DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Peter Jones
v
Exclusive Contracting (WA) Pty Ltd
(U2025/12697)

COMMISSIONER ROGERS ADELAIDE, 30 JANUARY 2026

Application for an unfair dismissal remedy – whether dismissal was harsh, unjust or unreasonable – valid reason – procedural fairness not afforded – dismissal of the Applicant was unfair – remedy ordered.

[1] On 4 August 2025, Mr Peter Jones made an application under s. 394 of the *Fair Work Act 2009* (**the Act**) for the Commission to remedy an unfair dismissal. He was summarily dismissed by Exclusive Contracting (WA) Pty Ltd (**Exclusive**) on 25 July 2025.

[2] Prior to his dismissal, Mr Jones was employed with Exclusive as a Ceiling Fixer for just over two years.[1]

[3] Exclusive are a commercial Wall & Ceiling subcontracting business[2] who are 'proudly multi-cultural, employing and contracting individuals from Taiwan, Uzbekistan, Russia, New Zealand, England, Ireland and several other countries.' [3]

[4] Mr Jones was dismissed on the basis that he had made inappropriate and racially offensive remarks about Chinese labour within the industry at a company toolbox meeting on 24 July 2025.

[5] Mr Jones was protected from unfair dismissal as his period of employment with Exclusive was in excess of 6 months and Exclusive are not a Small Business.[4]

[6] The employment relationship between Mr Jones and Exclusive was governed by the Exclusive Contracting (WA) Pty Ltd / CFMEU South Australian Enterprise Agreement 2023.

[7] There is no suggestion that the dismissal was a result of a genuine redundancy.

[8] Accordingly, I am required to determine whether the dismissal was harsh, unjust or unreasonable.

[9] Section 387 of the Act states:

> *"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."*

[10] I now consider each of these factors within the context of the evidence provided to the Commission.

Evidence

[11] All witnesses presented as credible and their evidence was largely consistent in the recollection of relevant events.

[12] One critical difference in the evidence related to a derogatory term that one witness claimed to have heard Mr Jones say in the meeting on 24 July 2025.

[13] None of the other witnesses who were present at the meeting were able to confirm that they directly heard Mr Jones make the derogatory remark, which Mr Jones vehemently denied saying. On the balance of probabilities, I do not accept that Mr Jones used that particular phrase as alleged.

Was there a valid reason for the dismissal related to Mr Jones' conduct (including its effect on the safety and welfare of other employees)

[14] Mr Jones was dismissed due to making 'inappropriate and racially offensive remarks about Chinese labour within the construction industry.'[5]

[15] Mr Jones contends that he did not intend for the comments to be offensive, that he did not single out an individual and did not racially vilify anyone so he should not have been dismissed.

[16] Exclusive submitted that Mr Jones made comments that were racially offensive publicly in front of other employees on the project and that the termination was reasonable and proportionate to that conduct.

[17] It is accepted by Mr Jones that he made remarks that "in 10 years' time, it will be a Chinese industry"[6] and "employees were worried about our job security".[7] These comments were made in the context of a site-wide discussion about upcoming work and low morale.[8]

[18] Mr Jones fluctuated throughout the proceeding between accepting that his comments could have been perceived as racist and showing remorse, to defending his comments and denying the comments were racist.

[19] Based on the consistent evidence of his colleagues, I find that Mr Jones made comments which included that Chinese workers were "taking our jobs", "taking over the industry" and "taking opportunities away from apprentices".[9]

[20] The comments were made in a site meeting on 24 July 2025 with more than 21 employees of Exclusive present, including several Chinese employees.[10]

[21] Numerous employees present at the meeting found Mr Jones' comments offensive, describing it as "unacceptable", "severely racially motivated" and had noted that it made them "feel quite uncomfortable".[11]

[22] It is not in dispute that Mr Jones singled out a particular group of people based on their race in front of a group of colleagues who belonged to that race.

[23] While Mr Jones attempted during his evidence to soften the intent of his comments and the exact words he used, it is clear from his evidence and the evidence of those present at the meeting that the concern Mr Jones was raising on 24 July 2025 related to an increase in the number of Chinese workers in the industry.[12]

[24] It was clearly implied in Mr Jones' comments that an increase in the number of Chinese workers, as distinct from any other workers, in the industry is a negative thing that he perceives as a problem.

[25] The Macquarie Dictionary defines 'racism' as:

> *"1. the belief that human races have distinctive characteristics which determine their respective cultures, usually involving the idea that one's own race is superior and has the right to rule or dominate others.*
>
> *2. a policy or system of government and society based upon such a belief.*
>
> *3. behaviour or language based on this kind of belief in relation to a person or persons of a particular race, colour, descent, or ethnic origin, either demonstrating an inherent prejudice*

without specific hostile intent or, alternatively, intended to offend, insult, humiliate, or intimidate.

4. such behaviour or language used against people of a different nationality." [13]

[26] I find that the comments made by Mr Jones were based on the belief that human races have distinctive characteristics which determine their respective cultures. It was implicit in his comments that people of Chinese heritage should not have the same opportunities as other races solely based on their race, which demonstrates an inherent prejudice.

[27] It is well established that a "valid reason" under section 387(a) of the Act is a reason that is, "sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced."[14]

[28] I find that Mr Jones made comments that were racist, irrespective of whether the comments were intended to offend and that making those racist comments in a site-wide meeting in a multicultural workplace constitutes a valid reason for dismissal.

Was Mr Jones notified of that reason?

[29] It was uncontested that the decision to dismiss Mr Jones had been made prior to Exclusive notifying him of the reason for dismissal.[15]

[30] Accordingly, I find that Mr Jones was not notified of that reason before the decision to terminate was made as required by s. 387(b) of the Act.[16]

Was Mr Jones given an opportunity to respond to the reason related to his conduct?

[31] Proper consideration of s. 387(c) requires a finding as to whether Mr Jones was given a real opportunity to respond to the reason for dismissal.[17]

[32] As a result of Mr Jones not being notified of the reasons for dismissal prior to being dismissed, I find that he was not given an opportunity to respond to the reason.

Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal?

[33] There is no positive obligation on an employer to offer an employee the opportunity to have a support person.[18]

[34] This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. [19]

[35] Mr Jones did not request a support person[20] and accordingly, I find that there was no unreasonable refusal by Exclusive for Mr Jones to have a support person present to assist in the discussions relating to dismissal.

Impact on procedures caused by size of employer's enterprise and absence of dedicated human resources management.

[36] Exclusive self-described themselves as a medium-sized contractor, with Mr Jones' accepting that Exclusive employed more than 40 people in South Australia at the time of the dismissal, in addition to employees located in Western Australia.

[37] It is uncontroversial that Exclusive do not have a dedicated human resources management specialists or expertise in the enterprise. Mr Long, as the General Manager, undertook the investigation and disciplinary process himself.

[38] It is contended by Exclusive that irrespective of these facts, the result would have been the same and Mr Jones would have been dismissed.

[39] While I respect Exclusive's strong stance regarding the consequences for Mr Jones due to the racial nature of the comments made, Mr Jones is entitled to procedural fairness and was not afforded it.

[40] I find that the combination of the size of the business and the lack of human resources expertise likely impacted the procedures, or lack thereof, that were followed. However, this does not relieve Exclusive of their obligations to provide Mr Jones basic procedural fairness.

Any other matters that the FWC considers relevant.

[41] Mr Jones told the Commission that obtaining employment in the industry was about networking, not responding to advertisements, and it is clear with his extensive experience that he is well connected within the industry.

[42] The difficulties that Mr Jones faced in finding alternative employment was attributed by himself to a combination of his age, a lack of work in the industry at the time and the fact that he was seeking employment only for a 5-month period as he intended to retire in December 2025.[21]

[43] Evidence was led by both parties about the winding down of the project that Mr Jones was working on and in considering all of these facts, I do not consider the dismissal to have been harsh, with respect to this factor.

Consideration

[44] As established in *Byrne v Australian Airlines Ltd:*[22]

> *"It may be that the termination is harsh but not 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."*

[45] Having considered and weighed each of the matters specified in section 387 of the Act, I am satisfied that Mr Jones' dismissal was harsh and therefore, unfair, on the basis that he was not afforded procedural fairness.

[46] While there was a valid reason for the dismissal, Mr Jones was not notified of the reason for the dismissal prior to a decision to dismiss him being made and accordingly, he was not notified of the reason or given an opportunity to respond as required by sections 387(b)-(c) of the Act.

[47] Being satisfied that Mr Jones made an application for an order granting a remedy under section 394 of the Fair Work Act, was a person protected from unfair dismissal and was unfairly dismissed within the meaning of section 385, the Commission may order the Applicant's reinstatement, or the payment of compensation to the Applicant.

Remedy

[48] Under section 390(3) of the Act, the Commission must not order the payment of compensation to the Applicant unless the Commission is satisfied that reinstatement of the Applicant is inappropriate, and the Commission considers that an order for payment of compensation is appropriate in all the circumstances of the case.

[49] I accept the parties' submissions that reinstatement is inappropriate in the circumstances, particularly where the project that Mr Jones was working on would have reached completion by this stage.

[50] Based on his intention to retire and submissions that there was no valid reason for the dismissal as well as not being afforded procedural fairness, Mr Jones sought compensation equivalent to 5 months wages.

[51] Exclusive submit that no compensation should be ordered due to the 'seriousness of the misconduct, the negligible future earning loss, and the Applicant's limited prospects or intention of re-entering the workforce.'[23]

[52] I find that is appropriate to make an order for compensation in all of the circumstances, particularly where Mr Jones was not afforded procedural fairness and a proper process in the dismissal being effected.

[53] The amount of compensation to be ordered must have regard to the criteria under section 392(2) of the Act. There was no suggestion that any orders for compensation would have an impact on the viability of Exclusive.

[54] The well-established approach used in the assessment of the quantum of compensation under s.392 of the Act is to apply the 'Sprigg formula' as follows,[24]

> *"1. Estimate the amount the employee would have received or would have been likely to receive if the employment had not been terminated,*
> *2. Deduct monies earned since termination,*
> *3.Deductions for contingencies,*

4. Calculate any impact of taxation,
5. Apply the legislative cap."

[55] Due to Mr Jones' conduct, I find it likely that he would have remained employed by Exclusive for no more than three weeks if procedural fairness was afforded in effecting the dismissal. Since his weekly rate at the time of dismissal was $2,029.72,[25] I find that Mr Jones would have received $6,089.16.

[56] No monies have been earned by Mr Jones since the termination despite him making some attempts to find employment. It is unlikely that Mr Jones will earn any income between the making of the order for compensation and the actual compensation. Accordingly, no adjustments are required.

[57] No adjustment needs to be made for contingencies as it is not relevant in the present case.[26]

[58] Mr Jones contributed to Exclusive's decision to dismiss him, and I consider it appropriate that a reduction of one week is applied.[27]

[59] As the amount is below the compensation cap, no further adjustment is required.

[60] In my view, the application of the Sprigg formula in this case does not result in an amount that is clearly excessive or inadequate. Accordingly, there is no basis for me to reassess the assumptions made in reaching the amount of two weeks' compensation to the Applicant.

[61] Exclusive is ordered to pay Mr Jones an amount of $4,059.44.

COMMISSIONER

Appearances:

P Jones, Applicant on his own behalf.
L Long, on behalf of the Respondent, Exclusive Contracting (WA) Pty Ltd.

Hearing details:

Adelaide
2025

20 November.

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[1] Digital Hearing Book (DHB) at p. 4.

[2] DHB at p. 161.

[3] DHB at p. 264.

[4] Section 23 of the Act.

[5] DHB at pp. 6 and 336.

[6] Audio Recording of Hearing (Part 1) at 42:39 and 43:23; DHB at p. 22.

[7] Audio Recording of Hearing (Part 1) at 55:23; DHB at p. 22.

[8] Audio Recording of Hearing (Part 1) at 1:13:29, 2:21:37 and 2:22:29, DHB at pp. 22, 24.

[9] DHB at p. 264; Audio Recording of Hearing (Part 1) at 2:00:34; 2:25:55; 2:36:36; 2:43:19; 2:44:48.

[10] DHB at p. 15.

[11] Audio Recording of Hearing (Part 1) at 2:23:01; 2:34:18; Audio Recording of Hearing (Part 2) at 9:28.

[12] DHB at p. 22, Audio Recording of Hearing (Part 1) at 2:00:34 and 2:43:19.

[13] *Macquarie Dictionary* (online) 'racism'.

[14] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 at [26]; *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at p. 373].

[15] Audio Recording of Hearing (Part 1) at 1:38:04-1:38:23.

[16] *Bartlett v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services* [2020] FWCFB 6429 at [19]; *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [70]–[73].

[17] *Bartlett v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services* [2020] FWCFB 6429 at [19].

[18] Explanatory Memorandum, Fair Work Bill 2008 [1542].

[19] Ibid.

[20] Audio Recording of Hearing (Part 1) at 59:39-1:00:06.

[21] Audio Recording of Hearing (Part 1) at 1:08:55-1:09:05; 1:10:23- 1:10:49.

[22] (1995) 185 CLR 410 at [128].

[23] DHB at p. 154.

[24] *Sprigg v Paul Licensed Festival Supermarket* R0235 (AIRCFB, Munro J, Duncan DP, Jones C, 24 December 1998) at para. 35, [(1998) 88 IR 21]; *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge* [2013] FWCFB 431 (Acton SDP, Smith DP, Ryan C, 4 February 2013) at [24], citing *Ellawala v Australian Postal Corporation* Print S5109 at [35].

[25] DHB at p. 11.

[26] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001) at para. 39; citing *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 43.

[27] Section 394(3) of the Act.