DECISION

Fair Work Act 2009
s.394—Unfair dismissal

James Arbon
v
Bunnings Group Limited T/A Bunnings Warehouse
(U2023/1826)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 1 MAY 2023

Application for an unfair dismissal remedy – jurisdiction – casual employee – s 384 Fair Work Act 2009 – whether "regular casual" – whether employment "regular and systematic" – whether reasonable expectation of ongoing employment – service to be counted – minimum employment period met – jurisdiction established

[1] On 7 March 2023 James Arbon (Mr Arbon or the applicant) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy in relation to his dismissal by Bunnings Group Limited (Bunnings, the employer or the respondent).

[2] Mr Arbon claims to have been unfairly dismissed on 16 February 2023.

[3] He seeks reinstatement and back wages, or compensation.

[4] Bunnings oppose the application and raise a jurisdictional issue. It contends that Mr Arbon was not protected from unfair dismissal because he did not serve the minimum employment period (six months) required by the FW Act. It says that in the six months prior to his dismissal Mr Arbon was not a "regular casual" within the meaning of the FW Act and did not have a reasonable expectation of employment by the employer on a regular and systematic basis.

[5] Conciliation was conducted on 31 March 2023 but the matter did not settle.

[6] I issued directions on 11 April 2023.

[7] The jurisdictional matter was heard by video on 20 April 2023. Mr Arbon was represented by an Industrial Officer of the Shop, Distributive and Allied Employees Association (SDA). Bunnings was represented by officers of its Human Resources and Legal department.

[8] This decision concerns the jurisdictional issue only.

[9] I heard evidence from Mr Arbon.

[10] Bunnings did not call oral evidence but relied on its documentary evidence drawn from business records.

[11] Documents including certain rosters and payroll records were submitted by Mr Arbon and Bunnings by consent.

Facts

[12] There is no dispute over the relevant facts, though the parties make a different submission on the ultimate conclusion I should draw on the jurisdictional facts that need to be determined.

Employment of Mr Arbon

[13] Bunnings is a large national retailer of household and hardware products.

[14] Mr Arbon is a full time university student living in suburban Adelaide.

[15] He commenced working for Bunnings on 28 April 2021. His employment was formalised by a contract of employment entered into in May 2021 sent under cover of a letter dated 10 May 2021[1] (Contract).

[16] Mr Arbon was employed under the terms of the *Bunnings Warehouse Small Format Stores Agreement 2013*, an industrial instrument made and approved under the FW Act[2] (Agreement).

[17] He was at all relevant times a casual employee placed into a casual pool which made him available to be rostered at multiple stores.

[18] After a period of training, he worked principally at the Prospect store. In the working period relevant to this matter (six months prior to dismissal) he worked only at the Prospect store. Prior to that he had occasionally worked at the Mile End store.

[19] He worked principally in the car park of the Prospect store (commonly collecting trolleys) though also, from time to time, worked in other departments.

[20] Income earned from his casual employment helped sustain Mr Arbon during his university studies.

Rostering

[21] Rosters at Bunnings Prospect were prepared by team leaders and made accessible online to employees. They were issued a minimum of two weeks in advance though shorter notice of a roster (a new or varied shift or a shift removed) occurred from time to time according to business needs or employee circumstances.

[22] In the six months prior to dismissal Mr Arbon obtained his roster in this manner.

[23] If Mr Arbon was able to work the roster he was allocated, he simply turned up to work at the rostered day and time.

[24] If Mr Arbon was not able to work a shift as rostered, he would advise his team leader of that fact in advance or arrange a swap with another employee. If Mr Arbon was planning to be absent for a period, he generally advised the store in advance of the roster being prepared and, in that instance, would not be rostered for that period.

[25] The length of shifts Mr Arbon worked were not always those he was rostered for. If the store was busy, Mr Arbon occasionally worked a longer shift. Less commonly, a shift to which Mr Arbon was rostered was withdrawn prior to the day and reallocated to others. This did not occur with respect to Mr Arbon's weekend work but it did occasionally occur with respect to weekday shifts.

[26] Mr Arbon was paid for the hours he worked, not the hours rostered. Mr Arbon was paid fortnightly, in the week following the completion of the fortnightly rostered period.

Hours rostered and worked

[27] I now deal with the shifts rostered and hours worked by Mr Arbon in the six months prior to dismissal. That six month period is 16 August 2022 to 16 February 2023.

[28] Mr Arbon had made it known to his team leader that as a full time university student he was able to regularly work on weekends (Saturdays and Sundays). He also advised Bunnings that he was able to work additional shifts on some weekdays when he did not have course commitments and during tertiary semester breaks.

[29] Based on this knowledge the Bunnings Prospect store generally rostered Mr Arbon to work shifts on alternate weekends (alternating between he and another employee who also worked car park duties on the weekend Mr Arbon did not work).

[30] The online rosters allocated to Mr Arbon and which he downloaded prior to working are in evidence.[3] Also in evidence, based on Bunnings business records, are the hours Mr Arbon in fact worked and was paid for.[4]

[31] In the six months prior to dismissal, Mr Arbon worked as follows:

- 20 August Saturday
- 21 August Sunday
- 25 August Thursday

- 3 September Saturday
- 4 September Sunday
- 9 September Friday
- 17 September Saturday
- 18 September Sunday
- 28 September Wednesday

- 29 September Thursday

- 2 October Sunday
- 15 October Saturday
- 16 October Sunday
- 20 October Thursday
- 23 October Sunday
- 28 October Friday
- 29 October Saturday
- 30 October Sunday

- 3 November Thursday
- 6 November Sunday
- 7 November Monday
- 10 November Thursday
- 11 November Friday
- 12 November Saturday
- 13 November Sunday
- 14 November Monday
- 16 November Wednesday
- 17 November Thursday
- 19 November Saturday

[22, 26 and 27 November Mr Arbon was rostered but the shifts were reallocated to others by Bunnings]

- 1 December Thursday
- 3 December Saturday
- 4 December Sunday
- 7 December Wednesday
- 9 December Friday
- 10 December Saturday
- 11 December Sunday
- 21 December Wednesday *[shift at short notice]*

[24 December Mr Arbon was rostered at short notice but did not work as he was intrastate]

- 7 January Saturday
- 8 January Sunday
- 11 January Wednesday
- 20 January Friday
- 21 January Saturday
- 22 January Sunday
- 25 January Wednesday
- 27 January Friday *[shift at short notice]*
- 29 January Sunday *[shift at short notice]*

- 3 February Friday
- 4 February Saturday
- 5 February Sunday
- 6 February Monday *[shift at short notice]*
- 10 February Friday
- 13 February Monday
- 14 February Tuesday

[shifts rostered for 16, 17, 18 and 19 February were not worked due to dismissal]

[32] Except where I have identified a shift worked as a 'shift at short notice', Mr Arbon was rostered to work that day based on the roster he downloaded in advance.

Dismissal

[33] Mr Arbon was dismissed effective from 16 February 2023 in the sense that he was removed from the roster prior to working the hours he had been rostered for that day.

[34] Mr Arbon also did not work on 17, 18 and 19 February 2023 which were days he had been rostered for.

Consideration

[35] Section 384 of the FW Act provides:

"384 Period of employment

(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was as a regular casual employee; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer."

[36] Whilst the phrase "continuous service' is not defined in the FW Act, the ordinary meaning of "continuous service" is a period of unbroken service by an employee with an employer.[5] However, regularly and systematically rostered casual employees remain in service notwithstanding that each engagement may be by separate casual contracts. Gaps in time between such contracts do not necessarily break service because it is the employment relationship and not the contract that is assessed for continuity.[6]

[37] For these reasons, the phrases "period of employment" and "continuous service" in s 384 of the FW Act and the phrase "continuous service" in s 22 are best read as relating to a period of an unbroken employment relationship and not necessarily an unbroken employment contract (subject to the further statutory provisions in s 22 which deem certain service to be continuous despite a break in the employment relationship).

[38] Thus, to have served the minimum employment period to be eligible to make an unfair dismissal application, Mr Arbon needs to establish that three jurisdictional facts existed in the six months prior to dismissal:

- that he was a casual employee (as defined);
- that he was a "regular casual employee" (as defined); and
- that he had a reasonable expectation of continuing employment on a regular and systematic basis.

[39] I now deal with each of these issues.

Was Mr Arbon a casual employee?

[40] A "casual employee" is defined in s 15A as:

"15A Meaning of *casual employee*

(1) A person is a ***casual employee*** of an employer if:

(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment;

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

(4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

(5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a ***casual employee*** of the employer until:

(a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or

(b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis."

[41] It is not in dispute that Mr Arbon was a casual employee.

[42] I take into account the terms of the Contract, which was the expression of the offer of employment by Bunnings and its acceptance by Mr Arbon. It is that and that only which I am required to consider under s 15A(4).

[43] Each of the four considerations required to be taken into account in s 15A(2) point in that direction.

[44] In relation to s 15A(2)(a), Bunnings could elect to offer work and Mr Arbon could elect to not accept work under the terms of the Contract. The Contract stated:[7]

> "You agree that you have no ongoing expectation of ongoing employment or guaranteed hours work."

[45] In relation to s 15A(2)(b), Mr Arbon was required to work according to the needs of the employer. The Contract stated:[8]

> "You are required to perform the duties of the position and any other duties as Bunnings may reasonably direct from time to time."

[46] In relation to s 15A(2)(c), the Contract described Mr Arbon as a casual employee.[9]

[47] In relation to s 15A(2)(d), the Contract provided that Mr Arbon was entitled to a casual loading under the terms of the relevant enterprise agreement.[10] Clause 13.2 of the Agreement provided for a 22.5% casual loading.

[48] I find that Mr Arbon was a casual employee as defined.

Was Mr Arbon a regular casual employee?

[49] A "regular casual employee" is defined in s 12 as:

> "a national system employee of a national system employer is a ***regular casual employee*** at a particular time if, at that time:
>
> (a) the employee is a casual employee; and
>
> (b) the employee has been employed by the employer on a regular and systematic basis."

[50] Section (a) of this definition is satisfied.

[51] Was Mr Arbon employed on a regular and systematic basis (ss (b))?

[52] For a casual employee to have worked on a regular and systematic basis it is sufficient for their employment to have been "regular" in the sense of being frequent notwithstanding it being unpredictable, and "systematic" in the sense of it being part of a pattern of engagement occurring as a consequence of businesses reliance on the employee's services notwithstanding that the precise pattern of working may not be foreseeable to the employee.[11]

[53] I find that Mr Arbon's employment as a casual employee was regular, having regard to its frequency. The concept should be applied liberally and implies a regular pattern.[12]

[54] Of the twenty-six weeks in the six months prior to dismissal Mr Arbon worked at least one day in twenty-one of these weeks. In only five of those weeks (weeks commencing 19 September, 3 October, 12 December, 26 December and 2 January) did Mr Arbon not work.

[55] Whilst I accept Bunnings' submission that the number of hours worked by Mr Arbon in a given week varied and was not predictable given that Mr Arbon was rostered according to

Bunnings' needs and also his availability around tertiary studies (resulting in some roster changes at short notice), this does not mean that Mr Arbon did not work regularly.

[56] Aside from frequency, there is evidence of a pattern of work whereby Mr Arbon made himself available to work on weekends and was rostered on alternate weekends and, when his studies permitted, supplemented that by making himself available to work on weekdays and was rostered on weekdays according to his availability and store needs. Whilst there were exceptions to this pattern, it was frequent enough for it to be somewhat of a default arrangement.

[57] Bunnings commonly rostered Mr Arbon on alternate weekends. Of the twenty six weekends in the six month period, Mr Arbon worked at least one day on fifteen of them. Of those fifteen, Mr Arbon worked both the Saturday and the Sunday on eleven of them.

[58] For these reasons I find that Mr Aaron was regularly employed.

[59] I also find that Mr Arbon was systematically employed in the sense that his employment was part of a pattern of engagement occurring as a consequence of businesses reliance on his services.

[60] There is clear evidence of an established and identifiable system by which Mr Arbon was offered casual work by Bunnings.

[61] Aside from being continuously on the books as a casual employee, Mr Arbon made his availability known in advance to Bunnings, and usually well in advance. Moreover, Mr Arbon was provided a roster by Bunnings at least a fortnight in advance of a shift and occasionally more than a month in advance.

[62] Mr Arbon was not a casual employee who worked simply when contacted by the employer shortly prior to a shift to ascertain if he was available to work that shift. Whilst that occasionally occurred, it was the exception and not the general position. The general position was that Mr Arbon was on the store roster, his forward availability was known to the employer and he was provided a forward roster of his allocated shifts with ample notice, so much so that Mr Arbon's evidence was that he routinely screenshot the roster and placed it on his kitchen fridge as a reminder.

[63] When Mr Arbon worked on a Saturday or Sunday, he would commonly though not always be rostered to work in the car park. Of the twenty-seven Saturdays or Sundays worked in this period, Mr Aaron worked the car park on twenty of them.

[64] This also suggests some system of routine reliance by Bunnings on Mr Arbon as one its weekend car park employees.

[65] Mr Arbon did not work in the car park on weekday shifts. His weekday shifts were worked in a variety of other in-store departments or in goods inward. This is consistent with Mr Arbon's evidence that his weekday work was supplementary to his weekend shifts.

[66] I find that Mr Arbon worked on a systematic basis in the relevant sense.

[67] For these reasons I conclude that Mr Arbon was employed on a regular and systematic basis.

[68] I make this finding without reliance on whether Mr Arbon had been offered but declined conversion to part time employment and whether this was an offer of conversion required by the FW Act or an offer made at the employer's initiative. I do so for two reasons. Firstly, the state of the evidence as to the context in which any refusal by Mr Arbon occurred is unsatisfactory such that no finding of fact could safely be made. Secondly, even if Mr Arbon declined either a statutory offer of conversion or a discretionary offer to become a part time employee, that does not re-characterise whether, whilst employed as a casual, he was regularly and systematically employed. It cannot alter a jurisdictional fact if that fact existed.

[69] Accordingly I find that Mr Arbon was a regular casual employee.

Did Mr Arbon have a reasonable expectation of continuing employment on a regular and systematic basis?

[70] I adopt the approach set out by Deputy President Beaumont in *Liting Gu v Geraldton Fishermen's Co-operative Pty Ltd*:[13]

> "[41] In my view, the consideration of 'reasonable expectation' is twofold. It requires, as was identified in *Bronze Hospitality No.2*, an examination of whether: (a) the employee had an expectation of continuing employment by the employer on a regular and systematic basis (subjective); and (b) that expectation, if held, was 'reasonable' (objective).
>
> [42] In determining whether the expectation was 'reasonable', regard is had to the employment contract as established at the time employment commenced. However, in my view consideration extends to all circumstances throughout duration of employment, as they prove relevant. As observed in *Bronze Hospitality No.2*, the Act does not limit the matters that may be taken into account in determining whether the expectation is reasonable. Such matters will include, for example, whether there are any mutual undertakings that are to be inferred from conduct or implied that take effect as contractual variations, or any subsequent express contractual variation. Matters may also include the period of employment, representations made (and by whom), rostering arrangements (particularly those made amply in advance), the industry in which the work is performed, and so on."

[71] Was there an expectation?

[72] I conclude there was. The evidence establishes that Mr Arbon had an expectation of continuing employment on a regular and systematic basis. He organised his work around his tertiary studies and made this known to his employer. He made himself available on a consistent basis to work on weekends, and to supplement that with weekday work when he was available. Mr Arbon continued to make himself available to again be rostered after having previously been rostered. This also supports a conclusion that he had an expectation of ongoing employment on that basis.

[73] Nor is the existence of an expectation discounted by reference to the relatively low number of days worked per week or that his work was secondary to his tertiary studies. There is no reason why an employee who makes themselves available to work a limited number of shifts in a week necessarily has less of an expectation of ongoing employment on that basis than an employee who makes themselves available for multiple shifts.

[74] Was the expectation reasonable in objective terms?

[75] I take into account that the terms of the Contract provided that as a casual you "may" (not shall) be offered shifts and "that you have no ongoing expectation of ongoing employment or guaranteed hours of work".[14]

[76] The Contract is a relevant consideration which weighs against a finding that a reasonable expectation existed.

[77] However, the practical manner in which the Contract operated is also relevant.

[78] In the circumstances of this matter, the performance of the Contract and the course of dealings between the parties over a period of nearly two years including the offer and acceptance of casual shifts on a regular and systematic basis in the six months prior to Mr Arbon's dismissal weigh strongly in the other direction notwithstanding the discretionary nature of Bunning's contractual right to offer or not offer work.

[79] The fact that Mr Arbon was rostered to work on 16, 17, 18 and 19 February 2023 and would have worked on those days but for being dismissed is also evidence that supports a finding that he had a reasonably held expectation of continuing employment on a regular and systematic basis.

[80] For these reasons, I conclude that Mr Arbon had a reasonable expectation of continuing employment on a regular and systematic basis.

[81] Section 384(2)(a)(ii) is made out.

Conclusion

[82] As ss 384(2)(a)(i) and (ii) are satisfied, Mr Arbon's service as a casual employee in the six months prior to dismissal counts for the purposes of the minimum employment period.

[83] Mr Arbon was relevantly employed for at least six months prior to dismissal.

[84] Mr Arbon's application is within jurisdiction. Having served the minimum employment period, he was a person protected from unfair dismissal. He was eligible to make a claim under s 394 of the FW Act.

[85] The jurisdictional challenge by Bunnings is dismissed.

[86] As the application has been the subject of conciliation, I will list the matter for further directions.

DEPUTY PRESIDENT

Appearances:

Ms B Barletta with Mr A Amin, *on behalf of* Mr J Arbon

Ms M Anderson with Ms M McHugh, *of and on behalf of* Bunnings Group Limited T/A Bunnings Warehouse

Hearing details:

2023
Adelaide (by video)
20 April

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[1] R1

[2] R2

[3] A1

[4] R3

[5] *Holland v UGL Resources Pty Ltd* [2012] FWA 3453 at [20]

[6] *Shortland v Smiths Snackfood Co Ltd* [2010] FWAFB 5709; *Flinders Ports Pty Ltd v Woolford* [2015] SASCFC 6 at [74] per Stanley J with whom Kelly J agreed

[7] R1 page 4

[8] R1 page 3

[9] R1 pages 2, 4

[10] R1 page 4

[11] *Bell v Aboriginal Legal Service (NSW/ACT) Limited* [2018] FWCFB 6102 at [10] – [11]; see also *Yaraka Holdings Pty Ltd v Glijevic* (2006) 149 IR 399 at [65] – [68] per Crispin and Gray JJ and at [89] per Madgwick J; *Kumnick v FedEx Express Australia Pty Ltd* [2022] FWC 2432, [49] – [54]

[12] *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 at [68]

[13] [2022] FWC 1342

[14] R1 page 4