



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Jaymi-Lee Morris

v

Alphaeus Hair Salon

(U2018/51)

COMMISSIONER RIORDAN

SYDNEY, 18 MAY 2018

Application for an unfair dismissal remedy.

[1] Ms Jaymi-Lee Morris (the Applicant) was employed by Alphaeus Hair Salon (the Respondent) between 2 May 2016 and 6 December 2017. The Respondent is owned by Mr Chris Tizzoni.

[2] The Respondent has failed to submit a Form F3 Employer Response at any stage during the Fair Work Commission (FWC) process.

[3] The Respondent failed to participate in the conference convened by a Fair Work Commission Conciliator on 5 February 2018.

[4] The Respondent did appear at the telephone Directions Conference on 16 February 2018 convened by the Commission, as presently constituted, and participated in a without prejudice conciliation.

[5] The Respondent failed to submit any submissions or witness statements in accordance with the Directions issued by the Commission on 19 February 2018.

[6] The Respondent failed to attend the hearing on 16 April 2018. The hearing proceeded in the Respondent's absence.

[7] Following the hearing, my Associate sent the following correspondence to the Respondent:

“Dear Mr Tizzoni,

I refer to the Notice of Listing and Directions that were issued on 19 February 2018 to notify that the above mentioned matter was set down for Arbitration Hearing before Commissioner Riordan on 16 April 2018 at 9.30am.

I confirm that you failed to comply with the Directions issued and further failed to attend the listed Hearing.

The arbitration hearing proceeded on 16 April 2018 with the Applicant in attendance.

Please be advised that you have seven days to provide a satisfactory explanation as to why you failed to participate in the hearing. If you fail to provide any explanation the Commissioner will determine the matter based on the evidence currently before him.”

[8] The Respondent did not reply to this correspondence.

Background

[9] The Applicant was employed by the Respondent as a hairdresser in its Nowra Salon.

[10] The Applicant and Mr Tizzoni appeared to have a good working relationship. The pair would regularly converse outside of normal business hours via facebook.

[11] The Respondent promised the Applicant that she would be the manager of a new salon that he was planning to open in Bombaderry.

[12] On 6 December 2017, the following text message exchange between the parties occurred on facebook messenger: (note I have abbreviated the inappropriate language that was used by both parties.)

“Chris Tizzoni

Hey do I have a 9am app tomorrow

...

Still awake but won't answer, have you looked at tomorrow or not. Remember I have only offered I, have yet given ur place. And now I have 2 more I will not need you. U need to make a choice you are either with me or against me. I will not take silence any more! And I do not need to. I will sever you as I have done to them! If you push me to it! As I have said I have had enough! You are not in control I am girl. And remember I just fixed your detrimental situation with the client you destroyed he hair! I think you forget my position.

Jaymi-Lee Morris

Sorry my phone died n I was fixing Christmas lights.

I did say yes but it must have sent

What the f***!!

Chris Tizzoni

I have sat back watched silently! It is up to you

Jaymi-Lee Morris

What are you in about!?

Missed call December 6th, 9:59pm

Can you please answer your phone

Chris Tizzoni

You have had a voice for to long, now you will here mine! Cut them off or you will not have a job with me!

Jaymi-Lee Morris

Cut who off?

Chris Tizzoni

RHIANNON AND NIK

Jaymi-Lee Morris

I hardly talk to them i told you yesterday. I haven't hung out with them, i try not to talk to you about them, I can't see what the problem is

Chris Tizzoni

And tell Lee if she ever questions me again on my venture it will be the last we ever speak!

I have had enough

Jaymi-Lee Morris

What are you talking about!?

Answer your phone please

Chris Tizzoni

Think about it

Jaymi-Lee Morris

Call me now

Leanne says she doesn't know what you're on about!?

Chris Tizzoni

No I was shown a vision of you leaving me! And she questioned the day of Bondi, I am sick of this shit. As I said you r either with me or against. And I will not be silenced any more!

The keys Jaymi

Jaymi-Lee Morris

Chris I was not going to leave you

Chris Tizzoni

To the new salon

Jaymi-Lee Morris

And I'm not?!

Chris Tizzoni

You all keep asking

I have signed it it will happen geez

Jaymi-Lee Morris

Yeah cause I wanna go have a look so I can get the ppl to start painting it
Yeah I know, I'm trying to be organised

Chris Tizzoni

Then stop seconf guessing me I can see and feel it f***
You r going to be in my will

Jaymi-Lee Morris

I am not second guessing you. Listen to me for f*** sake. I AM TRYING TO BE ORGANISED

Chris Tizzoni

I need to know I can trust you

Jaymi-Lee Morris

Yeah and that's great, I appreciate it. Awesome! So y r u having a dig at me. That's the 2nd time now you've said you'd just get rid of me for someone else. I f***ing hate that! And I will be speaking to u about this tomorrow because it makes me furious!

YOU CAN TRUST ME

I have done everything I can for u and the salon. This conversation is a f***ing joke.

Chris Tizzoni

Is it, so you and Lee have contributed nothing to this fear! Wake up, yes u can speak to me but be wise as my patience is very thin!

Jaymi-Lee Morris

Fear? I'm not scared of anything Chrs.
Leanne has nothing to do with any of the salon shit and she doesn't even know what your on about.

Chris Tizzoni

My fear Jaymi not yours

Jaymi-Lee Morris

What the hell are u scared of?
There's nothing to be afraid of.
No one is out to get u. Just go day by day and stop pushing me away

Chris Tizzoni

NOTHING I am just over all of it

Jaymi-Lee Morris

Just relax

Chris Tizzoni

I'm not pushing any one away, I had to win you back remember that! That's what you pushed, I just want to know you r with me!

Jaymi-Lee Morris

Well obviously I'm with you otherwise I would have left when I got back from Hawaii... but I didn't. But I still don't appreciate you saying you'll jut get rid of me. That shit is not on! I like my job, and I don't want it to go to shit just because u can't control what comes out of your mouth. I'm sorry but that, is so rude to say. Makes me feel like a worthless piece of shit. Which I'm not.

Chris Tizzoni

No you are not, and I have never said that about you! But you try to have control over me! Because you think you know better! But I KNOW BEST. I HAVE BEEN AROUND LONGER AND HAVE ACHIEVED MORE! YOU WILL RESPECT ME! I am moving you to a position that no one else can! I will pay you more than any one else can! All I am saying is, for me, such it has taken you weeks of re assuring you! How much time must I spend on you! Jessie will not be fired as I am standing for her! All these things make me wonder if I should keep you! Where is your heart my girl! Rid that attitude you have. As I will always be fine but you how ever are in question.

Jaymi-Lee Morris

I'm not gonna come in tomorrow I'm stressed out

Chris Tizzoni

Wat eves your down fall

Good luck in your new job if you can find one

Which you won't given my presence

Xo

I will cut you from my fold

Good luck girl as u will need it

Haha remember central caost no one will uire you as you r!

Mwah!

Keep fighting as you will meet ur end

Jaymi-Lee Morris

I quit. I don't need to put up with your shit. I don't need your luck.

I can stand on my own two feet thank you very much. I will come get my stuff tomorrow

Chris Tizzoni

You can get it wen I say so

Good bye loser

Jaymi-Lee Morris

No worries

Chris Tizzoni

And thank you for your carving pen
Cause it eliminates all your abilities
And tell Lee she is nothing but an ugly hard looking loser! And every one thinks you
are descusting! You two will and shall be shunned in this town xo

Jaymi-Lee Morris

Good bye Chris

Chris Tizzoni

After I'm finished with u
Good bye loser
I thin another has abandoned their employment
So it shall be
Oh and don't come for me as I will break you
Jaymi Morris
Literally
As I have done to other before
Not even you Nick could stand it haha
Xo
Everything will fold for you and I will stand and watch
You r dead to me! Nothing more! You will suffer as they will! And Lee there is
nothing you can do about it! My brother will be here soon and he out ranks you as a
detective! I will have justice and you will receive my wrath! U pieces of shit! I will
make you suffer!
And there will be know where in town you shall enjoy as my family owns it! You will
hang your heads as you will be shunned. My present to you.
Xo
Come after me weight lifter! I will break you! Your bones I'm talking!
Depart from me as I will destroy u!
Everything I have offered will be taken away from you and you will join the team that
have been destroyed!
You are nothing and will be nothing!
Have fun finding a job because u won't get one!
I bought mine wat can you do with urs
Loose r I still to fight for you idiot
Arrgg
You f***ed up
And I have to fight for u loose r
My god
Arrggh
U r nothing!! I can't wait for ur arrival
I shall destroy you! And you will be shammed!
Xo
Haha
I will win dumb c**t
Join ur siblings as I shall prevail
U will be nothing haha
Cry as you will cray forever
Take ur shit u ugly piece of crap because that is all that you r

And Lee will be nothing else the horrid piece of crap
Mwah u r nothing and I will make u nothing you piece of shit
Welcome ur new status”¹
(my emphasis)

Relevant Legislation

[13] The relevant provisions of the *Fair Work Act, 2009* (the Act), in relation to this matter are:

381 Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

(b) to establish procedures for dealing with unfair dismissal that:

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

(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.

385 What is an unfair dismissal

A person has been unfairly dismissed if FWC 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.

386 Meaning of dismissed

(1) A person has been dismissed if:

- (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

387 Criteria for considering harshness etc.

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 FWC considers relevant.

Consideration

[14] On the basis that the Respondent has failed to participate in these proceedings, the evidence of the Applicant stands unchallenged.

[15] In determining whether the Applicant's termination was harsh, unjust or unreasonable, I am obligated to take into account the issues identified in section 387 of the Act.

Section 387(a) valid reason

[16] In *Selvachandran v Peterson Plastics Pty Ltd*² it was held:

“In its context in s.170DE(1), the adjective “valid” should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must ‘be applied in a practical, common sense way to ensure that the employer and employee are treated fairly.’”

[17] There is no evidence of a valid reason in this circumstance. From the text messages that were submitted, the Respondent appears to have terminated the Applicant as a result of some type of “conspiracy theory” in relation to the Applicant's alleged discussions with current and former colleagues. There is no evidence of any inappropriate behaviour on behalf of the Applicant. I have taken this into account.

[18] The Applicant was happy in her job and very keen to manage the new salon at Bombaderry. The type of behaviour displayed by the Applicant does not fit within the parameters of an employee trying to undermine their employer. I have taken this into account.

[19] Based on the evidence before the Commission, I find that the Respondent did not have a valid reason to terminate the Applicant.

Section 387(b) Notified of reason

[20] I have taken into account that the “conversation” between the Applicant and the Respondent took place over a social media platform late at night. I am unaware of the sobriety or capacity of either individual during this recourse. I find that the Respondent did not provide the Applicant with a reason for her termination.

Section 387(c) Opportunity to Respond

[21] The Applicant was not provided with an opportunity to respond to her termination. As previously stated, this discourse occurred over a social media platform and appears to have escalated from a simple enquiry to an unfortunate conclusion. I have taken this into account.

Section 387(d) Refusal by employer to have a support person

[22] The conversation was not a disciplinary meeting but what appears to be a regular chat on facebook which spiralled out of control. I have taken this into account.

Section 387(e) unsatisfactory performance

[23] The Applicant's termination was not due to her unsatisfactory performance.

Section 387(f) Size of the Employer and its effect on the procedures that were followed

[24] I have taken into account that the Respondent is likely not to have in place set disciplinary procedures.

Section 387(g) Lack of Human Resource Management

[25] I have taken into account that the Respondent does not appear to have any dedicated human resources personnel in its employment.

Section 387(h) any other matter

[26] I have taken into account that the Applicant sent the message saying "I quit". I note that this exchange occurred after the Respondent told the Applicant "Good luck in your new job if you can find one. Which you won't given my presence."

Determination

[27] Having found that the Respondent did not have a valid reason to terminate the Applicant and having taken into account all of the other provisions of s387, I find that the Applicant's dismissal was harsh and unfair.

Remedy

[28] I now turn to consider the issue of the appropriate remedy for the Applicant.

[29] The relevant sections of the Act in relation to an appropriate remedy for a successful unfair dismissal application are:

"Section 390

When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(a) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Section 391

Remedy--reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

- (b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

- (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
- (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

Section 392

Remedy-compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

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

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

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period--the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

[30] I have taken into account that the Applicant is not seeking reinstatement but compensation for her unfair dismissal.

[31] I have taken into account that the Applicant has mitigated her loss by gaining new employment as a hairdresser, commencing in this new role on 4 January 2018.

[32] I have taken into account that the Applicant was unfairly summarily dismissed and was not paid any of her statutory entitlements.

[33] I have taken into account and considered all of the provisions of section 392 of the Act.

Determination

[34] I find that the Applicant's employment would have continued with the Respondent for the immediate future. The Applicant was keen to take on the increased responsibility of managing the new salon and the Respondent appears to have committed to her to take up this new role. I have decided that the Applicant is entitled to be paid for the time that she was unemployed, ie a total of 4 weeks' pay. The Applicant is also entitled to be paid her statutory superannuation entitlement of 9.5% for the 4 week period.

[35] I order that the Respondent pay to the Applicant, 4 weeks' pay plus her statutory superannuation entitlement.

COMMISSIONER

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¹ F2 unfair dismissal application – facebook exchange

² (1995) 62 IR 371