DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Amanpreet Kaur
v
The Trustee for Mehtaab Family Trust T/A Paint Splash
(U2021/1817)

COMMISSIONER LEE MELBOURNE, 23 JUNE 2021

Application for an unfair dismissal remedy.

[1] On 4 March 2021, Ms Amanpreet Kaur (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that she had been unfairly dismissed from her employment with The Trustee for Mehtaab Family Trust T/A Paint Splash (Respondent). The Applicant seeks compensation.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[4] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

When has a person been unfairly dismissed?

[5] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed; and

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

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

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

Background

[6] According to the Commission's Case Management System records, on 12 March 2021 the Commission contacted Mr Vikramjit Singh, who is identified as the relevant contact person for the Respondent on the Form F2 – Unfair dismissal application (Form F2). Mr Singh answered the telephone call, and Commission staff explained to him the unfair dismissal process. Mr Singh was also advised that he would receive correspondence from the Commission, including the application, a blank employer's response form (Form F3) for completion, an acknowledgment letter and a notice of listing for conciliation. Mr Singh confirmed his best contact number which was recorded on the Commission's file. The relevant correspondence was sent to Mr Singh on 12 March 2021, and the matter was listed for conciliation before a Commission conciliator on 26 March 2021.

[7] The Respondent was sent a letter on 23 March 2021 indicating that the Commission had not received the Form F3 from The Trustee for Mehtaab Family Trust T/A Paint Splash. The Respondent was also contacted via telephone on 25 March 2021, and Mr Singh indicated that he would try to complete the Form F3 "today or tomorrow morning". Another letter was sent on 25 March 2021, reminding the Respondent to complete the Form F3.

[8] On the morning of the scheduled conciliation, the Respondent sent the following email correspondence to the Commission. The correspondence was sent from one of the emails listed on the Form F2. The Respondent's email also included an alternative email address in the signature block, which was also listed on the Form F2.

"Hi

Good morning. I'm not feeling so well from yesterday that's why I requested to the lady on phone for reschedule today's appointment. I have a doctor appointment later today. Kindly reschedule today's call as i'm not in a healthy manner.

Thanking you

Vikramjeet Singh"

[9] The Commission subsequently contacted Mr Singh via telephone, who confirmed that he would send a medical certificate to the Commission in order to have the matter re-listed. The Applicant's representative was informed, and the conciliation was cancelled. The Respondent was contacted on 29 and 30 March 2021 after he had failed to provide a medical certificate. The Respondent never provided a medical certificate.

[10] On 6 April, the matter was listed for conciliation on 14 April 2021. The Respondent was contacted via telephone on 9 April 2021, however, there was no answer, and a voicemail message was left asking the Respondent to contact the Commission. On 9 April the Respondent was also sent another letter requesting the completed Form F3.

[11] On 14 April, the Respondent indicated during the conciliation that he was only available for a maximum period of 20 minutes before having to attend a function with his family, and that he never anticipated that it would take any longer. The Respondent requested that the matter be re-listed and indicated that he would make himself available for a maximum of 2 hours at that time. The Commission subsequently sent a letter to the Respondent, which confirmed that the conciliation did not proceed because of the unavailability of the Respondent. The Respondent was advised that if it wanted the matter to proceed via a further conciliation, then the Respondent is to email the Commission with its request within two working days. In the event that the Commission did not hear from the Respondent, the matter would be referred directly for arbitration before a Member of the Commission.

[12] The Commission was not contacted by the Respondent. In a letter dated 16 April 2021, parties were informed that the matter would be referred to a Member of the Commission. The matter was subsequently allocated to me on 19 April 2021. On 19 April 2021, my chambers sent an email to parties attaching a notice of listing and directions with information regarding the programming the matter. The email also reminded the Respondent to complete and return the Form F3.

[13] On 22 April 2021, a further email was sent to parties attaching an amended notice of listing and directions. The email also contained a further reminder for the Respondent to complete and return the Form F3. The programming of the matter was set as follows:

- The Conference/Mention was listed at 2:00 pm on Wednesday, 28 April 2021.
- In the event the application did not resolve at or before the Conference/Mention, the application was listed for Arbitration Conference/Hearing at 10:00 am on Wednesday, 2 June 2021.
- The Applicant was required to file their material by 12 May 2021.
- The Respondent was required to file their material by 26 May 2021.

[14] I note that the emails sent by my chambers on 19 and 22 April 2021 indicated that the Commission did not have the Respondent's contact number. This is an error. The Respondent had confirmed their contact number on numerous occasions, and the number was recorded on the file. Furthermore, for the avoidance of doubt, all email correspondence was sent to the two

emails listed on the Form F2. The Respondent had previously sent correspondence from at least one of those emails.

[15] Before the Conference/Mention on 28 April 2021, my chambers contacted the Respondent to no avail. Further attempts were made to contact the Respondent at and after 2:00 pm, however the Respondent did not answer. I note that my chambers contacted the phone number as confirmed by the Respondent, as well as the company number appearing in the Respondent's email signature block and the Form F2.

[16] On 30 April 2021, the Respondent was sent an email which stated as follows:

> "I refer to the above matter which was listed for Conference/Mention before Commissioner Lee on Wednesday, 28 April 2021.
>
> We confirm that the Conference/Mention did not proceed because of the unavailability of the Respondent.
>
> We attempted to contact you several times to no avail. We also left voicemail messages requesting that you call us back.
>
> We have not heard back from you, nor have we received a Form F3 as requested numerous times below.
>
> You must refer to the attached Notice of Listing and Directions for important information regarding the programming of this matter.
>
> The Notice of Listing and Directions attached are definite. An adjournment will only be granted at the discretion of Commissioner Lee and only on substantial grounds.
>
> The Commissioner will not accept material that is filed after the expiry of a timeframe unless an extension has been sought and only if granted by the Commissioner prior to the expiry of that timeframe.
>
> Please note that the matter will proceed as scheduled, and will be determined based on the material before the Commission."

[17] The Respondent was contacted via telephone on 6 and 27 May 2021 to no avail. A voicemail message was left by my chambers reminding the Respondent of the requirement to comply with the directions and requesting a call back.

[18] On 27 May 2021, my chambers emailed the Respondent, indicating that that they had been contacted by telephone and email to no avail. The email contained a further request for the Form F3, and noted the Respondent's non-compliance with the directions as follows:

> "The Employer's submissions were due by no later than close of business Wednesday, 26 May 2021. You have not filed any submissions to date.
>
> You must refer to the attached Notice of Listing and Directions for important information regarding the programming of this matter.

> As previously stressed, the Notice of Listing and Directions attached are definite. An adjournment will only be granted at the discretion of Commissioner Lee and only on substantial grounds.
>
> The Commissioner will not accept material that is filed after the expiry of a timeframe unless an extension has been sought and only if granted by the Commissioner prior to the expiry of that timeframe.
>
> Please note that the matter will proceed as scheduled, and should you not attend, a determination will be made in your absence based on the material before the Commission."

[19] On 1 June 2021, the Digital Court Book was sent to parties, alongside a notice of listing with the link to the hearing being held via Microsoft Teams. Parties were reminded to provide a list of appearances. The Respondent did not provide their appearances.

[20] Before the hearing on 2 June 2021, my chambers attempted to contact the Respondent, once again to no avail. Further attempts to contact the Respondent were made at and after 10:00 am, however the Respondent did not answer.

[21] In the circumstances I determined to proceed with the hearing in the absence of the Respondent as all efforts to contact the Respondent failed to illicit a response. A hearing was conducted on 2 June 2021 by telephone via Microsoft Teams. The Applicant attended and gave evidence on her own behalf. As there has been no response from the Respondent, the factual matters are uncontested.

[22] The uncontested factual background to the matter includes the following:

- The Applicant commenced employment with the Respondent on 24 February 2020.
- The Applicant's evidence is that her position was that of a painter, engaged to paint houses at various locations in Melbourne as advised by the Respondent.
- The Applicant was engaged on a full-time basis for 76 hours per fortnight. Her rate of pay was fixed at $25.53 per hour.

Permission to appear

[23] The Applicant sought to be represented at the Commission by a lawyer. Having considered the submissions of the Applicant's representative, I determined that allowing the Applicant to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter. This was the case having regard to the submissions made by the Applicant connected to the claimed repudiation of the contract of employment by the Respondent, and its purported acceptance by the Applicant.

[24] I therefore decided to exercise my discretion to grant permission for the Applicant to be represented. Accordingly, at the hearing on 2 June 2021, the Applicant was represented by Mr Chris Oldham, of Counsel.

Submissions and Witnesses

[25] The Applicant gave evidence on her own behalf.

Submissions

[26] The Applicant filed submissions in the Commission on 12 and 13 May 2021. The Respondent did not file any submissions in the Commission.

Has the Applicant been dismissed?

[27] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[28] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[29] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[30] In this matter, it is the Applicant's case that she was constructively dismissed as a consequence of the Respondent's repudiation of the employment contract. The evidence of the Applicant as to the conduct of the Respondent includes the following:

> "On 24 February 2020 I commenced working for the Respondent and reported to Mr Singh.
>
> My job title was that of a painter. I was a full-time employee. My base pay rate was fixed at $ 25.53 per hour and I was informed that I would have to work for 76 hours a fortnight.
>
> As part of my work, Mr Singh would from time to time provide me with details and addresses of the properties, sites at which paint jobs were required to be attended to. Pursuant to my duties and as directed by Mr Singh, I would carry out my painting duties.
>
> My primary workplace/worksite varied including suburbs but not limited to Glen Waverly, Blackburn, Point cook, Nunawading, Mickleham, Tarneit Donnybrook, Doreen, Wollert, Mount Waverly and Clayton. Directions would be provided to me by Mr Singh either orally or by text messages or by WhatsApp.
>
> …
>
> For the period 24 February to 13 December 2020, I received payment of my wages for work done by me in the form of direct transfers into my bank account. I also received pay slips for some of my pay periods.

…

I have not received payment of my wages for the period 14 December 2020 up until 17 January 2021.

Sometime in December 2020 I requested Mr Singh on behalf of the Respondent to pay my wages in time and in that regard sent a few messages to Mr Singh asking that he transfers my wages into my bank account for the pay periods worked by me.

By 18 January 2021 I had not received payment of my wages for three pay periods being.

(a) 14/12/2020 to 20/12/2020
(b) 28/12/2020 to 10/01/2021
(c) 11/01/2021 to 17/01/2021

Accordingly, on 18 January 2021, I sent a text message to Mr Singh on behalf of the Respondent requesting that the Respondent pay me my outstanding wages.

…

From 18 January 2021 up until 22 February 2021 the Respondent and Mr Singh refused, failed and neglected to provide me with my work schedule as had been previously done, despite I, being ready and able to attend to my employments with the Respondent. I had kept myself available for the Respondents work as part of my employment.

As the Respondent did not respond to me. I contacted my lawyer and through his office wrote to the Respondent inter alia seeking that the Respondent provide me my pay slips which had not been provided to me as set out above and payment for the outstanding wages for the period I had worked. In that letter my lawyer also put the Respondent on notice to the effect that if the Respondent did not provide me with job locations and schedules by l March 2020, I would treat the Respondents nonresponse and its failure to provide me working schedules as a repudiation of my employment contract with the Respondent and in which case I would have reason to believe that I was dismissed from my employment with the Respondent with effect from close of business 1 March 2021.

…

As my lawyer had not received any response from the Respondent, by 1 March 2021, on 4 March 2021, my lawyer wrote to the Respondent, setting out therein that I believed that I was dismissed from my employment with the Respondent as a painter with effect from close and business 1 April 202 l."[1]

(per original)

[1] DCB at page 33-34.

[31] The test for repudiation by the employer is whether the conduct of the employer, when judged objectively, showed an intention to no longer be bound by a contract.[2] The employer's actual or subjective intention is not relevant.[3]

[32] A repudiation of the contract does not bring the contract to an automatic end but gives the affected party the right to terminate the contract.[4] If the affected party accepts the repudiation the contract will end.[5]

[33] Where an employer has repudiated the contract, and an employee accepts the repudiation and exercises their right to terminate the contract, this will amount to a termination at the employer's initiative.

[34] Viewed objectively, the conduct of the Respondent in, firstly, ceasing to pay the Applicant at all for work she had performed for the Respondent from 14 December 2020 until 17 January 2021, and secondly, failing to provide her with a work schedule at all after 18 January 2021 without any explanation or further contact with the Applicant, is conduct which viewed objectively is repudiatory conduct.

[35] In the circumstances, the Applicant was entitled to put the Respondent on notice that if there was a continued failure to provide work and pay that she would treat that failure as repudiation. As there was no contact from the Respondent, the Applicant was able to and ultimately did exercise her right to terminate the contract of employment on 1 March 2021. In the circumstances, the employment relationship came to an end on 1 March 2021 and the Applicant's termination of employment was at the employer's initiative.

[36] I therefore find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent. I am therefore satisfied that the Applicant has been dismissed within the meaning of s.386 of the FW Act.

Initial matters

[37] Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

Was the application made within the period required?

[38] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

---

[2] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038, [13].
[3] Ibid.
[4] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34, [81].
[5] Ibid, see also *Dover-Ray v Real Insurance Pty Ltd* [2010] FWAFB 2670, [23].

[39] I have determined that the Applicant was dismissed from her employment on 1 March 2021 and made the application on 4 March 2021. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[40] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[41] It was not in dispute and I find that the Respondent is a small business employer, having fewer than 15 employees at the relevant time.

[42] It was not in dispute and I find that the Applicant was an employee, who commenced her employment with the Respondent on 24 February 2020 and was dismissed on 1 March 2021, a period in excess of 12 months.

[43] It was not in dispute and I find that the Applicant was an employee. I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Applicant's annual rate of earnings

[44] It was not in dispute and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings (being $50,447.28) was less than the high income threshold, which, for a dismissal taking effect on or after 1 July 2020, is $153,600.

[45] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[46] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code (the Code) if:

> (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
>
> (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[47] As mentioned above, I find that the Respondent was a small business employer within the meaning of s.23 of the FW Act at the relevant time, having fewer than 15 employees (including casual employees employed on a regular and systematic basis).

[48] It is therefore necessary to consider whether the Respondent complied with the Code in relation to the dismissal.

[49] The Code provides that it is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

[50] In this matter, there is no evidence that the Respondent believed on reasonable grounds that the Applicant engaged in any misconduct or that there was any conduct that was sufficiently serious to justify immediate dismissal.

[51] The Code provides for dismissal other than for serious misconduct:

> "In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.
>
> The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations."

[52] There is no evidence that the Applicant was given any warnings prior to the termination of her employment, nor was she given a reason her employment was at risk. There was clearly no opportunity to respond to any warnings as none were given.

[53] It is apparent on the evidence that the Respondent did not comply with the Code.

Was the dismissal a case of genuine redundancy?

[54] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

(a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[55] There was no evidence that the dismissal was a case of genuine redundancy. I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise. I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[56] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[57] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[58] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[6] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[59] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[7] and should not be "capricious, fanciful, spiteful or prejudiced."[8] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[9]

[60] There is no evidence of a valid reason for the dismissal related to the Applicant's capacity or conduct. In all the circumstances, I find that there was no valid reason for the dismissal. Consideration of this factor weighs towards a finding the dismissal is unfair.

---

[6] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674, [69].
[7] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
[8] Ibid.
[9] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

Was the Applicant notified of the valid reason?

[61] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[10]

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[62] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[11]

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[63] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. As there is no evidence that there were any discussions related to the dismissal, this factor is not relevant to the consideration.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[64] As there is no evidence that the dismissal related to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal, and to what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[65] In the circumstances of this matter, I will consider these two factors together. The Respondent is a small business. However, the Respondent made no submissions that the size of its enterprise was likely to impact on the procedures followed in effecting the dismissal. Nevertheless, the fact that the Respondent is a small business may have had an impact on the procedures followed in effecting the dismissal. However, the size of the Respondent's enterprise did not mean that it was open to the Respondent to apply procedures that were devoid of fairness. The Respondent has simply ceased communication with the Applicant leading to the termination of employment. The dismissal of the Applicant was, on the evidence, devoid of any fairness and this is a factor I will take into account under s.387(h).

[66] Having regard to the matters above, I find that the size of the Respondent's enterprise was not likely to impact on the procedures followed in effecting the dismissal. This is a neutral consideration.

What other matters are relevant?

[67] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

---

[10] *Chubb Security Australia Pty Ltd v Thomas* Print S2679, [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].
[11] Ibid.

[68] The Applicant submitted that it was accepted that the Applicant's employment was a short period of employment being just over 12 months. However, the Applicant intended to continue working with the Respondent and that the conduct of the Respondent, in ceasing all communications for no particular reason, is an extreme way to deal with an employee and it is unfair and harsh. It was submitted that the dismissal has been completely mismanaged by the Respondent.[12]

[69] The employees work performance or history is a factor that can be taken into account.[13] In this matter, the Applicant was employed for a short period of time. This does not weigh in favour of a finding of unfairness. However, there is no evidence of any issues with the Applicant's work performance. However, given the work performance was over such a short time period, this is not a significant factor and does not weigh in favour of a finding the dismissal was unfair.

[70] Procedural fairness is one of the factors that the Commission will take into consideration when deciding if a dismissal is unfair. Procedural fairness requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it.[14] Ordinarily, procedural fairness would require that an allegation be put to a person and they be given an opportunity to answer it before a decision was made.[15]

[71] In this matter, the conduct of the Respondent in simply ceasing all communications with the Applicant, ceasing supplying her with a work roster and ceasing payment of wages was completely devoid of procedural fairness. The appalling manner in which the Respondent brought the employment relationship to an end is a factor weighing in favour of a finding that the dismissal is unreasonable.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[72] I have made findings in relation to each matter specified in s.387 as relevant. In respect to s.387(a), I am satisfied that there is no valid reason for dismissal. This weighs in favour of a finding of the dismissal was unfair. The other factors (ss.387(b) – 387(g)) are either not relevant or neutral considerations. In respect to s.387(h), the complete lack of procedural fairness in effecting the dismissal weighs towards a finding the dismissal was unfair. There are no factors weighing towards a finding the dismissal was not unfair.

[73] I must consider and give due weight to each factor as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[16] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of the Applicant was unjust and unreasonable. It was unjust as there was no valid reason. Further, the failure to provide any procedural fairness to the Applicant leads me to conclude the termination was unreasonable.

---

[12] Transcript at PN90.
[13] *Streeter v Telstra Corporation Limited* [2008] AIRCFB 15, [25]; *Cunningham v Australian Bureau of Statistics* PR963720; *Gasz v Mobil Refinery Australia Pty Ltd* PR960826, [17].
[14] *Minister for Immigration & Multicultural Affairs v Bhardwaj* [2002] HCA 11, [40].
[15] *Kioa v West* [1985] HCA 81, [22].
[16] *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, [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

Conclusion

[74] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[75] Being satisfied that the Applicant:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[76] Under s.390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[77] The Applicant submitted that she did not seek reinstatement because she had taken steps to find further employment since the dismissal and has successfully secured further work as a painter. At the hearing, the Applicant gave evidence that she had obtained work as a painter, at first as a casual and then ultimately as a full-time employee with another employer.[17] However, subsequent to the hearing, and consistent with further directions issued by me at the hearing, the Applicant submitted a statutory declaration attesting to her earnings since her dismissal. In that statutory declaration, the Applicant's evidence was that she was in fact engaged as a contractor with another company, rather than an as an employee. The Applicant also advised that she had continued weekend work as a Kitchen Attendant with a separate employer.

[78] Having regard to the matters referred to above, in particular that the Applicant has secured further work and does not seek reinstatement, I consider that an order for reinstatement is inappropriate. I will now consider whether a payment for compensation is appropriate in all the circumstances.

[79] Before I commence the consideration on compensation, I note that the Applicant's legal representative failed to provide any submissions or evidence as to the further remuneration earned by the Applicant despite that being an express requirement of the directions. The evidence as to further remuneration earned by the Applicant only emerged after questioning of the Applicant by me during the hearing. In fact, submissions on

[17] Transcript at PN47 - PN49.

compensation made by the Applicant's representative prior to the hearing was to make an order for "…compensation is [sic] an amount the Commission thinks fit".[18] At the hearing when I asked the representative for submissions on compensation, the response was to the effect that compensation was justified because the manner in which the Applicant was treated was unacceptable.[19]

Compensation

Is an order for payment of compensation appropriate in all the circumstances of the case?

[80] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[20]

[81] The Applicant's position as referred to above is that the repudiation has occurred in circumstances that are thoroughly unacceptable, and the compensation is justified.[21] There are no submissions from the Respondent.

[82] In all of the circumstances, I consider that an order for payment of compensation is appropriate because the Applicant should be compensated for losses reasonably attributed to the unfair dismissal.

Compensation – what must be taken into account in determining an amount?

[83] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

[18] DCB at page 30.
[19] Transcript at PN88.
[20] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].
[21] Transcript at PN88.

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the Commission considers relevant.

[84] My consideration of all the circumstances of the case is set out below.

[85] As noted by the Full Bench, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*).[22] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.[23],[24]

Section 392(2)(a) – Effect of the order on the viability of the Respondent's enterprise

[86] There are no submissions or evidence that an order for compensation would have an effect on the viability of the Respondent's enterprise. This factor is not a relevant consideration.

Section 392(2)(b) – Length of the Applicant's service with the employer

[87] The Applicant was employed as a full-time employee for just over one year. This is a relatively brief period of employment. I accept that a short period of service may warrant reducing the amount of compensation ordered. However, I am not satisfied that it is appropriate to do so in this case.

Section 392(c) – Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[88] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[25]

[89] During the hearing, I gave the Applicant an opportunity to provide evidence regarding the remuneration that she would have received, or would have been likely to receive, if she had not been dismissed. The Applicant stated that she wanted to continue working for the Respondent as she wanted to make a career in that field.[26] The fact that she has secured work as a painter for another company is demonstrative that she wants to continue working in that line of work. There is no evidence from the Respondent as to why the employment

[22] (1998) 88 IR 21.
[23] [2013] FWCFB 431.
[24] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].
[25] *He v Lewin* [2004] FCAFC 161, [58].
[26] Transcript at PN44.

relationship would not have continued, but for the dismissal, for a considerable period of time.

[90] In the circumstances, I am satisfied that the Applicant would have continued working for the Respondent for at least a further 12 months after the dismissal. At the time she was dismissed, the Applicant was engaged on a full-time basis, working 76 hours per fortnight. The Applicant received an hourly rate of $25.53 per hour. Therefore, the Applicant would have received a total income of $50,447.28 in that 12-month period.

[91] In the 12-month period after the dismissal, the Applicant would have received a total income of $50,447.28 less tax, plus superannuation of 9.5%. I have determined that this is the income the Applicant would have received or would have been likely to receive from the Respondent, if she had not been dismissed. I note that it is also relevant that the Applicant was earning, at the time of the dismissal and up until the present time, remuneration from her weekend work with Kebab Thyme Group Pty Ltd (Kebab Thyme). However, I have dealt with the Kebab Thyme remuneration for the purposes of calculating compensation under s.392(g) and have not included that remuneration in the calculation under this section.

Section 392(d) – Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[92] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[27] What is reasonable depends on the circumstances of the case.[28]

[93] The Applicant has clearly taken steps to mitigate her loss as she has quickly secured further work, on a contractual basis with another company, being Soaring Horse Painting Pty Ltd (Soaring Horse Painting). She has also maintained her weekend employment as a Kitchen Attendant with Kebab Thyme.

[94] I am satisfied, that the evidence of the efforts of the Applicant to mitigate her loss have been reasonable steps. I am satisfied that the Applicant made reasonable efforts to mitigate her loss. It is not appropriate to make a deduction from the compensation amount.

Sections 392(e) and (f) – the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation; and the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation

[95] It is only the remuneration earned by the employee since their dismissal until the end of their anticipated period of employment that is relevant. The Applicant has provided two statutory declarations and related evidence setting out the amounts that she has actually earned since the dismissal. Firstly, the remuneration from the painting work the Applicant has performed as a contractor for Soaring Horse Painting includes $3,895.50 for the period 1 March to 30 March 2021 and $3,789.50 for the period from 31 March to 30 April 2021 (the March and April periods). The total for the March and April periods is $7,685.

[27] *Biviano v Suji Kim Collection* PR915963, [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053, [45].
[28] *Biviano v Suji Kim Collection* PR915963, [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[96] The Applicant intends to but has not yet issued an invoice for $3,445 for the period 1 May to 31 May 2021 (the May period invoice). I will include that amount of the May period invoice as income likely to be earned.

[97] In addition to the remuneration earned at Soaring Horse Painting, the Applicant has actually earned $5,977.35 from her work as a Kitchen Attendant with Kebab Thyme since the time of dismissal. The remuneration earned from Kebab Thyme is dealt with under s.392(g) and not included in the calculations under this section. Therefore, the total of the amounts actually earned since the date of termination from Soaring Horse Painting is $7,685.

[98] As to the amounts likely to be earned in the anticipated period of employment, this will include the May period invoice amount of $3,445 which has not yet been received. As to the likelihood of the Applicant continuing to earn remuneration from Soaring Horse Painting at a similar rate to that of her earnings since 1 March, the evidence is mixed. It is apparent that for the period from 1 March until end of May 2021, the Applicant has invoiced for an average monthly amount of $3,710. Ordinarily, there would be no reason not to find it likely that this rate of earnings would continue for the further 9 months of the anticipated period of employment.

[99] However, the Applicant has provided evidence that:

> "Furthermore, I state that I have now been provided with a letter dated 2 June 2021 from Soaring Horse Painting which confirms that due to the current situation of the lockdown, my working hours for the month of June will be reduced and that as the company does not have many confirmed bookings after the month of June 2021, I may not be able to get as much work as I am getting now from the company for the month of June 2021 and that the company does not commit to give me any further work after the month of June 2021."

[100] The Applicant provided a letter from Mr Singh of Soaring Horse Painting which is in the following terms:

> "This letter is to confirm that Amanpreet Kaur … is currently working for Soaring horse painting as a painter on abN (sic). She has worked almost (143+147+130= 420 hours) from the period of March,2021 to until now. When she started to work with, we had many confirmed bookings for these periods. Due to current situation of lockdown, her working hours may also get affected in the month of June. As we don't have much confirmed bookings after the mid of june, she may or may not able to get as much as work as she is getting now. As per current bookings available, we don't commit to give her any work after the month of June, 2021."
>
> (per original)

[101] Taking into account this evidence, it is likely that the Applicant's remuneration from Soaring Horse Painting will be less than the average rate of earnings in the first three months of engagement, at least while Melbourne continues to be impacted by COVID-19 restrictions. Further, Soaring Horse Painting has not committed to provide any work to the Applicant after the month of June. While current indications are that COVID-19 restrictions will ease somewhat in Melbourne, the history of the pandemic has demonstrated that the future effect

of the pandemic remains uncertain. Taking into account all of the circumstances, in particular the indications of the uncertainty of continued work for the Applicant at Soaring Horse Painting, I am satisfied that the Applicant is likely over the remaining 9 months of the anticipated period of employment to earn 50% of her average monthly earnings from the first three months of her engagement with Soaring Horse Painting.[29] This amount is to be added to the amount yet to be invoiced for the May period of $3,445. This yields a total amount of remuneration the Applicant would have received or was likely to receive in the anticipated period of employment from Soaring Horse Painting of $20,140.

[102] As to the anticipated earnings of the Applicant from Kebab Thyme, the payslips attached to the Applicant's second statutory declaration show the Applicant has consistently been earning $430.80 per week from that employment since March with only one exception. The Applicant has been regularly employed with Kebab Thyme for approximately two years. There is no indication this will not continue for the anticipated period of employment. Therefore, the anticipated earnings from Kebab Thyme for the anticipated period of employment will be $1,6801.20.[30] The anticipated earnings from Kebab Thyme is dealt with under s.392(g) and not included in the calculations under this section.

[103] In summary, in considering the factors under ss.392(e) and 392(f) I am satisfied that:

- The Applicant has actually earned $7,685 from Soaring Horse Painting since the dismissal. I am also satisfied the Applicant is likely to earn a further $20,140 in the anticipated period of employment. This yields a total amount of actual and likely earnings for the anticipated period of employment from Soaring Horse Painting of $27,825.

- The amount to be deducted totals $27,825.

[104] This amount is to be deducted from the amount of earnings I have determined that Applicant was likely to receive if she had not been dismissed of $50,447.28. Deducting $27,825 from the amount of $50,447.28 yields an amount of $22,622.28.

Sprigg Factors

[105] The first and second *Sprigg* factors are addressed above under the headings for ss.392(2)(c) and 392(2)(e) respectively.

[106] The third step in *Sprigg* concerns whether any allowance should be made for contingencies. Contingencies only apply to the anticipated period of employment.[31] In this case, the anticipated period of employment is 12 months from 1 March 2021. Therefore approximately 8 months of the anticipated period of employment is not actually known. This is a relatively short period and I consider that a small deduction for contingencies is appropriate to the amount of 5%. A deduction of 5% from $22,622.28 leaves an amount of $21,491.17.

[107] The fourth step concerns taxation. While the Commission is obliged to consider the impact of taxation in determining compensation, there is no requirement that the Commission

[29] This is an amount of $16,695 ($3,710 multiplied by 9, divided by 2).
[30] 9 months (or 39 weeks) multiplied by $430.80 = $1,6801.20.
[31] *Enhance Systems Pty Ltd v Cox* PR910779, [39] citing *Ellawala v Australian Postal Corporation* Print S5109, [43].

deduct taxation from the total compensation ordered.[32] I have determined a deduction for taxation is not appropriate in the circumstances.

[108] The fifth step concerns application of the statutory compensation cap, which is addressed below.

Sections 392(g) – Any other matter that the Commission considers relevant.

[109] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[33]

[110] As referred to earlier, the Applicant was employed at the time of the dismissal from the Respondent as a Kitchen Attendant with Kebab Thyme. That employment has not been impacted, in the circumstances of this case, by the dismissal of the Applicant by the Respondent. Therefore, for the purposes of determining the compensation amount, the actual earnings and likely earnings from Kebab Thyme for the anticipated period of employment will be the same as the remuneration the Applicant would have received or would be likely to receive from Kebab Thyme were it not for the dismissal. Therefore, if I was to deal with the Kebab Thyme remuneration in the alternative way of including the amounts referred to above in the consideration under ss.392(c), 392(e) and 392(f), this would not affect the final calculation as the amounts would in effect, cancel each other out. Nor do I consider there is any other reason to reduce the amount of compensation taking into account the remuneration from Kebab Thyme. I therefore do not think it is appropriate to reduce the amount of compensation to take into account the remuneration earned by the Applicant from Kebab Thyme.

[111] I also consider the amount of $21,491.17 is an appropriate amount of compensation in all the circumstances of his matter. This leaves an amount of $21,491.17 less taxation as required by law plus superannuation of 9.5%.

Compensation – is the amount to be reduced on account of misconduct?

[112] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by s.392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct. In this matter, there is no evidence of misconduct. In the circumstances it is not appropriate to deduct an amount for misconduct.

Conclusion

[113] This leaves an amount of $21,491.17 gross, less tax as required by law, plus 9.5% superannuation. This accords a fair go all round to both the Respondent and the Applicant.

[114] The remuneration the Applicant was entitled to receive in the 6 months prior to dismissal was $25,223.64. The amount of $21,491.17 is less than either 6 months remuneration or half the amount of the high income threshold, which is currently an annual rate of earnings of $153,600, and no deduction is required to account for that.

[32] *Ellawala v Australian Postal Corporation*, Print S5109, [72].
[33] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].

[115] In light of the above, an order will be issued concurrently with this decision that the Respondent pay $21,491.17 gross less taxation as required by law, plus 9.5% superannuation to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

COMMISSIONER

Appearances:

C. Oldham, of Counsel, for the Applicant

Hearing details:

2021.
Melbourne (by telephone via Microsoft Teams):
June 2.

Printed by authority of the Commonwealth Government Printer

<PR730607>