FAIR WORK AUSTRALIA

Darvell v Australian Postal Corporation

Acton SDP, Ives DP and Smith C

20 May, 1 June 2010

Termination of Employment — Unfair dismissal — Application for leave to appeal and appeal — Whether differential treatment of employees — Whether occupational health and safety concerns justified refusal to follow directions — Appeal dismissed — Fair Work Act 2009 (Cth), ss 394, 604.

The applicant sought leave to appeal Hamilton DP's decision that his dismissal was not harsh, unjust, or unreasonable.

The applicant had refused on "safety grounds" to follow directions to unload is truck, had accepted unlabelled unit loading devices on one occasion and had walked outside designated walkways.

The applicant sought to argue that he was treated more harshly than other employees engaging in similar conduct. He also sought to argue that failing to follow lawful directives where he genuinely believed that he was entitled on occupational health and safety grounds to refuse to unload his truck was not a valid reasons for his dismissal.

Held (refusing permission to appeal): (1) The conduct of the applicant constituted a valid reason for his dismissal.

(2) The Deputy President did not err in his findings that the applicant did not genuinely and reasonably believe that there were occupational health and safety grounds to refuse to unload his truck.

(3) The Deputy President did take into account the allegation that other employees engaging in similar conduct were less harshly treated, and was correct in holding that other factual matters explained that difference in treatment.

Sexton v Pacific National (ACT) Pty Ltd (unreported, AIRC, Lawler VP, Print PR931440, 14 May 2003); *Daly v Bendigo Health Care Group* (unreported, Commonwealth, Australian Industrial Relations Commission, PR973305, Senior Deputy President Kaufman, 13 July 2006), considered.

Cases Cited

Daly v Bendigo Health Care Group (unreported, Commonwealth, Australian Industrial Relations Commission, PR973305, Senior Deputy President Kaufman, 13 July 2006).

Darvell v Australia Post [2009] FWA 1406.

Sexton v Pacific National (ACT) Pty Ltd (unreported, AIRC, Lawler VP, Print PR931440, 14 May 2003).

Application for leave to appeal and appeal

A Weinmann, for the appellant.

C O'Grady, for the respondent.

Cur adv vult

Fair Work Australia

Introduction

1 This matter is an appeal by Mr Wayne Darvell against a decision[1] of Deputy President Hamilton of 2 March 2010 in which his Honour dismissed Mr Darvell's application under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act). In his application Mr Darvell sought a remedy in respect of the termination of his employment by the Australian Postal Corporation (Australia Post). The Deputy President dismissed the application because he concluded the termination of Mr Darvell's employment by Australia Post was not harsh, unjust or unreasonable.

Background

2 Mr Darvell's employment was summarily terminated by Australia Post on 7 July 2009, after almost 20 years service. At the time of the termination of his employment Mr Darvell was a Postal Transport Officer with Australia Post. His duties involved truck driving and associated duties. He was also an Occupational Health and Safety Representative at Australia Post and a Deputy Shop Steward for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia. Mr Darvell's dismissal was associated with his failure to follow directives of Australia Post.

Bases of appeal

3 Mr Darvell submitted that in dismissing his s 394 application his Honour erred in finding:

(a) his refusal to unload his truck on occupational health and safety grounds constituted a valid reason for his dismissal;

(b) his acceptance of unlabelled unit loading devices (ULD's) on one occasion constituted a valid reason for his dismissal; and

(c) his walking outside of designated walkways constituted a valid reason for his dismissal.

4 Mr Darvell, however, does not deny that he engaged in such conduct or that his refusal to unload his truck and his acceptance of unlabelled ULD's was contrary to specific directives from Australia Post.

5 Further, Mr Darvell submitted his Honour erred in failing to find that the less harsh treatment of other Australia Post employees found to have engaged in similar misconduct rendered his dismissal harsh, unjust or unreasonable.

6 Moreover, he submitted his Honour erred in failing to find:

(a) that he genuinely and reasonably believed he was entitled on occupational health and safety grounds to refuse to unload his truck; and

---

1 *Darvell v Australia Post* [2009] FWA 1406.

(b) that as a consequence his refusal to follow a lawful directive was not a valid reason for his dismissal.[2]

Legislative provisions

7 The FW Act sets out when a person is protected from unfair dismissal[3] and what is an unfair dismissal.[4] It is apparent that there was no contest between the parties that Mr Darvell was protected from unfair dismissal. Further, it seems that the contest about whether Mr Darvell was unfairly dismissed centred around whether his dismissal was harsh, unjust or unreasonable.

8 Section 387 of the FW Act provides in this respect that:

> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA 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 FWA considers relevant.

9 We turn then to consider Mr Darvell's grounds of appeal.

Consideration

10 Mr Darvell's first ground of appeal proceeds on the assumption that his Honour found each of Mr Davell's refusal to unload his truck, acceptance of unlabelled ULD's and walking outside of designated walkways constituted a valid reason for his dismissal by Australia Post.

11 It is apparent, however, that his Honour concluded that together, or in combination, such conduct by Mr Darvell constituted a valid reason for the termination of his employment. In concluding in respect of s 387(a) of the FW Act, his Honour said:

> [86] I find that there was a valid reason for the termination of Mr Darvell's employment, namely breach of Australia Post directions by accepting ULD's without weight labels, refusing to unload his vehicle, and walking outside the designated area at the Melbourne Parcel Facility.

We think that conclusion was reasonably open to his Honour.

---

2 Appeal Exhibit A1.

3 *Fair Work Act*, ss 382-384.

4 *Fair Work Act*, ss 385-389.

12 Mr Darvell also maintains that his Honour erred in failing to find he genuinely and reasonably believed he was entitled on occupational health and safety grounds to refuse to unload his truck. We are unable to conclude that his Honour so erred because we, like his Honour,[5] are not persuaded that Mr Darvell genuinely and reasonably believed he had occupational health and safety grounds to refuse to unload his truck.

13 Mr Darvell's actions and the surrounding circumstances are contrary to him having such a belief. The Provisional Improvement Notice (PIN) he issued to Australia Post on 7 June 2009 under the *Occupational Health and Safety Act 1991* (Cth) (the OH and S Act) stated that he believed the OH and S Act or the relevant regulations had been contravened. The contravention was stated in the PIN as "NO CONSULTATION WITH OH&S REP ON CHANGES TO WORK PRACTICES. BULLYING OF DRIVERS TO DO WORK AGAINST THEM CLAIMING UNSAFE. QUOTING SECTION 16 & 21." The reasons for Mr Darvell's belief were stated in the PIN as "LACK OF CONSULTATION WITH OH&S REP NOT ENOUGH SETTING IN OF SAFE WORK PRACTICES." In the PIN, Mr Darvell said the following action should be taken "STOP ALL LOADING AND UNLOADING BY DRIVERS AT ARDEER PARCEL FACILITY TILL DRIVERS REPRESENTATIVES CAN COMMUNICATE AND CONSULT WITH MANAGEMENT."

14 Prior to 1 June 2009, however, when the relevant loading and unloading of trucks by drivers commenced, Mr Darvell was or was able to be involved in consultations on the proposed loading and unloading through an Australia Post and union Joint Consultative Committee, through a "tool box" meeting between Australia Post and the relevant employees and through an Issues Register whereby employees could raise their issues and/or concerns about the proposal. Further, after 1 June 2009 Australia Post provided Mr Darvell with other opportunities to consult with them on the loading and unloading of the trucks, but he declined them. Moreover, Mr Darvell did not issue the PIN until 7 June 2009. This was more than a month after he was made aware by Australia Post of their proposal to have the drivers load and unload their trucks from 1 June 2009 and five days after he was first asked by Australia Post to unload his truck but refused to do so.

15 The fact that Australia Post had engaged in and further offered the very thing complained about in Mr Darvell's PIN, namely consultation on the proposal to have the drivers load and unload their trucks, and the fact that Mr Darvell delayed in issuing the PIN indicate Mr Darvell's belief that he had occupational health and safety grounds to refuse to unload his truck was not genuine and/or reasonable.

16 Finally, we turn to Mr Darvell's ground of appeal that his Honour erred by failing to find the termination of Mr Darvell's employment was harsh, unjust or unreasonable in circumstances where other employees had engaged in the conduct but their employment was not terminated.

17 In elaborating on this ground of appeal, Mr Darvell said that by failing to find that the less harsh treatment of others who refused to unload their trucks, who picked up unlabelled ULD's and/or who walked off designated walkways

5 See, eg, *Darvell v Australia Post* [2009] FWA 1406 at [66]-[69], [97].

rendered Mr Darvell's dismissal harsh, unjust or unfair, his Honour applied the wrong principle, failed to take into account relevant facts and made findings not open on the evidence.

18 Mr Darvell said the wrong principle applied by his Honour is that it was for him to prove that each instance of inconsistent treatment was not relevantly different to his case. Mr Darvell submitted that the onus actually lies with the respondent to establish a valid reason which is "sound, defensible and well founded", and the respondent failed to discharge that burden.

19 The relevant facts not taken into account by his Honour, Mr Darvell said, were that other employees engaged in the conduct but were not dismissed and there was no evidence to the effect that their circumstances were materially different to those of Mr Darvell.

20 Mr Darvell said the finding not open on the evidence is that each of those other employees had materially different circumstances such that no valid comparison could be made with his punishment.

21 The issue of differential treatment of employees in respect of termination of employment was considered by Vice President Lawler in *Sexton v Pacific National (ACT) Pty Ltd*.[6] In *Sexton's* case, his Honour said:

> [33] It is settled that the differential treatment of comparable cases can be a relevant matter under s 170CG(3)(e) to consider in determining whether a termination has been harsh, unjust or unreasonable …
>
> [36] In my opinion the Commission should approach with caution claims of differential treatment in other cases advanced as a basis for supporting a finding that a termination was harsh, unjust or unreasonable within the meaning of s 170CE(1) or in determining whether there has been a "fair go all round" within the meaning of s 170CA(2). In particular, it is important that the Commission be satisfied that cases which are advanced as comparable cases in which there was no termination are in truth properly comparable: the Commission must ensure that it is comparing "apples with apples". There must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper comparison to be made.

22 Section 170CG(3)(e) of the *Workplace Relations Act 1996* (Cth) was relevantly similar to s 387(h) of the FW Act.

23 Similarly, in *Daly v Bendigo Health Care Group*,[7] Senior Deputy President Kaufman said:

> [62] I am troubled by the apparent disparity in the treatment of Mrs Daly and the other nurses concerned. However, on balance I have concluded that this factor does not render the otherwise justified termination of her employment into one which is harsh, unjust or unreasonable. There was no evidence led as to why the other three nurses were treated differently to Mrs Daly. The fact that none of them was sacked does not of itself render the treatment of Mrs Daly unjust. Although differential treatment of employees can render a termination of employment, harsh, unjust or unreasonable, that is not necessarily the case. I agree with Lawler VP's observation in *Sexton* that "there must be sufficient evidence of the circumstances of the allegedly comparable cases to enable a proper

6 *Sexton v Pacific National (ACT) Pty Ltd* (unreported, AIRC, Lawler VP, Print PR931440, 14 May 2003).

7 *Daly v Bendigo Health Care Group* (unreported, AIRC, PR973305, Kaufman SDP, 13 July 2006).

> comparison to be made." There is not, in this case, sufficient evidence to enable a proper comparison to be made. Having regard to Mrs Daly's years of experience, her direct involvement with the patient to a greater extent than that of the other nurses and her refusal to acknowledge that she had acted inappropriately, I am not prepared to find that because the employment of the other nurses involved was not terminated, Mrs Daly's termination of employment was harsh, unjust or unreasonable. (Footnotes omitted.)

24 We respectfully concur with their Honours.

25 We are not persuaded his Honour erred as suggested by Mr Darvell. It is apparent his Honour was both alive to and took into account the issue of how other employees who had engaged in conduct constituting the valid reason for Mr Darvell's dismissal were treated by Australia Post. In his decision he specifically referred to the alleged inconsistency of treatment of employees breaching directions of Australia Post and the evidence in respect of the issue.[8] However, his Honour concluded that:[9]

> [78] [D]ifferent employees have different work histories, respond in different ways when issues of performance are raised with them, the nature of the breach may be arguably different because of different jobs and the context, and other matters. These matters explain what appears on the surface to be an inconsistency of approach to some degree.
>
> [79] … factors such as the poor performance record of Mr Darvell explain any difference in treatment. (Footnotes omitted.)

26 Further, in determining whether Mr Darvell's dismissal was harsh, unjust or unreasonable, his Honour said:[10]

> [96] … There may be on occasion questions raised about the degree to which Australia Post is fully consistent in the application of its policies, but not in this case such as to undermine its right to issue directions and have them complied with. As discussed earlier, if comparisons are to be made between the treatment of various employees they have to take into account the different contexts, which include work history, the responses made by each employee, the nature of the job and other matters.

27 We consider his Honour's approach was consistent with authority.

Conclusion

28 For the reasons given, we are not persuaded his Honour erred in his decision on Mr Darvell's unfair dismissal application. No public interest grounds have been established for granting permission to appeal from Deputy President Hamilton's decision.[11] We, therefore, refuse Mr Darvell permission to appeal and dismiss the appeal.

Permission to appeal refused; appeal dismissed

ALEX LAZAREVICH

---

8 See, eg, *Darvell v Australia Post* [2009] FWA 1406 at [76]-[80].

9 *Darvell v Australia Post* [2009] FWA 1406 at [78]-[79].

10 *Darvell* at [96].

11 *Darvell v Australia Post* [2009] FWA 1406.