engaged as a Maintenance Officer at Paynesville Gardens Care Community.

…"

[8] Ms Truter said that on 20 June 2023, the Applicant sent her the following documentation:

1. An application for a Family Violence Interim Intervention Order (**FVIIO**), together with supporting documentation including a summons and the FVIIO made by the Magistrates' Court of Victoria on 13 April 2023 against the Applicant in relation to his ex-partner and her son.[5]

2. An application to vary the FVIIO that had been made on 13 April 2023, arising out of alleged behaviour on 17 June 2023.[6]

3. A search warrant issued on 18 June 2023 that applied to the Applicant.[7]

4. A Charge sheet dated 18 June 2023 outlining four charges against the Applicant.[8]

5. An undertaking of bail dated 18 June 2023 requiring the Applicant to attend Court on 21 June 2023.[9]

[9] The charges against the Applicant were:

1. Theft of the mobile telephone of his ex-partner (valued at $1,500).

2. Contravention of the FVIIO made on 13 April 2023 by forcing entry onto his ex-partner's address in the knowledge that his conduct would probably cause apprehension or fear in his ex-partner for her safety and that of another person (her son).

3. Contravention of the FVIIO made on 13 April 2023 by forcing entry onto his ex-partner's address.

4. Entering a private place without express or implied authority from the owner or any legitimate purpose.

[10] On 21 June 2023, the Applicant sent an email to Ms Truter attaching a *Notice of Order Made* at the Magistrates' Court of Victoria sitting at Bairnsdale on 21 June 2023[10] detailing that the Applicant had entered a plea of guilty in relation to three of the four charges and been fined $700 without conviction, as part of an aggregate order. It may be noted that the third of the four charges (see [9](3) above) was withdrawn.[11]

[11] On 23 June 2023, the Respondent emailed the Applicant a letter. This letter included the Respondent's stated belief that the Applicant's arrest on the Paynesville Gardens Care Community premises on 18 June 2023 may have affected his suitability to perform his position as Maintenance Officer and that it required him to attend a meeting with Ms Hall and Ms Truter on 26 June 2023, to discuss matters pertaining to his suitability to meet the inherent requirements of his role, specifically:

"1. Your failure to meet the terms of your employment contract requiring you to disclose any matters that could give rise to a change in your police check by failing to disclose the Family Violence Interim Intervention Order issued to you on 13 April 2023.

2. The subsequent breach of the Interim Intervention Order resulting in your arrest.

3. Your arrest and charge on 18 June 2023 of theft.

4. The subsequent fine following the charge of theft issued by the Magistrates Court on 21 June 2023."[12]

[12] The Applicant attended the meeting on 26 June 2023. There were differing accounts given as to what transpired, in particular in relation to the Applicant's behaviour during the meeting, but it is apparent that the Applicant asked for a break on two occasions. The account of Ms Truter and Ms Hall was that during the second break, they observed the Applicant getting into his motor vehicle and leaving the premises, whereas the Applicant stated that he left the premises so that he could speak with a representative and that, after some time, he returned to the Respondent's premises (at a time before 5pm) only to find that "everyone had gone."[13]

[13] On 27 June 2023, the Respondent sent a letter to the Applicant by email in which it asserted that his behaviour during the course of the meeting and subsequent refusal to participate in the meeting may be considered a breach of Opal HealthCare Policies. The letter further outlined that the Applicant was required to meet with Ms Hall and Mr Truter on 29 June 2023, to discuss allegations and potential breaches of Opal values, the Opal Code of Conduct and the Applicant's position description and contract of employment, expressed as being:

"13 April 2023	That you failed to disclose the Family Violence Interim Intervention Order issued to you on 13 April 2023.
26 June 2023	That you failed to follow a reasonable direction to discuss matters as outlined in a letter to you dated 23 June 2023."[14]

[14] The Applicant attended the meeting onsite on 29 June 2023. There are different accounts going to what the Applicant stated at the outset of the meeting. Ms Truter's recollection is that the Applicant stated, "If this is going to end in my termination, just let me know now because I am not going to go through this" whereas the Applicant's recollection was that he said, "It looks as though you're trying to terminate me." What followed was the two allegations being put to the Applicant. In relation to the (first) allegation that he had failed to disclose the FVIIO made on 13 April 2023, the Applicant stated that he did not think he had to disclose it because it was a civil matter. The Respondent's position is that the Applicant declined to respond to the (second) allegation that he had failed to follow a reasonable direction to discuss the matters outlined in the letter dated 23 June 2023, whereas the Applicant's position is that he cannot recall saying that he would not respond to this allegation.[15] Ms Hall stated that the Applicant gave the answer "No" when he was asked whether there was anything else he wanted to add but the Applicant sought to explain his position as follows:

"MR DE LA RUE: I believe I made comments that all of the process that I was going through didn't really - didn't go with the contract and what they were asking me was above and beyond.

THE DEPUTY PRESIDENT: All right.

MR DE LA RUE: Meaning the letter that was sent, all of the allegations were post part of me being under the process that I believe they needed to do, and they didn't follow."[16]

[15] There is no dispute that the Applicant was informed that a show cause process would then be undertaken. On 30 June 2023, the Respondent emailed the Applicant a letter informing him that the allegations against him had been substantiated and asserting they were not in line with the Respondent's values and policies. The 30 June 2023 letter further outlined:

"These substantial breaches are extremely serious and as such we are considering terminating your employment. As such we require you to show cause as to why your employment should not be terminated.

…

During the meeting we also discussed matters that may affect your suitability to perform your position of Maintenance Officer, specifically:

1. The subsequent breach of the Interim Intervention Order resulting in your arrest.

2. Your arrest and charge on 18 June 2023 of theft.

3. The subsequent fine following the charge of theft issued by the Magistrates Court on 21 June 2023.

We believe that **these matters**, in particular the charge of theft, effects your suitability to perform your position of Maintenance Officer. As such we require you to show cause as to *why your employment should not be terminated*.

…"[17]
(**my emphasis**)

[16] The Applicant was advised that a 'show cause' meeting would be held on 4 July 2023 via Microsoft Teams, to which he could bring a support person. The Applicant in fact attended the show cause meeting in person and agreed that he had been comfortable to attend without a support person. The Respondent asserts the Applicant's 'show cause' reason as to why he should not be terminated was "I don't feel I have broken any rules of the contract, that is it."[18] The Applicant did not disagree with this but added that he had also said "I can fulfil the inherent requirements of the role and I should not be terminated for not disclosing interim intervention order, as I was not obliged to do so."[19]

[17] Following the 4 July 2023 'show cause' meeting, the Applicant was sent an Outcome/ Termination of Employment letter dated 4 July 2023. The letter outlined that Mr De La Rue had been terminated effective 4 July 2023, due to the 'substantiated' allegations in the 30 June 2023 letter.

Consideration

[18] As previously outlined, I am under a duty to consider each of the criteria in s.387 of the Act in reaching my conclusion and will do so below.

Was there a valid reason for dismissal relating to Mr De La Rue's capacity or conduct? – s.387(a)

[19] In considering whether the dismissal of the Applicant was harsh, unjust or unreasonable, I am required to take into account whether there was a valid reason for the dismissal related to his capacity or conduct (including its effect on the safety and welfare of other employees). The reason or reasons should be "sound, defensible and well founded"[20] and should not be "capricious, fanciful, spiteful or prejudiced".[21]

[20] The first of the allegations said to have been substantiated and thereby relied upon by the Respondent as a valid reason for the Applicant's termination was that he failed to disclose the FVIIO issued on 13 April 2023. It was asserted by the Respondent that this failure to disclose was in breach of the following:

a) Opal Values;

b) The Opal Code of Conduct;

c) The Applicant's position description; and

d) The Applicant's contract of employment.

[21] Ms Hall's evidence was that the Opal Code of Conduct incorporates the Opal Values and that the Respondent specifically relied upon there having been the following breaches of the Opal Code of Conduct:

a) Theft of any person's property or medications or Opal property;

b) Not adhering to Opal's police and criminal check policy and procedures; and

c) Not complying with a lawful and reasonable direction given by someone who has authority to give the direction.[22]

[22] As to the asserted 'theft' breach, I observe that the Opal Code of Conduct is stated to set out expectation for the way in which employees are to "conduct themselves at Opal" and applies to employees "who work within Opal's homes" when "engaged in work related activities outside the Opal home or office environment." Having regard to these terms, I am not

satisfied that the Applicant's out of hours theft of the mobile telephone of his ex-partner constitutes a breach of the Code of Conduct in the manner asserted by the Respondent.

[23] As to the asserted non-adherence to the Respondent's/Opal's police and criminal check policy and procedures,[23] I am not persuaded that the failure to disclose the FVIIO issued on 13 April 2023 constituted a breach. The Respondent's/Opal's police and criminal check policy references convictions and circumstances in which a person has been charged and found guilty of an offence, but not convicted. As at 13 April 2023, the FVIIO had been made against the Applicant in relation to his ex-partner and her son but there had neither been a charge laid nor a conviction recorded. Rather, the Applicant was, at that stage, the subject of a summons in respect of an application for an Intervention Order that was to be heard on 21 June 2023.

[24] The Respondent's reliance on an asserted breach of the Applicant's position description stems from the statement in the position description outlining "To follow Opal values, Opal policies and procedures and practices to ensure the maintenance team demonstrate professional behaviours accordingly" as a key responsibility.[24] A difficulty presented by this proposition is that the position description focusses very much on the Applicant's work performance and the Respondent's working environment.

[25] The Respondent also relied on the requirement in the contract of employment that the Applicant notify his manager as soon as practicable if charged and/or convicted of a criminal offence during the course of his employment, for the purposes of the *Age Care Act 1997* (Cth) and/or related legislation. [25] As to this, the Applicant provided information in relation to the charges against him within two days of having been charged, which was also the day immediately following the request for information made by the Respondent. The Applicant also informed the Respondent of the outcome of those charges, which did not include conviction, on the same day the Order in relation to them was made. Having regard to these facts, I am not persuaded that the Applicant acted in breach of this particular contractual requirement and note the evidence of Ms Hall at the determinative conference:

> "We had no concern over the fact that once Mr De La Rue was arrested on our premises and we subsequently asked for some evidence around what had happened with the charges, he did meet that requirement..."[26]

[26] Nor am I persuaded that the Applicant breached the warranty under the contract of employment that he would immediately notify his Manager if he became the subject of proceedings that <u>may</u> lead to a conviction of any criminal offence at any time during his employment[27] because he did not advise the Respondent in relation to the the FVIIO when it was made on 13 April 2023. It cannot be reasonably suggested that it would follow that the Applicant being subject to an application for an Intervention Order to be heard on 21 June 2023, and nothing more, <u>might</u> lead to a conviction of a criminal offence during his employment.

[27] Some of the other requirements in the Applicant's contract of employment said by the Respondent to have been breached were the obligations to:

a) Perform the duties in a professional, efficient, timely and lawful manner (clause 2.2(e));

b) Provide all information, reports and assistance requested by the Respondent in relation to the performance of the duties (clause 2.2(f)); and

c) Comply with the Respondent's policies and procedures (clause 2.2(k)).[28]

[28] As to these duties, I would observe that the first two relate to work duties and I have already made comment in relation to the third.

[29] The second allegation put to the Applicant and relied upon as the other valid reason for the Applicant's termination was that he failed to follow a reasonable direction to discuss matters as outlined in the letter dated 23 June 2023. The specific allegation put in that letter was that the Applicant failed to follow a reasonable direction to discuss the following:

a) Matters pertaining to his suitability to meet the inherent requirements of his role, including his failure to meet the terms of his employment contract requiring him to disclose matters that could give rise to a change in his police check by failing to disclose the FVIIO;

b) The subsequent breach of the FVIIO, resulting in his arrest;

c) His arrest on 18 June 2023 and the charge of theft; and

d) The subsequent fine imposed for theft.

[30] The Respondent submitted that its request constituted a reasonable and lawful direction with which the Applicant was contractually obliged to comply.[29] The essence of the Respondent's assertion in relation to the first of these four matters was that the Appellant was obstructive when the Respondent was attempting to gain to get an understanding of why he had not disclosed the FVIIO issued on 13 April 2023, earlier than 20 June 2023.[30]

[31] I have noted there was dispute between the Applicant and Ms Truter on the question of whether the Applicant had in fact raised the FVIIO issued on 13 April 2023 at a time earlier than June 2023. Regardless, I do not consider there to have been a requirement for the Applicant to disclose it prior to 18 June 2023 because the FVIIO had been obtained as a result of an ex parte application and had until then represented neither a charge nor a conviction. Further, the FVIIO arose from a relationship not related to the Applicant's employment. Prior to 18 June 2023, the Applicant had not yet had the opportunity to formally address the FVIIO, let alone dispute it.

[32] As to the four matters more generally, the Respondent also sought to rely on obligations it submitted arose under the *Age Care Act 1997* (Cth) in asserting the Applicant had a duty to comply with all laws, regulations, standards and guidelines that applied to his position (clause 2.2(1)).[31] I am unable to conclude that these specifically formed the basis for a valid reason to terminate the Applicant's employment in this case because the Respondent failed to specifically articulate what those statutory obligations were. Similarly, the Respondent also made the following broad assertions without articulating their source:

a) It had obligation to conduct a risk assessment where it held concerns about criminal charges or convictions; and

b) There were eight standards it is required to meet in order to maintain its accreditation; and

[33] To the extent the Respondent's complaint is that the Applicant was not forthcoming with details in responding to its correspondence from 19 June 2023 onwards or during the meetings on 26 and 29 June 2023 and 4 July 2023 that preceded his termination, I am not persuaded, having regard to the circumstances of this case, that this of itself gave rise to a valid reason for termination. By this time, the Applicant had been arrested on the Respondent's premises and the extent to which the Applicant elected to attempt to allay the Respondent's concerns arising from this development, was ultimately a matter for him.

[34] I have, however, concluded that it was the Applicant's arrest at work on 18 June 2023 that gave rise to a valid reason for his termination. The Applicant has maintained throughout that his arrest for contravening the FVIIO on 17 June 2023, having forced entry into his ex-partner's premises without her express or implied authority or any legitimate purpose and stolen her mobile telephone (for which he ultimately pleaded guilty), was not related to his employment. The Applicant argued that that his breach of the FVIIO was a civil matter with no connection to his employment and lamented that it was unfortunate he was working on the Respondent's site on 18 June 2023, because his termination and the unfair dismissal application that has followed would not have transpired if he had not been arrested at work. These beliefs appear to have informed the Applicant's decision regarding what he would disclose. I consider the Applicant allowed himself to be arrested at work when this was entirely avoidable. I am satisfied that by the time the Applicant was arrested, he would have known he was a person of interest to police since the night before. Ms Hall gave unchallenged evidence that the Applicant told her in a telephone conversation on 20 or 21 June 2023, that the police had knocked on his door on the evening before his arrest, but he had chosen not to answer.[32]

[35] I am persuaded that owing to the events of the evening before, the Applicant cannot have been surprised that he was a person of interest by the time he attended work on 18 June 2023. Yet, despite knowing he was a person of interest, the Applicant elected to attend work without having addressed matters with the police first or having notified his employer that there were matters that might give rise to police involvement at his workplace. In doing so, the Applicant paid no regard to the Respondent's brand and reputation as a residential aged care provider. Further, in full view of residents of the Respondent's facility and members of their families, the Applicant was combative when confronted by the police officers attending his workplace and was required to be handcuffed and taken away in a "paddy wagon."[33] In the context of the Applicant's employment, this was wholly unacceptable. I accept the broad proposition that the Respondent has an obligation to provide for the health, safety and welfare of residents in its care. Residents in aged care facilities are dependent. They are invariably vulnerable. Their families place enormous trust in the relevant aged care provider to provide a safe and secure environment.

[36] I therefore consider that in attending for work on 18 June 2023 without notifying his manager about the events of the evening before, the Applicant acted in a manner that was wholly indifferent to the Respondent's brand and reputation as an aged care provider and in breach of

his contractual obligation to notify his manager as soon as he became aware of any information or matter that may affect the Respondent's brand or reputation.[34] The Applicant left the Respondent significantly exposed, particularly because it was ignorant as to the background circumstances and had no forewarning that the police might attend its residential aged care facility looking for one of its employees. I am also satisfied that through his conduct when confronted by the police, the Applicant acted in a manner that was entirely reckless as regards the Respondent's credibility and reputation as an aged care provider, together with its goodwill and relationships with its residents, their families and other employees. This also constituted a serious breach of his contract of employment.[35] I am satisfied the Applicant's conduct in failing to notify the Respondent in advance of attending work and his response when the police attended his place of work were serious breaches of his employment contract and sufficiently detrimental to the ongoing employment relationship so as to constitute a valid reason for his dismissal.

Notification of the valid reason – Opportunity to respond to any reason related to capacity or conduct – ss.387 (b) and (c)

[37] Notification of a valid reason for termination should be given to an employee protected from unfair dismissal before the decision is made,[36] in explicit terms,[37] and in plain and clear terms.[38] In *Crozier v Palazzo Corporation Pty Ltd*[39] a Full Bench of the Australian Industrial Relations Commission dealing with a similar provision of the *Workplace Relations Act 1996* stated the following:

> "[73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."

[38] The background I have outlined above indicates the letter sent to the Applicant dated 23 June 2023, required the Applicant to attend a meeting with Ms Hall and Ms Truter on 26 June 2023 to discuss matters pertaining to his suitability to meet the inherent requirements of his role. These matters were outlined to include his arrest at work on 18 June 2023. At the 26 June 2023 meeting, the Applicant was invited to respond to contents of the 23 June 2023 letter. The 27 June 2023 letter again raised the Applicant's arrest and notified the Applicant of a meeting to take place on 29 June 2023, at which he was again invited to discuss the assertion that he had failed to follow the "reasonable direction" to discuss the arrest, and other matters. At the 29 June 2023 meeting, the Applicant was given the opportunity to respond to the Respondent's assertions.[40] The 'show cause' letter dated 30 June 2023 gave notice of the Respondent's opinion that the Applicant had failed to follow a "reasonable direction" to discuss the allegations outlined in the 23 June 2023 letter and that this was an "extremely serious" breach, such that the Respondent was considering the termination of his employment. The 'show cause' letter also included the assertion that the Applicant's arrest had affected his suitability to perform his role as Maintenance Officer and invited him to show cause as to why his employment should not be terminated at a meeting on 4 July 2023. Finally, these allegations were raised with the Applicant at the 'show cause' meeting held on 4 July 2023 and the

Applicant was given an opportunity to respond. I am therefore satisfied that the Applicant was notified through the various letters sent to him that the Respondent wanted to discuss, amongst other things, his arrest at work on 18 June 2023 and further, that he was provided with an opportunity to respond at the various meetings. I am therefore satisfied that the considerations in ss.387(b) and (c) of the Act were met.

Unreasonable refusal by the employer to allow a support person – s.387(d)

[39] This consideration is not a factor in this application. No refusal was alleged, and it may be noted that in each piece of correspondence inviting the Applicant to a meeting, there was an invitation for him to bring a support person.

Warnings regarding unsatisfactory performance – s.387(e)

[40] The Respondent did not dismiss the Applicant on the basis of unsatisfactory performance and therefore, this consideration is not a relevant factor in this case.

Impact of the size of the employer on procedures followed - s.387(f) and absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[41] I do not consider the size of the Respondent to have been a relevant consideration impacting on the procedures followed in effecting the dismissal in this case (s.387(f)) and there was not an absence of dedicated human resources management specialist/expertise, such that s.387(g) is a consideration in this case.

Other relevant matters – s.387(h)

[42] Section 387(h) of the Act requires the Commission to take into account any other matters it considers relevant.

[43] I have noted the Applicant was employed by the Respondent for a period of between 12 and 18 months and that a payment of 3 weeks in lieu of notice was paid upon termination. There was some dispute regarding whether there were issues of performance during the course of the Applicant's employment but, as noted above, issues of performance were not relied upon as a reason for the Applicant's dismissal and I make no finding that the Applicant's performance was deficient. Further, no disciplinary issues appear to have arisen prior to the circumstances giving rise to the Applicant's dismissal.

[44] The Applicant submitted that he has suffered personal and economic detriment that has been wholly disproportionate to the circumstances relating to his termination and that while it had been his intention to work for the Respondent until retirement age, he has been unable to work since his dismissal due to ongoing medical issues for which he is receiving treatment. Medical certificates outlining that the Applicant had no capacity for employment from 4 July 2023 until 22 December 2023 were produced, one of which diagnosed the Applicant with "depression and anxiety related to hostile work environment at Opal + circumstances of dismissal." The signatory to that particular medical certificate was not present at the determinative conference and so I was not in a position to explore these propositions. The Applicant claimed he would not be capable of resuming work for at least twelve months[41] and

advised he had made a workers' compensation claim against the Respondent. The Applicant also stated that he had consulted both a psychologist and a psychiatrist. The frequency of such consultations was not entirely clear. It would seem that one of the two practitioners had been consulted on a single occasion and the other, who was prescribing medication, was being consulted on an ongoing basis. The Applicant also said that he is consulting a drug and alcohol specialist and, on a fortnightly basis, an anger management consultant.

[45] Having considered these matters raised in relation to s.387(h) of the Act and weighed them against the other considerations in s.387, in particular the matters I outlined above in [34] – [36], I do not find that they are sufficient to render the Applicant's dismissal harsh, unjust or unreasonable. As I have outlined above, I consider that by allowing circumstances to develop to the point where he was arrested at work without having notified the Respondent in advance that this was a possibility, the Applicant acted with indifference and recklessness towards the Respondent's brand, reputation and goodwill as an aged care provider. Further, the Applicant's behaviour at the point of arrest had the very real potential to negatively impact upon the Respondent's relationships with its residents, their families and other employees. Residents in aged care facilities and their families are entitled to expect a safe, secure and peaceful environment and should be spared potential anxiety that might flow from witnessing the dramatic arrest of an employee who works amongst them in what is their home for the final years of their lives. The Applicant's actions left the Respondent unacceptably exposed to brand and reputational damage. While these events in this case might well have been regarded differently if the Applicant had been employed in another industry, I consider the distinctive characteristics of the aged care industry support a determination that the Applicant's dismissal was not unfair.

Conclusion

[46] I have made findings in relation to each matter specified in s.387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[42] I am satisfied the dismissal of the Applicant was not harsh, unjust or unreasonable. Accordingly, I find that the Applicant's dismissal was not unfair. As I have found that the Applicant's dismissal was not unfair, his application for unfair dismissal remedy is dismissed.

DEPUTY PRESIDENT

Appearances:
Ms D De La Rue on his own behalf.
Ms K Hall for DPG Services Pty Ltd.

Determinative conference details:
2023.

Bairnsdale.
7 December.

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[1] Digital Court Book (DCB) at page 158.

[2] Exhibit R1, DCB at page 142, see paragraph 6(b) and DCB at page 175.

[3] Exhibit R2, DCB at page 120, see paragraphs 14 and 15.

[4] Annexure ST-1 to Exhibit R2, DCB at page 126.

[5] Annexure KH6 to Exhibit R1, DCB at page 192.

[6] Annexure KH7 to Exhibit R1, DCB at page 199.

[7] Annexure KH8 to Exhibit R1, DCB at page 202.

[8] Annexure KH9 to Exhibit R1, DCB at page 204.

[9] Annexure KH10 to Exhibit R1, DCB at page 207.

[10] Annexure KH11 to Exhibit R1, DCB at page 211.

[11] Exhibit A6 is a full copy of the Notice of Order Made on 21 June 2023.

[12] Exhibit A3, DCB at page 49.

[13] Transcript PN 232.

[14] DCB at page 132.

[15] Transcript PN 371.

[16] Transcript PN 373-375.

[17] Annexure ST-7 to Exhibit R2, DCB at page 135.

[18] DCB at page 18.

[19] Exhibit A1, DCB at page 22, see paragraph 12(a).

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

[21] Ibid.

[22] Annexure KH1 to Exhibit R1, DCB at pages 149 and 150.

[23] Annexure KH2 to Exhibit R1, DCB at page 152.

[24] Annexure KH5 to Exhibit R1, DCB at page 189.

[25] Annexure KH4 to Exhibit R1, DCB at page 183 – see Clause 14.1(c).

[26] Transcript PN 310.

[27] Annexure KH4 to Exhibit R1, DCB at page 185.

[28] Annexure KH4 to Exhibit R1, DCB at pages 176 and 177.

[29] Annexure KH4 to Exhibit R1, Clause 2.2(j), DCB at page 177.

[30] Transcript PN 310.

[31] Annexure KH4 to Exhibit R1, Clause 2.2(l), DCB at page 177.

[32] Exhibit R2, DCB at page 121, see paragraph 29.

[33] Exhibit R2, DCB at page 120, see paragraph 15 and Annexure ST-1 to Exhibit R2, DCB at page 126.

[34] Annexure KH4 to Exhibit R1, Clause 2.2(i), DCB at page 177.

[35] Annexure KH4 to Exhibit R1, Clause 2.2(h), DCB at page 176.

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

[37] *Previsic v Australian Quarantine Inspection Services* (AIRC, Holmes C, 6 October 1998), Dec 907/98 M Print Q3730.

[38] Ibid.

[39] (2000) 98 IR 137, 151.

[40] Transcript PN 434.

[41] Transcript PN 618.

[42] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].