DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Dharun Prasad

v

Cordina Chicken Farms Pty Limited
(U2019/2419)

COMMISSIONER CAMBRIDGE SYDNEY, 18 OCTOBER 2019

Unfair dismissal - unsatisfactory performance - failure to report or investigate significant safety incident - no proper contemplation of reasonable explanation provided by applicant - no valid reason for dismissal - no proper consideration of alternatives to dismissal - dismissal harsh, unjust and unreasonable - reinstatement appropriate remedy.

[1] This matter involves an application for unfair dismissal remedy made pursuant to section 394 of the *Fair Work Act 2009* (the Act). The application was lodged at Sydney on 5 March 2019, and it was made by *Dharun Prasad* (the applicant). The respondent employer is *Cordina Chicken Farms Pty Limited* (ABN: 29 003 058 428), (the employer or Cordina).

[2] The application indicated that the date that the applicant's dismissal took effect was 5 February 2019. Consequently, the application was not made within the 21 day time limit prescribed by subsection 394 (2) of the Act. However, the Fair Work Commission (the Commission) issued a Decision on 19 July 2019, [2019] FWC 4867, whereby Dean DP granted the applicant an extension of time, and the matter was subsequently re-allocated for substantive Determination.

[3] The matter was the subject of a Pre-Hearing Conference held on 26 July 2019. At the Pre-Hearing Conference the Commission granted permission, pursuant to s. 596 of the Act, for either Party to be represented by lawyers or paid agents. Further, the Commission made Directions for the Parties to file and serve evidence and submissions prior to a Hearing fixed for 19 September 2019.

[4] At the Hearing held on 19 September, the applicant was represented by Mr D Potts, solicitor from *Kells* lawyers. Mr Potts called the applicant as the only witness to provide evidence in support of the unfair dismissal claim. The employer was represented by Mr D Collinge, solicitor from *Gills Delaney* lawyers. Mr Collinge called the employer's Group HR Manager, Mr A Chandra, as the only witness who provided evidence in opposition to the unfair dismissal claim.

Background

[5] The applicant is a man of some 57 years of age who had worked for the employer for about 25 ½ years. The applicant was initially engaged to perform production line work and he was subsequently promoted to the positions of; a Production Supervisor; a Production Planner; and he acted in the role of Production Manager. In April 2018, the applicant was promoted to a position described as Assistant Production Manager which involved direct responsibility for between 25 and 30 employees in a particular section of the employer's operation.

[6] The employer operates a large-scale poultry business involving the processing, preparation and distribution of chicken meat products throughout Australia and to various export markets. The applicant worked at the employer's manufacturing and distribution plant located in the Sydney suburb of Girraween. Cordina has more than 570 employees and there are in excess of 300 employees engaged to work at the Girraween plant.

[7] The applicant had a generally commendable work history as reflected in his progressive promotions to the Assistant Production Manager position. However, in February 2012, the applicant was issued with an official disciplinary warning involving his failure to have the necessary production to ensure that a major customer was properly supplied with sufficient quantities of produce. The written disciplinary warning issued to the applicant on 13 February 2012, stated that it would be rescinded after six months. The applicant also received a first written warning dated 1 June 2018, which arose from a significant production breakdown that occurred on 30 May 2018. This warning raised complaint that the applicant did not report the breakdown immediately to his Production Manager. However, the applicant delayed reporting the issue because the Production Manager had requested that he not disturb her in the early morning.

[8] The events that led directly to the dismissal of the applicant involved a near miss safety incident that occurred on 17 January 2019 (the safety incident). On 17 January 2019, the applicant had attended for work as normal which involved him commencing on site from about 2 am and leaving the workplace at around 10:00 to 10:30 am.

[9] The applicant had a regular practice of telephoning the worksite after he had returned home to speak with the senior supervisor on site in order to check that the production on that day was proceeding without problem and as planned. The applicant rang the senior supervisor, Mr Ali, from home during the morning on 17 January, and Mr Ali informed him that there had been something that had occurred which was of concern, but which did not disturb the production scheduling, and that he would inform the applicant of the matter on the following day, 18 January 2019.

[10] The applicant attended work at about 2 am the next day, 18 January, and when Mr Ali attended the site at about 5 am, he told the applicant that there had been an accident involving what was potentially a very serious incident. The serious safety incident occurred when a forklift was unloading a large module off the back of a truck. In the process of unloading, the module fell and luckily no serious injury occurred. The module fell because the forklift operator had failed to release one of the straps that secured the module onto the truck, and when he attempted to lift the module, the strap caused the module to tip and fall to the ground.

[11] Mr Ali explained the circumstances and details of the safety incident to the applicant. Importantly, Mr Ali told the applicant that the safety incident had been reported, and that an investigation had been commenced by senior site managers, Daniel Cordina and Allen

Meiring. The applicant spoke to the forklift driver and verbally warned him that his failure to operate safely was unacceptable, and that if he did not "check things more closely" he could lose his job. The applicant did not complete any documentary report of the safety incident nor did he conduct any further investigation into the safety incident.

[12] On 22 January 2019, the applicant was involved in a meeting which dealt with production related issues involving the communication of kill start times and temperature controls. The meeting resulted in an email communication that sought, inter alia, to ensure that the applicant was the person that was to communicate all kill start times. Subsequently, a kill start time was not communicated in accordance with the directive provided in the email of 22 January. On 24 January 2019, the applicant sent an email to one of his work colleagues, which was copied to his manager, and which pointed out the failure to comply with the directive that had emerged from the meeting of 22 January 2019. In this email, the applicant used what could be described as an abrupt reproach when he stated; "*so get it right*."

[13] On the following day, Friday, 25 January 2019, the applicant was issued with a letter entitled; Invitation to Disciplinary Meeting, and he was suspended from duty. The Invitation to Disciplinary Meeting was issued by the employer's Group HR Manager, Mr Chandra. The letter contained details of six allegations which it said appeared to have involved serious failures of the applicant to discharge the responsibilities associated with his position as Assistant Production Manager. The most notable allegations involved the applicant's failure to report and investigate the safety incident that occurred on 17 January, and the content and tenor of the applicant's email of 24 January 2019. The letter further advised that a disciplinary meeting to discuss the allegations would be held on Wednesday, 30 January 2019.

[14] The applicant attended the disciplinary meeting on 30 January 2019, and he provided verbal responses to the six allegations that were set out in the Invitation to Disciplinary Meeting letter. The applicant's responses were considered by Mr Chandra. However, five of the six allegations were determined to have constituted unsatisfactory performance, and in a further letter to the applicant dated 1 February 2019, Mr Chandra informed the applicant that the substantiated unsatisfactory performance and his previous warnings represented sufficient grounds to terminate his employment. The applicant was then invited to a further meeting on 4 February 2019, and informed that this meeting would involve an opportunity for the applicant to show cause as to why his employment should not be terminated.

[15] The applicant attended a further meeting on 4 February 2019 with inter alia, Mr Chandra. The applicant was unable to persuade Mr Chandra that his employment should not be terminated, and on the following day, 5 February 2019, the applicant was provided with a letter of dismissal which stated inter alia, that Cordina "*feels that the trust in the employment relationship is no longer tenable*." The applicant was provided with payment in lieu of notice of termination together with statutory entitlements and an additional two weeks ex gratia payment was made.

[16] Since the dismissal the applicant has unsuccessfully sought alternative employment. He provided evidence of numerous job applications and other activities associated with the pursuit of alternative employment. The applicant has obtained some limited remuneration working as an Uber driver.

The Case for the Applicant

[17] Mr Potts who appeared for the applicant, referred to written submissions which advanced the assertion that the dismissal of the applicant was unfair. The written submissions made on behalf of the applicant were framed to align with the various factors found in s. 387 of the Act. Mr Potts made oral submissions in amplification of the written material.

[18] The submissions made on behalf of the applicant asserted that there was no valid reason for the dismissal related to the applicant's conduct or performance. In particular, it was submitted that the failure of the applicant to report and investigate the near miss safety incident was not a valid reason for termination of employment. In this regard, various aspects of the circumstances surrounding the safety incident were referred to and asserted to provide support for the proposition that the applicant's failure to report and investigate the safety incident did not represent a valid reason for dismissal.

[19] The submissions made on behalf of the applicant highlighted particular circumstances and aspects of the applicant's conduct in relation to the safety incident. The submissions noted that the applicant was not at the site when the incident took place, and that when he next attended the site, he was told that the safety incident had already been reported and that an investigation had been commenced.

[20] The submissions made by the applicant acknowledged that he had been notified of the reason for his termination. Further, the applicant acknowledged that he was given two opportunities to respond to the reasons that the employer proposed to rely upon in the dismissal. However, the applicant asserted that he provided an acceptable explanation and that it was entirely unreasonable for the employer not to modify their decision to terminate his employment in light of the explanation that he provided. The applicant submitted that the failure of the employer to modify their decision to terminate his employment indicated that they had prejudged the issue.

[21] In further submissions, the applicant acknowledged that he had been given an opportunity to have a support person present during the discussions relating to the dismissal. The applicant also admitted that in May 2018, he had been given a written warning regarding the delay with communicating to his Production Manager. However, it was asserted that when all of the circumstances surrounding that warning were considered, the warning was unjustified.

[22] The submissions made on behalf of the applicant noted that the employer was a large employer that had a dedicated Human Resource Manager team, and accordingly it should have been capable of following all appropriate procedures.

[23] The applicant also made submissions which asserted that his long period of employment of over 25 years which was largely unblemished, should mitigate against the employer's decision to terminate his employment. The applicant further submitted that the Commission should come to the conclusion that the employer did not have a valid reason for dismissal. However, it was submitted that if there was a valid reason to terminate the applicant's employment, given his length of service, age, and difficulty in finding alternative employment, the dismissal was nevertheless clearly harsh.

[24] In summary, Mr Potts submitted that the conduct of the applicant involving his failure to report or investigate the safety incident in circumstances where his supervisor had told him that it had already been reported and was under investigation, could not represent conduct that

established valid reason for dismissal. Mr Potts submitted that the actions of the applicant did not represent an egregious breach of safety. Further, Mr Potts said that the warning provided in February 2012 had rescinded within six months of it being issued, and there were extenuating circumstances surrounding the 2018 warning which involved the Production Manager discouraging the applicant from calling her in the middle of the night because it upset her partner.

[25] In conclusion, Mr Potts submitted that the dismissal of the applicant was harsh, unjust and unreasonable. Further, Mr Potts submitted that the applicant had been looking for alternative employment without success, and reinstatement would be the appropriate remedy for his unfair dismissal.

The Case for the Employer

[26] Cordina was represented by Mr Collinge, who referred to a written outline of submissions that had been filed on 6 September 2019. The written submissions made on behalf of Cordina were broadly constructed by reference to the various factors contained in s. 387 of the Act. Mr Collinge made oral submissions in supplementation of the documentary material.

[27] Mr Collinge submitted that the matter did not involve a complex case. Mr Collinge submitted that the applicant was dismissed for valid reason. Mr Collinge said that the applicant was a senior employee with significant responsibilities in terms of the safety and welfare of others in the workplace, and he had failed to discharge those responsibilities when he did not report or further investigate the very serious near miss safety incident.

[28] The submissions made on behalf of Cordina stated that the applicant was dismissed as a direct result of his unsatisfactory work performance in relation to the January 2019 safety incident, on a background of prior performance delinquencies in February 2012 and May 2018. Mr Collinge described the applicant's conduct as inexcusably casual and lackadaisical in attending to what is a central function of any manager's role. Mr Collinge submitted that the applicant's conduct provided clear valid reason to elect to terminate his contract of employment.

[29] The submissions made by Cordina asserted that the applicant had a history of sustained performance defaults which provided a sound and well-founded reason to bring the employment to an end. Further, Cordina submitted that the applicant did not identify any adequate excuses or vitiating circumstances despite being given every opportunity to do so.

[30] Further, Cordina submitted that the applicant was advised of the reasons for dismissal, and he was given two opportunities to respond or provide some explanation. However, according to the submissions made by Cordina, the applicant was not able to provide any reasonable explanation for his conduct and failure to perform in accordance with his responsibilities. Cordina submitted that the process that it has adopted was transparent and procedurally fair.

[31] The further submissions made on behalf of Cordina noted that there had not been any unreasonable refusal to allow the applicant to have a support person present to assist during the discussions that occurred relating to his dismissal. Further, Cordina also submitted that the applicant had been the subject of prior warnings regarding his unsatisfactory performance.

[32] In addition, Cordina submitted that it had dedicated human resource management specialists and it had adopted a relatively sophisticated procedure that provided the applicant with procedural fairness. The submissions made by Cordina also acknowledged that the applicant had been employed for a considerable period of time. However, it was submitted that in recognition of the applicant's length of service, it had made an ex gratia payment, and this ameliorated any potential harshness of the dismissal.

[33] In summary, Cordina submitted that it dismissed the applicant for valid reason relating to his performance/conduct. Further, it submitted that it had adopted a procedurally sound process that provided the applicant with opportunity to respond to the reasons for his dismissal and the applicant's responses had been carefully considered. Mr Collinge submitted that the dismissal of the applicant was not a harsh, unreasonable or unfair outcome, and the application for unfair dismissal remedy should be dismissed.

Consideration

[34] The applicant was a person protected from unfair dismissal and his claim for unfair dismissal remedy was jurisdictionally established. Section 385 of the Act stipulates that the Commission must be satisfied that four cumulative elements are met in order to establish an unfair dismissal. These elements can be identified in s. 385 which is in the following terms:

> *"385 What is an unfair dismissal*
> *A person has been **unfairly dismissed** if the 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.*
> *Note: For the definition of **consistent with the Small Business Fair Dismissal Code**: see section 388."*

[35] In this instance there was no dispute that; the applicant had been dismissed; the employer was not a small business; and that the dismissal was not a case of genuine redundancy. Consequently, the determination of the unfair dismissal claim has been confined to consideration of that element contained in paragraph (b) of s. 385 of the Act, namely, whether the dismissal was harsh, unjust or unreasonable.

Harsh, Unjust or Unreasonable

[36] Section 387 of the Act contains criteria that the Commission must take into account in any determination of whether a dismissal is harsh, unjust or unreasonable. These criteria are:

> *"(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."

S. 387 (a) - Valid reason for the dismissal related to capacity or conduct

[37] The circumstances of the termination of the applicant's employment involved broadly uncontested evidence. The evidence established that the primary reason for dismissal that Cordina relied upon was the applicant's failure to make any formal report or investigate the safety incident that occurred on 17 January 2019. Cordina also sought to base the applicant's dismissal upon what it described as the inappropriate comments made by the applicant in an email of 24 January 2019. In addition, Cordina made mention of some unresolved cleaning issues that were allegedly the responsibility of the applicant. However, these cleaning issues were not explored in any detail, and it was clear that the central issue upon which the dismissal of the applicant was based was his failure to report or further investigate the safety incident.

A Valid Reason for Not Reporting the Safety Incident

[38] There was no dispute that the applicant did not report or further investigate the safety incident. However, the applicant was not a witness to the safety incident as it occurred when he was at home. The incident was recounted to him by Mr Ali, who, together with the forklift driver, were presumably the only persons with first-hand knowledge of the incident. The uncontested evidence provided by the applicant was that Mr Ali told the applicant that the safety incident had been reported, and that senior managers had commenced an investigation. In such circumstances, it would seem to be understandable that the applicant would not complete what would be another report of the incident, given by himself, a person who had not witnessed the event, nor would it seem necessary to conduct another investigation in addition to that which was apparently being undertaken by Mr Cordina and Mr Meiring.

[39] It must be readily acknowledged that there may have been a reasonable requirement for the applicant to, in all instances, provide a report and conduct an investigation into all serious safety incidents, even if such report and investigation might be additional to reports and investigations made by others. However, any such requirement upon the applicant was not discernible from either; the Cordina Workplace Health, Safety and Environment Policy, at

clause 4.7 or elsewhere; or the "INCIDENT REPORTS" communication dated 31 May 2018 from Mr Meiring.

[40] The employer's Group HR Manager, Mr Chandra, made the decision to dismiss the applicant upon a finding inter alia, that the applicant had failed to provide any valid reason for his failure to report and investigate the safety incident. During the Hearing, the Commission questioned Mr Chandra as to why he rejected the applicant's explanation for not reporting and further investigating the safety incident, and the following evidence was provided:

> *"But he says he didn't report it because he thought it had been reported, certainly by Mr Ali, and he had indicated that even Mr Cordina and Mr Meiring had apparently been involved in some aspect of investigation. Why wouldn't that be - - -? --- On the 18th of - - -*
>
> *Perhaps I can finish the question? --- Sorry.*
>
> *Why wouldn't that be some valid reason for him to assume that it had already been reported?--- Commissioner, this was not the first time he had failed to report and then he always had basically given an excuse that he couldn't report an issue because of various reasons."*[1]

[41] Regrettably, this evidence and the evidence provided more generally by Mr Chandra was unconvincing and largely unsatisfactory. There was clearly a logical, plausible and reasonable explanation for why the applicant did not complete a formal report or further investigate the safety incident. There was no evidence to establish a proper basis for Mr Chandra to reject this explanation. In simple terms, whatever the applicant may have done or not done in the past does not represent a sound or defensible basis upon which to determine the issues that were under examination at that time.

[42] Consequently, to the extent that the dismissal of the applicant was based upon a finding that he had failed to provide any valid reason for not reporting or investigating the safety incident, such a finding has no basis in fact. The applicant did provide a valid reason for not reporting or further investigating the safety incident. The spurious basis upon which Mr Chandra rejected the applicant's explanation for not reporting or further investigating the safety incident has meant that the primary reason for the dismissal of the applicant was not sound, well-founded or defensible.

The Allegations

[43] A careful and thorough examination of all the evidence, particularly that involving the development and prosecution of the six allegations that Mr Chandra included in the disciplinary process, has demonstrated an entirely inadequate foundation upon which to dismiss the applicant. The totality of the evidence has resulted in an unfortunate presentation that reveals that the allegations made against the applicant were largely exaggerated and artificially constructed in a fashion such that they might be accurately described as "trumped-up charges".

[44] The findings that Mr Chandra made in which he substantiated five of the six allegations, might, if they had been properly established, amount to some level of unsatisfactory performance. However, Mr Chandra erroneously elevated the unsatisfactory

performance issues, even if taken at their highest, to constitute what he described as a grave breach of employment obligations that was incompatible with a continuation of the employment. This finding was entirely disproportionate to the level of unsatisfactory performance that could be contemplated even if the allegations had been properly substantiated.

[45] Consequently, on even the most generous contemplation of the unsatisfactory performance purportedly established by the employer, dismissal would represent an entirely disproportionate consequence. Therefore, upon a hypothetical adoption of the employer's reasons for dismissal they would not represent sound, well-founded and defensible reasons for dismissal.

S. 387 (b) - Notification of reason for dismissal

[46] The employer provided written notification of the reasons for the applicant's dismissal. The written notification was firstly provided by way of the "RE: YOUR EMPLOYMENT" letter dated 1 February 2019, and subsequently reiterated in the termination of employment letter dated 5 February 2019.

[47] Although the letter of 1 February, confirmed the employer's findings in respect of five of the six allegations, and advised that these findings substantiated unsatisfactory performance, the termination of employment letter indicated that Cordina felt that the trust in the employment relationship was no longer tenable. There was no elaboration or explanation as to what caused Cordina to adopt that feeling, and presumably it arose from the findings in respect of the five allegations mentioned in the letter of 5 February 2019. However, this was not made clear by way of the notification of the reason for dismissal as set out in the termination of employment letter.

S. 387 (c) - Opportunity to respond to any reason related to capacity or conduct

[48] The employer provided the applicant with two opportunities to respond to the allegations.

S. 387 (d) - Unreasonable refusal to allow a support person to assist

[49] There was no unreasonable refusal to allow the applicant to have a support person present to assist during the discussions that related to his dismissal.

S. 387 (e) - Warning about unsatisfactory performance

[50] The evidence of warning about unsatisfactory performance included the rescinded disciplinary warning of 13 February 2012, and the first written warning of 1 June 2018. The February 2012 warning was rescinded and should therefore be disregarded. Although the 1 June 2018 warning was accepted by the applicant, it must be considered in the context of uncontested evidence that the Production Manager had requested that she not be contacted in the middle of the night.

[51] Consequently, there was only a first written warning upon which some reliance could be placed. By logical implication, a first written warning would be followed by at least a

second written, and perhaps a final warning before dismissal for unsatisfactory performance was invoked.

S. 387 (f) - Size of enterprise likely to impact on procedures

[52] The employer is a large size business operation and therefore size of the enterprise would be unlikely to impact on the procedures followed in effecting the dismissal.

S. 387 (g) - Absence of management specialists or expertise likely to impact on procedures

[53] The employer did have a human resource management team with the relevant specialists. It was therefore somewhat surprising to identify the regrettable approach that Cordina adopted with the development and prosecution of the six allegations that were raised against the applicant. It was similarly surprising that with the assistance of dedicated human resource management specialists, Cordina speciously rejected the entirely reasonable explanation provided by the applicant for his failure to report or further investigate the safety incident.

S. 387 (h) - Other relevant matters

[54] The applicant had a long and generally commendable employment record of about 25½ years. The applicant had been progressively promoted to the relatively senior management position of Assistant Production Manager. There was no satisfactory explanation as to why Cordina could not have implemented some form of alternative disciplinary action. The disciplinary process would have logically anticipated a second written warning, and if the circumstances were seen to require more stringent repercussions, then perhaps demotion of the applicant might have occurred, rather than the dismissal of a long serving employee of 57 years of age.

[55] The dismissal of the applicant may be viewed in stark contrast with the absence of any disciplinary action taken against either Mr Ali or the forklift driver who was involved in the safety incident. Neither Mr Ali nor the forklift driver reported the near miss safety incident of 17 January 2019. However, there was no evidence that Cordina raised concern that the eyewitnesses to the incident did not provide formal reports. Instead, all the responsibility for the reporting and investigation of an incident that occurred when he was not even on site, was levelled at the applicant.

[56] The inconsistency of the treatment of the applicant compared to others who were more directly involved in the safety incident, is a further reflection of the disproportionate and unreasonable contemplation adopted by Cordina regarding the applicant's admitted failure to formally report or further investigate the safety incident.

Conclusion

[57] In this case, the applicant was dismissed for unsatisfactory performance. The primary reason for dismissal involved the applicant's failure to formally report or further investigate a serious near miss safety incident. The applicant admitted that he had not reported or further investigated the safety incident. However, he provided an understandable and reasonable explanation for his action in not reporting or investigating the safety incident, as he had been

told that it had already been reported, and that the incident was under investigation by more senior managers. The employer speciously disregarded the explanation provided by the applicant, and this rejection has meant that the reason for dismissal was not sound, well-founded or defensible.

[58] The employer conducted an investigation into the applicant's conduct which involved the development and prosecution of largely exaggerated and artificial allegations. The employer found five of the six allegations to be substantiated and it erroneously concluded that the applicant had committed a grave breach of his employment obligations. Upon careful analysis of all the evidence, the true nature and severity of any unsatisfactory performance could only have warranted disciplinary action involving some second written warning, and the dismissal of the applicant was an entirely disproportionate response.

[59] Consequently, the dismissal of the applicant was without valid reason related to his capacity or conduct. Further, the procedure that the employer adopted when it constructed and prosecuted the unsound allegations that were made against the applicant was unjust and unreasonable. The dismissal of the applicant also represented inconsistent disciplinary treatment when contrasted with the absence of any disciplinary measures taken in respect of other individuals who also had a responsibility to report the safety incident.

[60] The employer failed to properly consider alternative disciplinary action of lesser severity than dismissal. The hasty and ill-conceived determination to dismiss a long serving employee who had a generally commendable work history and who was 57 years of age was manifestly harsh.

[61] Therefore, the dismissal of the applicant must be held to have been harsh, unreasonable and unjust. The applicant is entitled to remedy for his unfair dismissal.

Remedy

[62] The applicant has sought reinstatement as remedy for his unfair dismissal.

[63] The question of remedy in respect of an unfair dismissal is the subject of Division 4 of Part 3-2 (ss. 390 - 393) of the Act. Section 390 of the Act is relevant to the consideration in this instance and is in the following terms:

> ***"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*

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

[64] I have carefully considered whether it would be appropriate to make Orders for the reinstatement of the applicant. The dismissal of the applicant, and the subsequent evidence that has been presented in these proceedings, has, on balance, disclosed some basis for the employer to hold legitimate performance concerns which require appropriate rectification on the part of the applicant.

[65] However, I do not consider that there has been a genuine loss of trust and confidence such that the employment relationship should not be re-established. Further, I have not been persuaded that any difficulties that may be associated with addressing the applicant's performance could not be satisfactorily reconciled. Importantly, there was no evidence upon which to conclude that the relationship between the applicant and other managers and staff might represent a barrier to reinstatement or would otherwise make reinstatement inappropriate.

[66] In the particular circumstances of this case, after considerable contemplation, I have arrived at the conclusion that a significant injustice would occur if the applicant was not provided with the remedy that he has sought. The applicant's personal circumstances, including his long service, age, and the difficulties that he has experienced in finding alternative employment, provides further support for a remedy of reinstatement. Therefore, I have concluded that reinstatement would be appropriate in all of the circumstances of this case.

[67] Consequently, for the reasons stated above, I find that the applicant is a person protected from unfair dismissal and he was unfairly dismissed. Further, I am satisfied that reinstatement of the applicant would be appropriate, and therefore I am prepared to make Orders for the reinstatement of the applicant.

[68] Orders providing for the reinstatement of the applicant will be issued separately. If the Parties are unable to agree on the amount to be paid to the applicant in accordance with Order number 3, regarding an Order to restore lost pay, the application will be listed for further proceedings to enable the Commission to determine that amount. Any request for such further proceedings should be made within 21 days from the date of this Decision.

COMMISSIONER

Appearances:

Mr D Potts, solicitor from Kells Lawyers appeared for the applicant.

Mr D Collinge, solicitor from Gills Delaney Lawyers appeared for the employer.

Hearing details:

2019.
Sydney:
September, 19.

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[1] Transcript @ PN302-PN304.