DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Andrew Goddard
v
Richtek Melbourne Pty Ltd
(U2023/13155)

DEPUTY PRESIDENT COLMAN MELBOURNE, 16 APRIL 2024

Unfair dismissal application – dismissal unfair – compensation – restraint of trade provision and relevance to mitigation of loss

[1] Andrew Goddard has made an application for an unfair dismissal remedy under s 394 of the *Fair Work Act 2009* (Act). From March 2022, Mr Goddard was employed by Richtek Melbourne Pty Ltd (Richtek) as a salesperson selling grouting and grouting services. On 22 December 2023, he was dismissed for allegedly not following the company's quoting policy and procedure, and for being rude to a customer. Mr Goddard contends that these allegations were never put to him, and submits that his dismissal was both procedurally unfair and disproportionate to his alleged conduct, and that it was harsh, unjust or unreasonable.

[2] Mr Goddard gave evidence that on 20 December 2023, he noticed that his superannuation had not been paid properly. He contacted his manager at company headquarters in Perth. The manager directed him to speak with an administrative assistant, which he did. The next day, his car broke down. He reported this to the sales manager, John Keppie, and was told that there was no alternative car for him to use, and that he should enjoy a *'very long weekend'*. A few hours later, he received an email message from Mr Keppie attaching a letter, which stated that Richtek had decided to terminate his employment for not following the company's quoting policy or its procedures about attending customer premises to give quotes, and for being rude to a customer which had resulted in a complaint. The letter stated that the dismissal took effect that day.

[3] Mr Goddard then sent a text to Mr Keppie, protesting that he had not received any warning about these matters. Mr Keppie replied that he had sent several warnings to Mr Goddard's work email address earlier that day. He then forwarded three letters to Mr Goddard's personal email address, all dated 22 December 2023. The first letter stated the following:

> '*RE: First Written Warning*
>
> *I am writing this letter to formally address several incidents that have recently occurred, which have led to your first written warning. It is important that we discuss these matters seriously, as they directly impact your behaviour and actions while representing Richtek.*

1. *Quote 102076, Not following procedures.*

   Customer had made the office aware that you didn't attend site on the 21/12/23 to inspect a leaking shower but instead tried to quote over the phone. We have then had to send another quoter out site (sic) the following day to look at the works and inspect.

Consider this letter as your first written warning concerning the (sic) It is vital that we witness a substantial improvement in your conduct moving forward. Failure to do so will result in a second written warning, and if no improvements are observed thereafter, it may lead to termination of your employment contract.

I trust that you understand the severity of these matters and recognize the importance of rectifying your behaviour immediately. Should you wish to discuss these concerns further or require any clarification, please do not hesitate to reach out to me.

Yours sincerely,

John Keppie

General Manager / Sales Manager'

[4] The second letter had the same form and content as the first, save for the subject line, which was *'RE: Second Written Warning',* and the second paragraph, which stated:

'1 Quote 101530

Customer has called and made a formal complaint about being spoken down to in a rude manner.'

[5] The third letter was also essentially the same as the first, save for the subject line, which was *'RE: Third Written Warning'*, and the second paragraph, which read:

'1. Not following Richtek quoting pricing on quotes. Making one off item instead of prebuilds. Customers then calling and complaining that they have no information on invoices regarding what is included as part of works.'

[6] Mr Goddard said that he tried to contact Mr Keppie by telephone but was unable to reach him. Some days later he received a final pay slip. He did not receive any payment in lieu of notice of termination of his employment.

[7] In relation to the subject matter of the first warning letter, Mr Goddard said that he had followed normal practice which was to contact the customer by telephone to get an idea of the job and to introduce himself to the customer. This would entail some light conversation around the customer's issue, what the job involved and the customer's perspective on the matter, to better enable the sales conversation on arrival at the premises.

[8] As to the allegation in the second warning letter, Mr Goddard said that he remembered speaking to a particular customer over the telephone, who he believed was called Trish. Her problem was water collecting under the floor. She said that the water was pooling out from underneath the tiles in the doorway. Mr Goddard's evidence was that he told Trish that there must be a leak. Trish replied that she did not think it was a leak and said words to the effect of *'I think I know what I am talking about. It's not a leak. I built this house.'* Mr Goddard then responded by saying, *'I'm sorry, I didn't know you were a builder, I would have approached the conversation differently.'* Trish then said, *'I don't like your attitude.'* Mr Goddard said in his evidence that he and Trish did not *'hit it off*'. He also said that while he was not intentionally rude, he could see how his last statement might have been regarded as *'sarcastic, in response to her dismissing my assessment of the obvious problem'.* He said that if he had actually been discussing a job with a builder, he really would have approached the conversation differently.

[9] In relation to the subject of the third warning letter, Mr Goddard said that the company's F3 document had referred to the client in question as a Maurice Stechiwskyj, and that if this was the job in question, the suggestion that he had not quoted properly was wrong. This client had needed two showers regrouted. The floor was pulled up and had to be replaced. The job kept getting bigger. It was necessary to engage a carpenter to do the floor before the regrout could be done, but no carpenter was available until the New Year. Mr Stechiwskyj had then found another company that could do both the rebuild and the grouting and had then cancelled the job.

[10] Mr Goddard said that in the company's F3 response it had complained about his having worn boots in a client's bath and shower. He said that this was simply standard practice and he had never been told not to do this.

[11] Mr Goddard submitted that no valid reason for his dismissal had been established. None of the matters referred to by the company in the three warnings or the termination letter were raised with him before his dismissal and he had no opportunity to respond to them. The three warning letters had been hastily sent to him the same day as his dismissal, and he did not even see them until after receiving the termination letter. Mr Goddard said that his dismissal was evidently related to alleged poor performance, but he had not previously been warned about his performance. Mr Goddard said that he had not been afforded a fair go and his dismissal was harsh, unjust and unreasonable, and therefore unfair.

[12] Richtek failed to comply with my directions to file submissions and witness statements. It failed to attend the hearing. The notice of listing advised the parties that they were required to attend the proceeding and noted that s 600 of the Act allows the Commission to determine a matter in the absence of a person who has been required to appear before it. I have proceeded to do so. I have taken into account the materials filed by the company, which comprise the F3 response form and several documents that were attached to it.

[13] In the F3 response, which was signed by Phillip Richardson, the chief executive officer, the company stated that the reasons for Mr Goddard's dismissal were the following: a customer (quote 101530) had made a formal complaint due to being *'abused'* by Mr Goddard, which had brought the company into disrepute; Mr Goddard had not followed company pricing policy and had instead made up his own policy, thereby *'effectively stealing'* from the company; Mr Goddard had failed to follow company procedure by not *'attending quotes'*; and he was said to

have abused office staff. The F3 stated that the *'evidence'* was attached. This comprised four documents.

[14] The first was a customer record made by Mr Keppie on 21 December 2023 concerning a discussion with 'Trish', which stated that the client was very upset and crying and had said that the way she had been spoken to was terrible. Trish had said that she was waiting for a call from 'Andy' and wanted an apology. She also said that someone had got in her bath with his boots on and made a mess. The customer record identified Trish as Mr Goddard's client and referred to quote number 101530, which is the same quote referred to in the second warning letter. In his evidence, Mr Goddard said that he did not recall visiting Trish's premises and thought it unlikely that he had done so after the telephone call he had described in his evidence. He did not dispute that the Trish referred to in the customer record was his client, but thought it was possible that the person referred to in the customer record was a second Trish; however it is likely, and I find, that this is the same Trish. It is improbable that two clients called Trish would both have complained about Mr Goddard around the same time.

[15] The second document was an undated online customer review from *'Sharon N'*. The post begins with the words: *'Don't bother cause they won't either!'* It complained about the failure of the tradesperson she had booked to keep an appointment. On the document are the handwritten words *'Andrew Goddard's customer'*. In his evidence, Mr Goddard said that he did not recall this customer. The third document is another customer review posted by a Phoebe Martin, which states that the person who was supposed to come and quote was running late, and when he phoned, he was very rude. Again, a handwritten note states that this is Mr Goddard's customer. Mr Goddard could not recall this customer either. Neither of these documents indicate why the company believes these persons were Mr Goddard's clients. The company did not submit any customer records, such as the one relating to Trish. These documents do not establish that the people who posted these reviews were Mr Goddard's clients, or that he did anything wrong.

[16] The fourth document is an invoice said to have been prepared by Mr Goddard for Mr Stechiwskyj. On it appear the words *'Andrew Goddard's quote. Should be a prebuild item, underpriced, Customer unhappy and was refunded in full'*. It is unclear what a prebuild item is. No pricing policy was submitted to the Commission by the company. There is no basis to conclude from this document and the other materials before the Commission that Mr Goddard failed to follow company policy in relation to the pricing of quotes.

Consideration

[17] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission is required to take into account the matters set out in s 387. The matter in s 387(a) is whether there was a valid reason for the dismissal. A valid reason is one that is both a good reason for dismissal, and a reason that has been substantiated because the Commission is satisfied on the balance of probabilities that the relevant misconduct or poor performance actually occurred.

[18] Three principal matters appear to be relied upon by the company as constituting valid reasons for dismissal, namely the allegations set out in the warnings and the termination letter. As to the first, I am not satisfied that Mr Goddard failed to follow company procedures in

relation to providing quotes on site. The company did not produce a copy of the policy that was said to have been contravened. Mr Goddard said that it was normal practice to scope out a job initially on the telephone. I accept this evidence. Mr Goddard was a credible witness. The subject matter of the first warning letter was not a valid reason for dismissal because the allegation is not made out.

[19] Similarly, the conduct alleged against Mr Goddard in the third warning letter is unsubstantiated. The quote pricing policy that Mr Goddard was said to have contravened was not produced by the company. In any event, it is not clear what Mr Goddard is said to have done wrong here. Both the relevant warning letter and the termination letter stated that he had made a *'one off item'* instead of a *'prebuild'*, which led a customer to make a complaint. But the company has not explained what Mr Goddard ought to have done or why any omission was sufficiently serious to warrant a warning, let alone a decision to terminate his employment. The suggestion in the F3 that Mr Goddard had effectively stolen from the company is absurd. Mr Goddard's explanation of this matter was perfectly sensible; the job had various components, one of which required a carpenter, and no carpenter could be obtained until the New Year. In the meantime the customer found another provider.

[20] A third matter relied upon as a valid reason for dismissal by the company is the customer complaint from 'Trish' to whom Mr Goddard had allegedly spoken rudely. Mr Keppie's note in the customer record stated that Trish was very upset and crying. Although Mr Keppie did not give evidence, Mr Goddard was taken to this record during his evidence and did not claim that her reaction as recorded here was implausible, nor did he otherwise cast doubt on it. To his credit, Mr Goddard was very candid about the fact that he and Trish did not *'hit it off'*, and that she had *'challenged'* his view of the problem. He said that, although he was not intentionally rude, he could understand how his comments to Trish could have been taken to be sarcastic in response to her *'dismissing my assessment of the obvious problem'*. There is a hint of exasperation in this language even long after the event and it is not difficult to imagine that the customer was offended by the encounter. On the balance of probabilities, and based on Mr Goddard's own evidence, I find that, objectively, Mr Goddard was sarcastic and therefore rude in his dealings with Trish. It is understandable that the customer would have been upset by this, as reported by Mr Keppie. Mr Goddard spoke down to a customer who did not agree with his point of view. This was conduct that had the potential to bring the company into disrepute, which was a matter for which the company could terminate the employment without notice under clause 9.2(c) of the contract of employment. It constituted a valid reason for dismissal and qualified as misconduct. However, in considering whether a dismissal for such conduct was unfair, the contract is not the only matter to be weighed in the balance.

[21] The other matters which appear to be relied on by the company as a valid reason for dismissal are the two critical customer comments made in online reviews, copies of which were attached to the F3. The posts are not dated however I understand that they were discovered after the dismissal. Conduct of an employee that occurs during the employment but comes to light only after the dismissal may constitute a valid reason for dismissal. It is not necessary that the impugned conduct have been relied on by the employer at the time of dismissal (or at all), because s 387(a) is directed at whether the Commission is satisfied that there existed a valid reason for dismissal, not whether the employer invoked such a reason when it ended the employee's employment. However, in this case the circumstances surrounding these customer complaints are simply not known. In particular, Mr Goddard's evidence, which I accept, was

that he had no recollection of these persons. It has not been established that these people were Mr Goddard's clients or that the complaints they made related in any way to him. As to the one line assertion in the F3 that Mr Goddard had *'abused office staff'*, this is entirely unsubstantiated. So too is the suggestion in the company's materials that Mr Goddard acted contrary to policy by wearing his boots in customers' showers: no relevant policy has been produced.

[22] It was suggested by Mr Goddard that the company may have had an ulterior reason for dismissing him which was connected to the fact that he had recently raised complaints or concerns about his working conditions, including superannuation entitlements and his work vehicle. However this was not developed. In my view the company's reasons for dismissal were the ones it identified. But only one of those reasons, Mr Goddard's rudeness to the customer Trish, has been substantiated.

[23] Section 387(b) and (c) of the Act require the Commission to take into account whether the person was notified of any valid reason, and whether the person was given an opportunity to respond to any reason for dismissal related to capacity or conduct. In the present case Mr Goddard was notified of the reason for dismissal only after he was dismissed. He was not afforded any genuine opportunity to respond to the allegations against him. The warning letters were superficial and perfunctory, hastily sent to Mr Goddard hours before he was dismissed. The second and third warning letters were ill-adapted copy-overs of the first that did not even correct the mistake in the third paragraph, each referring to the *'first written warning concerning the',* where the sentence abruptly ends. The letters speak of an expectation of substantial improvement but the timing of these warnings suggests that there was never any real intention that Mr Goddard would be afforded an opportunity to correct any perceived shortcomings in his behaviour.

[24] There was no unreasonable refusal by the employer to allow Mr Goddard to have a support person present to assist at discussions relating to the dismissal (s 387(d)), because no such request was made and no such meetings occurred. To the extent that the dismissal related to alleged poor performance, no genuine warnings were given (s 387(e)). The company made no submission about the relevance of ss 387(f) or (g) – the degree to which the size of the employer's enterprise, or the absence of dedicated human resources management specialists or expertise, would be likely to impact on the procedures followed in effecting the dismissal. I note that the company has 23 employees and does not appear to possess in-house expertise in human resources management; this likely affected the quality of the procedures followed in effecting the dismissal and I afford this some weight. Section 387(h) requires the Commission to take into account any other matters that it considers relevant. In this regard, Mr Goddard said that the dismissal had taken a significant toll on his financial situation. He also said that the dismissal had taken him completely by surprise and that he had not perceived any risk to his employment at all. He had begun to think of himself as having reached a new stage in his life, one of stability and success. There had been discussions in late 2023 about him becoming the sales manager in Melbourne. He could begin to contemplate getting a mortgage or buying a car. All of this was removed without warning or notice on the day of his dismissal.

[25] Taking into account all of these matters, I consider that the company's decision to dismiss Mr Goddard was harsh and therefore unfair. Mr Goddard was rude to a customer, which was a valid reason for dismissal. This episode created a risk to the company's reputation and

engaged clause 9.2 of the contract. However, this was a first offence. In all of the circumstances, it ought to have attracted a disciplinary response short of dismissal, such as a final warning. The company relied on other reasons for dismissal which, in conjunction with the reason that I have found to be a valid one, might have rendered the dismissal fair, but these other matters have not been substantiated. Further, the process adopted by the company was patently defective; the company made no genuine effort to raise its concerns with Mr Goddard, and sent him at the last moment a flurry of letters so that it would have some basis to say that he had been warned. In fact, Mr Goddard was given no opportunity at all to defend himself. Even taking account of the relatively small size of the business, this was a grossly inadequate procedure.

Remedy

[26] The only remedies that the Commission may award are reinstatement and compensation. The former is not sought and I do not believe it would be appropriate in this case. Mr Goddard seeks compensation. Section 392 requires the Commission to take into account certain matters when determining an amount of compensation. There is no indication that compensation would affect the viability of the employer's enterprise (s 392(2)(a)). I note that Mr Goddard had some 21 months of service with the company (s 392(2)(b)). Section 392(2)(c) directs the Commission to take into account the remuneration that the person would have received or would have been likely to receive if the person had not been dismissed. This requires the Commission to consider what would have occurred if the person was not dismissed, and in particular how long the person would have remained employed. Mr Goddard submitted that, had he not been dismissed, his employment would have lasted for at least another year. I agree. I accept his evidence that he had no intention of leaving. Although his annual base salary was $65,000 a year, which is $1250 a week, Mr Goddard said that he earned substantial commissions. A payslip from January 2024 showed that for the first six months of the 2023/24 financial year he had earned, inclusive of commissions, $53,652.46 (excluding superannuation). Over the 12 month period for which his employment would likely have continued had he not been dismissed Mr Goddard could have expected to earn $107,304.92; with superannuation, adjusted to account for the rise on 1 July 2024, this would be $119,366.63.

[27] Section 392(2)(d) requires the Commission to consider the efforts of the person to mitigate the loss suffered as a result of the dismissal. Mr Goddard said that he had applied for hundreds of jobs on *'Seek'*, including sales jobs, in which he had a lot of experience. However, he said that he had not applied for jobs in the same sector as his previous work, because of the presence of a post-employment restraint provision in his contract of employment (clause 10.1). This stated that for a period of 12 months after the termination of his contract of employment, Mr Goddard was not to work as an employee or contractor or advisor or in any other capacity in any business which was *'engaged in activities substantially similar or identical to the Company and provides services substantially similar or services offered by the Company.'* One wonders why such restraint of trade provisions are so commonly found in the contracts of ordinary workers and whether they really protect any legitimate business interest of the employer, or merely serve to fetter the ability of workers to ply their trade, and to reduce competition for labour and services. Ordinarily, one would expect a person to have applied for jobs in the sector of their expertise as a reasonable step in mitigating loss. However the presence of a non-compete provision in his contract explains Mr Goddard's decision not to do so. Although the provision is most likely unenforceable on the basis that its scope is unreasonable,

an ordinary worker cannot be expected to know this, and it is understandable that Mr Goddard would not want to risk embroiling himself in a legal controversy by acting contrary to an express provision in his contract. I therefore make no deduction in respect of Mr Goddard's decision not to apply for jobs that might have involved a prima facie contravention of the restraint of trade provision in his contract of employment.

[28] Section 392(2)(e) requires the Commission to take into account any earnings of the person since their dismissal. Mr Goddard gave evidence that he had obtained two jobs since his dismissal, at lower rates of pay than his previous role, from which he had earned $10,464.85; with superannuation, this amounts to $11,615.98. He has recently found a new job on a salary of $60,000 per year ($1153.85 a week). I proceed on the basis that he will continue in this role for the foreseeable future and it is therefore appropriate to deduct the weekly wages he is currently earning over the remainder of the 12 month period for which he would have likely remained employed but for the dismissal (36 weeks). This produces a figure of $41,538.46, which with superannuation comes to $46,252.08. This gives a sub-total to be deducted, for actual earnings since dismissal and expected future earnings, of $57,868.06. The 12 month figure of $119,366.63 is reduced to $61,498.57.

[29] A further deduction should be made for the misconduct constituted by Mr Goddard's rudeness to the customer (see s 392(3)). I will deduct 25%, which gives a figure of $46,123.94. Further, I will adopt the approach in other decisions of applying a discount to reflect contingencies. The usual amount of 15% appears to me to be appropriate, which gives a figure of $39,205.34.

[30] I will order that this amount, less taxation as required by law, be paid to Mr Goddard within 28 days of the date of this decision. An order is issued separately in PR773520.

DEPUTY PRESIDENT

Appearances:

G. Dircks for the applicant
No appearance for the respondent

Hearing details:

2024
Melbourne
9 April

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