DECISION

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

Con Margaritis
v
Safiery Pty Ltd
(U2024/2601)

COMMISSIONER CONNOLLY MELBOURNE, 2 AUGUST 2024

Application for an unfair dismissal remedy – alleged insubordination amounting to serious misconduct – serious misconduct not found – no valid reason – dismissal found to be harsh, unjust and unreasonable – determined reinstatement not appropriate - compensation ordered.

Introduction

[1] On 7 March 2024, Mr Con Margaritis (the Applicant) made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that his dismissal from Safiery Pty Ltd (the Respondent) on 21 February 2024 was harsh, unjust or unreasonable. The Respondent denies these allegations.

[2] On 9 April 2024, Directions were issued for the filing of submissions and evidence in relation to the merits of the application, to be heard on 27 May 2024.

[3] Having considered the submissions made by the parties and the evidence available before me, I have found that the termination of Mr Margaritis' employment was harsh, unjust, and unreasonable. The reasons for this finding are set out below and its consequences for both the Applicant and the Respondent are found at the conclusion of this decision.

When can the Commission Order a Remedy for unfair dismissal?

[4] Section 390 of the Act provides that the Commission may order remedy if:

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

(b) the person has been unfairly dismissed.

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

When is a person protected from unfair dismissal?

[6] Section 382 of the 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 that the high-income threshold.

When has a person been unfairly dismissed?

[7] Section 385 of the Act provides that 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."

Background

[8] The uncontested factual background to this matter is as follows:

- The Respondent operates a business in the electronics, technology and energy solutions industries based in Arundel, Queensland.
- Mr Bruce Loxton is the Founder and CEO of the company, Safiery Pty Ltd (**Safiery**), who is the Respondent to this application.
- The Applicant commenced employment with the Respondent as General Manager on 21 February 2023, working from the Respondent's new Victorian facility. His annual salary at the time of his termination was $100,000, plus a $235 per week as vehicle and computer allowance.

- On 19 December 2023, Mr Loxton telephoned the Applicant to address concerns he had with the Applicant's performance and asked the Applicant to call him every day thereafter.

- On 20 December 2023, the Applicant did not call Mr Loxton.

- On 21 December 2023, Mr Loxton left the Applicant a voice message restating his request for the Applicant to call him on a daily basis and asked he return his call.

- The Applicant replied to Mr Loxton by text message and exchanged the following text messages:

  Thursday 21 December at 10.24am

  Applicant: "*In the phone Bruce*
  Call you back"

  Respondent: *"Call when convenient"*

  Thursday 21 December at 12.37pm

  Applicant: *"At the specialist Bruce*
  I will call you"

  Respondent: *"Ok I need to speak with you"*[1]

- The Applicant did not call Mr Loxton on 21 December 2023 and did not call him daily thereafter.

- The Applicant returned to work following the Christmas shut down on or around 11 January 2024 and submits he returned to normal work duties, including contacting Mr Loxton as required.

- This did not include contacting Mr Loxton daily as requested.

- On 6 February 2024, Mr Loxton replied to an email the Applicant had sent on 1 February 2024 where he reminded him of his request to call as follows:

  6 February 2024, at 2.07pm

  "Hi Con

  Test results are satisfactory. 3m for remote activation is practical

  Please note I asked you on 20th December to call me every day.

  I did not received (sic) a call on the 21st of December nor any day this year.

Bruce"[2]

- The Applicant performed work as normal for the period 7 to 18 February 2024.

- On 19 February 2024, the Applicant presented for work at his normal start time of approximately 6.30am and found he could not log onto his work email and received a notification that his access had been removed.

- At 7.10am on 19 February 2024, the Applicant sent a text message to Mr Loxton stating:

  "Good Morning Bruce
  Just tried to log into my email and it says that its been disabled by my Google Workspace Administrator
  Do you know anything about this?"[3]

- At 8.58am the same day, Mr Loxton replied to the Applicant as follows, attached to this was a letter of termination:

  "Yes Con, your contract has been terminated effectively immediately. An email has also been sent to you."[4]

- The attached termination letter advised the Applicant as follows:

  "*Dear Con*

  We regret to inform you that your employment with Safiery Pty Ltd is being terminated effective immediately.

  This decision is not taken lightly and follows a series of documented incidents of insubordination which have been addressed with you directly. Specifically, your refusal to adhere to the direct instruction given in December 2023, where you were required to call and discuss work related matters daily with the writer. Despite being formally reminded in writing this year, you continued to disregard this directive.

  Insubordination disrupts the workplace and undermines management's authority. It is essential for the functioning of any company that all employees adhere to the directives of their supervisors. It also impacts customer delivery when you fail to return calls when a customer's kit is being prepared for commissioning. Your repeated failure to call leaves us no choice but to terminate your employment.

  Please understand that you have had multiple opportunities to correct this behaviour, including written warnings. Unfortunately, these efforts have not resulted in a satisfactory change in your behaviour.

  …"

- On 7 March 2024, the Applicant filed his application for an unfair dismissal remedy.
- The Respondent refutes that the Applicant should be entitled to reinstatement or any other remedy.

The hearing

[9] There being contested facts involved, the Commission is obliged by s.397 of the Act to conduct a conference or hold a hearing. Considering the views of the parties and the circumstances of this case, I determined a hearing was the most effective and efficient way to resolve the matters of contention.

[10] The hearing was convened on 27 May 2024 via video. The Applicant was represented by Mr Andrew Jewell (Solicitor), who was granted leave pursuant to s.596 of the Act. The Respondent was represented by Mr Bruce Loxton, Founder and CEO.

Witnesses and submissions

[11] The Applicant's representatives filed written submissions and a witness statement from Mr Margaritis, who gave sworn evidence during proceedings.

[12] The Respondent filed written submissions and an outline of evidence and witnesses to be called, including emails and text messages to support. The Respondent also indicated its intention to call witnesses in additional to Mr Loxton in further support of its submissions but did not file any witness statements or other supporting material.

[13] On 15 May 2024, representatives for the Applicant raised with my Chambers the issue that the Respondent had failed to comply with my directions, indicating their objection to any witnesses appearing to give evidence for the Respondent without a witness statement having been filed and served prior.

[14] Later in the same day, my Chambers wrote to the Respondent advising the requirement of my directions for any intended witness statements to be filed and served. The Respondent did not provide any reply or otherwise to this correspondence. At the commencement of the hearing, Mr Loxton indicated he was comfortable with proceeding on his submissions, supported by his sworn evidence.

[15] A court book, containing all materials filed by the parties was compiled and distributed to the parties prior to the Hearing. I received the entirety of the court book into evidence, subject to appropriate weight being given to the evidence that was tainted by opinion, irrelevance or hearsay.

Initial matters to be considered

[16] Section 396 of the Act sets out the following:

"The FWC must decide the following matters relating to an application for an order under Division 4 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."

[17] As set out above in s.396 of the Act, consideration as to whether the dismissal was unfair cannot occur unless the Commission is first satisfied that the provisions of s.396 have been met. In the present case, it is not contested, and I am satisfied that Mr Margaritis' application was filed on 7 March 2024 and is made within the required timeframe. It is not contested, and I am satisfied that Mr Margaritis was earning below the high-income threshold and is a person protected from unfair dismissal. It is also not contested, and I am satisfied, that the Respondent is not a small business, by virtue of the employers F3 form, indicating at the time of the Applicant's termination the Respondent had 17 employees. Nor is it asserted, and I am satisfied this is not a case of genuine redundancy.

[18] As I have been satisfied that the requirements of s.396 are met, I now turn to consider the merits of whether the Applicant's dismissal was harsh, unjust or unreasonable.

Was the dismissal harsh, unjust or unreasonable?

[19] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[5]

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[20] Section 387 of the Act provides for the criteria for consideration whether a dismissal was harsh, unjust or unreasonable as follows:

"**387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC 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.”

[21] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.[6]

[22] I have set out my consideration of each below.

s.387(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)

[23] 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]

[24] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.[10] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.[11]

[25] Deputy President Asbury (as she was then) summarised the relevant principles in relation to an employer's onus of establishing that there was a valid reason for a dismissal on the balance of probabilities as follows in *Mellios v Qantas Airways Limited,* which was confirmed on appeal by the Full Bench:[12]

> "[17] In considering whether there is a valid reason for the Applicant's dismissal, I am required to be satisfied on the balance of probabilities that he engaged in the alleged misconduct or in misconduct to which dismissal was a valid, sound and defensible response. I must be conscious of the gravity of the allegations and the ramifications for the Applicant if they are made out. However, the standard of proof does not change and the issues in dispute must be determined on the balance of probabilities. Put another way, if must be more probable than not that the Applicant engaged in the relevant misconduct."

[26] I have applied these principles to the matter before me.

The Applicant's Evidence

[27] The Applicant's submissions are that there is not a valid reason for his dismissal related to his capacity or conduct. He submits the reasons for termination communicated in his termination letter are insubordination, a refusal to adhere to a direct instruction to call Mr Loxton daily and a failure to return customer calls. The Applicant denies he had demonstrated any insubordination in his employment. He submits that he was never given a clear formal direction to call Mr Loxton daily and that he performed his duties as a manager to the best of his abilities, communicating with Mr Loxton regularly as necessary. On occasion, he accepts that he may have missed calls from Mr Loxton and the occasional client and may not have returned all calls because he was busy engaged in his work. However, he maintains that he returned most calls at the earliest opportunity and a failure to return calls as alleged by the Respondent does not constitute serious misconduct justifying dismissal. Mr Margaritis' evidence in proceedings supported these submissions. Further, his evidence also included statements from 3 customers of the Respondent who indicated their satisfaction with his level of support and customer service, which was uncontested.

[28] In the event the Commission finds there was a valid reason for dismissal despite his submissions and evidence, Mr Margaritis submits his termination was harsh, in the circumstances where he was terminated by text message, was not issued with any warnings or other disciplinary action prior to the dismissal and that there were more appropriate alternative disciplinary actions available to the Respondent in the present circumstances.

[29] In support of his submission, Mr Margaritis' evidence is that when he commenced at Safiery he had an understanding he would be provided with the necessary training and support, given his limited experience in the industry. He accepts that while some training was provided, this was inadequate and despite repeated requests directly to Mr Loxton he was not supported further. He submits that he was a diligent employee, that he endeavoured to do his best in difficult circumstances but felt that Mr Loxton was more interested in sales than providing him technical support.

[30] He maintains that he was committed to remaining in employment with Safiery had it not been for his termination, which blindsided him, was communicated to him by text message and came without any warning or performance counselling – formal, or otherwise.

The Respondent's Evidence

[31] The Respondent accepts that the Applicant was employed with an understanding that he would be provided with technical training and support to successfully perform the duties required of his position. They submit and it is not contested that Mr Margaritis was provided with initial training in Queensland soon after commencing his employment. On returning to Melbourne, the Respondent's position is that the Applicant was repeatedly asked to attend further training but failed to do so. Further, that the Applicant was repeatedly asked to respond to logged customer queries but failed to satisfactorily address these requests to the extent Mr Loxton was required to intervene and assist.

[32] In response to these concerns, Mr Loxton's evidence is that he raised his concerns with the Applicant in a voice message left on his phone on 24 October 2023, where he proposed to review and further assist the Applicant with his performance, including by personally attending the Melbourne site office. The Respondent submits and it was not contested that the Applicant's response to this voice message was the following text message:

> *"Hi Bruce*
> *Just got your message I'm at the doctors at the moment as I said in my email I won't be in so don't waste your money coming down. Have a think about a plan for this Victorian Branch and some training for me and I'll call you in a couple of days !"*[13]

[33] Mr Loxton's oral evidence is that in response to this message from the Applicant he started to consider if he was not interested in meeting him and being assisted, whether Mr Margaritis was interested in improving and continuing to work for the Respondent. Despite these concerns, he took steps to provide further training and support to the Applicant by sending a senior technician from Queensland for a period of weeks. The Respondent's case is the Applicant's work performance failed to improve and Mr Loxton was required to assist and direct the Applicant to address customer concerns and complaints. Supporting these submissions, the Respondent presented a series of text messages between the Applicant and the Respondent from October 2023 through to December 2023.

[34] To further address his concerns and manage the Applicant's work performance, Mr Loxton's evidence is that in a phone call with the Applicant on 19 December 2023, he gave Mr Margaritis a clear and lawful direction that he was to call him daily thereafter so they could discuss issues and concerns to ensure they are addressed. When the Applicant failed to follow this direction and did not call him on 20 December 2023, on 21 December 2023 Mr Loxton called the Applicant and again left him a message and text to return his call.

[35] Mr Margaritis failed to call. Mr Loxton submits that this was a clear act of insubordination by the Applicant, that his instruction could not have been clearer and that he was concerned the Applicant had made up his mind to ignore his directions.

[36] Mr Loxton's evidence is that he has not received a call or spoken to the Applicant since 19 December 2023 despite his clear instructions. On 6 February 2024, he sent the Applicant a formal email reminding him he was to call him daily since 20 December 2023 and his failure to do so.

[37] At this time, Mr Loxton's submits that he had almost given up on the Applicant's preparedness to change and rectify his behaviour by following his direction but was prepared to wait to see if anything would change. Considering he had given the Applicant the same lawful direction to call him 3 times, he did not think it was necessary to provide Mr Margaritis any further request to respond or otherwise clarify any consequences of a failure to do so.

[38] When Mr Margaritis failed to call and his response to this written email request failed to acknowledge this fact, Mr Loxton submits he considered the Applicant to have engaged in serious misconduct justifying instant dismissal. On 19 February 2024, he sent the Applicant an email terminating his employment. Further, maintaining that by not acting as directed and calling him, the Applicant denied himself the opportunity to have Mr Loxton's concerns about his performance raised with him.

Findings

[39] Mr Margaritis accepts Mr Loxton asked him to call him daily, on at least one occasion on 19 December 2023 and that he did not. He maintains that this failure was not an act of insubordination or a failure to comply with a lawful direction, because the request was not formally put to him in this way and that he communicated with Mr Loxton in the normal course of performing his work, as Mr Loxton did with him. Further, the Applicant submits that but for the message of 19 December 2023, at no other time did Mr Loxton or another representative of the Respondent call or otherwise formally communicate this direction to him. That when Mr Loxton says he reminded him in writing on 6 February 2024, he considered this to be an informal "note" as part of an otherwise normal communication about an unrelated work matter. Mr Loxton refutes this.

[40] The evidence of Mr Margaritis' failure to address customer complaints is inconclusive. Mr Loxton submits this was part of his insubordination and failure to perform his duties or want to perform them as required. Apart from his oral evidence of phone calls and a series of text messages that indicate a normal pattern of communication between a supervisor and branch manager, there is no other evidence presented that supports this conclusion. There is no email or letter, formal or informal, that outlined the Respondent's concerns and expressly communicates what is required of the Applicant and the consequences of a failure to do so.

[41] Mr Margaritis disputes Mr Loxton's version of the phone calls between them and does not accept that any concerns about his dealings with customers were clearly and directly communicated to him. On the contrary, his evidence is that he had a good track record dealing with customers for the Respondent and has presented written statements from clients that support this view, which were not contested. In this regard, I am inclined to favour the evidence of Mr Margaritis to that of Mr Loxton and do not accept the alleged customer complaints or otherwise are a valid reason for his dismissal.

[42] This conclusion leaves the question of whether Mr Margaritis otherwise demonstrated insubordination in his employment by failing to comply with a direction to call Mr Loxton daily as the only other possible valid reason to justify the termination of his employment.

[43] In this regard, I am not convinced by the Respondent's submissions. In particular, the principal evidence of the Respondent is that on 19 December 2023, Mr Loxton provided the Applicant with a clear and unequivocal direction that he was to call him daily thereafter and this direction was repeated in a voice message left on 21 December 2023. The Applicant disputes this was the case. Mr Loxton has not presented any additional written evidence, formal or otherwise to support this proposition. The additional evidence is that the Applicant continued onto a period of leave for the Christmas period and returned to work on 11 January 2024 and performed his normal duties, including communicating with other team members as required, including Mr Loxton, as an email of 1 February 2024 provided by the Applicant indicates.

[44] In oral evidence, Mr Loxton presented as a straightforward, direct manager, communicator, and CEO. His evidence as to why he did not call the Applicant himself, and why he did not provide the Applicant with a clear warning or direction as to what was expected of him after he sent an email on 6 February 2024 was that he had already told the Applicant twice and it was not his place to tell him again.

[45] I am not convinced this was a considered response from a person who clearly communicates and appears to have a low tolerance for being ignored or trifled with. My impression of Mr Loxton is that these are character traits he takes great pride in. On this basis, I do not accept Mr Loxton's request that the Applicant call him daily was a clear enough direction that the Applicant would have interpreted as a lawful direction he was required to comply with or face disciplinary action.

[46] If this was the case, and the Applicant continued to ignore this direction, I am more convinced by the evidence before me and the submissions of the parties that Mr Loxton would not have waited until 19 February 2024 to take steps to deal with what he describes as insubordination and therefore do not accept this to be a valid reason for termination. I also do not accept that it was enough for the Respondent to have *"told him twice"* and not have taken more proactive steps to warn the Applicant formally and, preferably in writing, that he was facing disciplinary action including the potential termination of his employment.

[47] Terminating an employment relationship is a serious matter, particularly so in cases of serious misconduct. It is well established[14] that prior to making this decision an employer should take steps to clearly provide an employee with due warning and an opportunity to rectify behaviour that is clearly not so offensive or adverse to health and safety as to justify otherwise.[15] In the present circumstances, it is clear to me that this is not the case.

[48] I accept that Mr Loxton had legitimate concerns with the Applicant's tone, conduct and performance and that he sought to address these concerns by providing additional support and direction. I accept that some of this evidence supports a finding that the Applicant engaged in misconduct. In particular, the tone in which the Applicant addresses and communicates with his supervisor supports this conclusion, as the following email extracts identify:

23 October 2024

> *"…I will not be installing any more systems unless trained properly and not over the phone… I will need someone to come and install the kit as I will be doing it myself."*[16]

6 February 2024

> *"Hi Bruce,*
> *Thanks for your feedback*
> *….*
>
> *As for the lack of communication I can say that's definitely a two way street, it seems for the most part I only hear from you when we need to get invoicing and sales numbers up. I'm concerned about the lack of engagement and what seems to be a disregard to the running and success of the Melbourne office. I still require more training and support as well as some direction and planning to ensure the success*
> *of the Melbourne office*
>
> *Please see email below*
>
> *I haven't heard from you either"*[17]

[49] I accept these communications do not reflect a relationship of respect, subordination and trust in his manager's direction and indicate an amount of what may constitute misconduct on behalf of the Applicant. However, I do not accept they amount to insubordination or serious misconduct justifying dismissal. Critically, I have also not been satisfied that Mr Loxton clearly took steps to communicate his concerns to the Applicant and provide him with due warning and procedural fairness.

[50] I also accept that the impression Mr Margaritis had of the verbal request he call Mr Loxton daily was that this was an informal request, that as the Victorian Manager he needed to consider this in the normal course of his duties, and I am not satisfied that his failure to do so is a valid reason for dismissal.

[51] In reaching this conclusion I have also had regard to the fact that the Respondent failed to provide the Applicant with any written direction or clarification of its expectations of him. Further, that the Applicant was not formally warned he could face disciplinary action, was not provided with a written opportunity to rectify his conduct, was not provided with any due process, opportunity to respond or explain himself prior to being provided his notice of termination by text message on 19 February 2024.

[52] Moreover, I have considered the context of the letter of termination provided to the Applicant and in particular the assertion therein that the Applicant was formally reminded in writing of the requirement to call and that he was provided with written warnings and multiple opportunities to correct his behaviour. I have found no evidence of these assertions.

s.387(b) Whether the person was notified of that reason

[53] Proper consideration of s.387(b) requires a finding to be made as to whether the Applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[18]

[54] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[19] in explicit,[20] plain and clear terms.[21]

[55] As identified by the Full Bench in *Crozier v Palazzo Corporation Pty Ltd*:

> "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before a decision taken to terminate their employment in order to provided them an opportunity to respond to the reason identified."

[56] As I am not satisfied that there is a valid reason for dismissal, this factor is not strictly relevant in this case.[22] If I had found there was a valid reason for dismissal, I would have found that Mr Margaritis was not notified of the reason for his dismissal prior to a final decision being made by Mr Loxton. The uncontested evidence before me is that the Applicant was sent an email and termination letter before 6am on 19 February 2024 and alerted to his termination letter by text.

s.387(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[57] There is no evidence the Applicant was provided with an opportunity to respond to the reasons for the dismissal and provided an opportunity to show cause as to why his employment should not be terminated prior to this decision being made and communicated to him. Consequently, there were no discussions prior to the dismissal at which Mr Margaritis could have requested a support person to be present. I consider this to weigh in favour of the Applicant

s.387(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

[58] This factor is not relevant to the facts of this case as there was no request or opportunity for this to occur in the circumstances of this case.

s.387(e) If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal

[59] A Full Bench has previously stated the following regarding what constitutes being "warned" when considering this factor in predecessor legislation:

> "In the context of s.170CG(3)(d) we think that a warning must:

- Identify the relevant aspect of the employee's performance which is of concern to the employer; and

- Make it clear that the employee's employment is at risk unless the performance issue identified is addressed.

In relation to the latter requirement, a mere exhortation for the employee to improve his or her performance would not be sufficient. We also note that we accept that these criterion are to be applied in a practical and commonsense way taking into account the employment context."[23]

[60] Mr Loxton contends the Applicant's failure to satisfactorily attend to customer calls and queries was made known to the Applicant and was a performance related reason that contributed to his decision to terminate the Applicant's employment. Mr Margaritis disputes this is the case, and as indicated above, I have not been satisfied this presents a valid reason for termination.

[61] I have also not been satisfied that the Applicant was provided with any clear warning of unsatisfactory performance prior to being notified of his dismissal. Aside from the disputed phone calls, there is no clear evidence presented to support this conclusion. Furthermore, I do not accept Mr Loxton's position that in deciding not to call the Applicant was denying himself an opportunity to be made aware of Mr Loxton's concerns and provided with a clear warning to improve or face termination. The responsibility of managing Mr Margaritis, identifying concerns, and articulating a requirement for improvement was Mr Loxton's in the first instance and was clearly not discharged in the present circumstances.

[62] On this basis, I find this factor weighs in favour of the Applicant.

s.387(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 s.387(g) - Whether the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise impacted on the procedures followed

[63] The Respondent has not made any submission on the size of its business or the absence of a dedicated human resource specialist. The Respondent is not a small business and has at least 17 employees with a national presence. It does not have dedicated human resources specialists and Mr Loxton appears to be a hands-on founder and CEO, taking a direct role in staffing and management decisions. I am satisfied this factor impacted on the procedures adopted in effecting the termination.

[64] The evidence before me suggests the Respondent's reliance on an informal hands-on approach has presented significant challenges in clearly communicating decisions and would benefit from seeking further advice and assistance with future endeavours. Despite this finding, I am not satisfied that these factors excuse the Respondent from the clear deficiencies in the way it has conducted its communication with the Applicant, articulated its concerns and the procedures of fairness and due process it has failed to apply in effecting its decision to terminate his employment. Therefore, I consider this to be a neutral factor.

s.387(h) Any other matters that the FWC considers relevant

[65] The undisputed evidence in this case is that the Applicant has lost his sole source of income because of his dismissal and that this has had a significant impact on him, his financial and non-financial circumstances. The Applicant also submits, and it has not disputed, that he has not been paid for hours worked on 15, 16 and 20 February 2024, that he did not receive a 1 month notice period required by his contract of employment, and that despite applying for over 50 jobs he has not yet been able to find alternative employment.

[66] I have regarded these other factors to weigh in favour of the Applicant.

Conclusion

[67] I have determined that there was not a valid reason for the dismissal.

[68] I am not satisfied that Mr Margaritis was notified of the valid reason for his dismissal prior to this decision being made.

[69] I am not satisfied that Mr Margaritis was given an opportunity to respond to any reason related to his capacity or conduct.

[70] There was no unreasonable refusal by the Respondent to allow Mr Margaritis a support person because no meeting ever occurred.

[71] I am not satisfied that there was relevant unsatisfactory work performance prior to the dismissal that was a contributing factor.

[72] I consider that the size of the Respondent's business and the absence of employed dedicated human resource management specialists impacted on the procedures followed.

[73] I have also had regard to the other matters I consider are appropriate to take into consideration.

[74] I have determined that Mr Margaritis' dismissal was harsh, unjust and unreasonable.

[75] If I had found there was a valid reason, I would have found the dismissal was harsh given Mr Margaritis's age and because the employer's concerns with his conduct were not clearly and formally communicated to him or so serious as to constitute serious misconduct.

[76] If I had found there was a valid reason, I would also have found that the dismissal was unjust and unreasonable because Mr Margaritis was not notified of the reason for dismissal and was not provided with an opportunity to respond prior to the final decision being made.

Remedy

[77] Having been 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 Act;

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

[78] Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

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

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

Is reinstatement of the Applicant inappropriate?

[79] In the present circumstances, the Applicant submits that reinstatement is not an appropriate remedy as his health may be impacted were he reinstated and that the inherent trust and confidence required of parties to the employment relationship has been destroyed. The Respondent supports this.

[80] I have considered these submissions, and I am satisfied that in the present circumstances reinstatement is not an appropriate remedy due to the clear breakdown of the employment relationship between the parties, which appears to be beyond repair.

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

[81] Having determined that reinstatement is not appropriate, 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…"[24]

[82] Where an Applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[25]

[83] Here, the Applicant submits that he would have continued in his employment relationship for at least a further 12 months. His undisputed evidence is that he has not been able to secure alternative income since his termination despite significant effort. On this basis, I am satisfied that the Applicant has incurred financial loss in the period since his termination and that some compensation is appropriate.

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

[84] Section 392(2) of the Act requires all 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 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 WC considers relevant.

[85] During the hearing, I invited both parties to address these criteria and at the conclusion of proceedings sought additional submissions on the effect of any order on the viability of the Respondent's enterprise. Considering all the circumstances of this case, the evidence before me and additional submissions, I am satisfied I can form a view as to compensation and consider each of these criteria below.

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

[86] I do not have any evidence before me that would indicate that an order for compensation would have an effect on the viability of the employer's enterprise. In additional submissions provided after proceedings the Respondent presented a statutory declaration from Mr Loxton indicating a challenging net cash and available cash position confronting the Respondent. Ultimately however, this evidence suggests a stable and viable financial position for the Respondent, taking into account sales forecasts for immediate payment, relevant to wages despite a poorer revenue performance for the Victorian enterprise in FY24 when compared to FY23. Submissions from the Respondent are that the business's viability was not a factor in its decision to terminate the Applicant. I have therefore regarded this as a neutral factor in the calculation of compensation.

(b) the length of the person's service with the employer

[87] The Applicant commenced employment with the Respondent in a full-time capacity on 21 February 2023 and worked for the Respondent 1 week less than a full 12 months until 19 February 2024.

[88] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

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

[89] As stated by a majority of the Full Court of the Federal Court:

> "…in determining the renumeration 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 has 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 the likelihood of a further termination in order to be able to assess the amount of renumeration the employee would have received, or would have been likely to receive, if there had not been the actual termination".[26]

[90] In the present circumstances, the Applicant's evidence is that he would have continued in his employment for at least a further 12 months but for his termination. The Respondent does not accept this position and Mr Loxton's evidence is that once the Applicant failed to Respondent to his request to call him a third time after 6 February 2024 his termination was just a matter of time. The evidence in this case clearly indicates that by this stage the employment relationship was breaking down and may well have been beyond repair. I have also found that Mr Loxton had legitimate concerns with the Applicant's conduct that, while not a valid reason for termination, are a relevant consideration to the likelihood of the employment relationship continuing.

[91] There is no conclusive evidence before me to suggest the Applicant may not have addressed the Respondent's concerns with him and called Mr Loxton. Mr Loxton's own evidence is that had this occurred termination may not have occurred. However, on the evidence before me, I consider this unlikely. In these circumstances, I consider it likely that the Applicant would have remained in employment for a further period. I am not convinced however that this period would have been indefinite. Rather, considering all the circumstances of this case, in particular the tone of the communication (and lack thereof) between the Applicant and the Respondent, I find Mr Margaritis would likely have remained employed for a further four months. I consider this to be the "anticipated period of employment."[27]

[92] Mr Margaritis's annual salary was $100,000.00.

[93] I calculate the remuneration Mr Margaritis would have been likely to receive working for Safiery from 21 February 2023 to 21 June 2024 to be $33,333.33 gross, plus superannuation of $3666.66

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

[94] I am satisfied that the Applicant took reasonable steps to mitigate his loss as evidenced by the uncontested submissions that he has sought alternative suitable employment, applying for over 50 positions since termination.

(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

[95] The Applicant's evidence is that he has not received any remuneration since being dismissed by Safiery.

(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

[96] As I have found the anticipated period of employment would have ended on 21 June 2024 and there being no evidence of the Applicant's earnings between the time of making the order and the actual compensation, this factor is not relevant.

Compensation – how is the amount calculated?

[97] 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 Licenced Festival Supermarket (Sprigg)*. This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages"*.[28]

[98] The approach in Sprigg is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an Applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[99] I have estimated that Mr Margaritis would have remained employed by Safiery until 21 June 2024.

[100] The remuneration Mr Margaritis would have received, or have been likely to have received, from his dismissal on 21 February 2024 until 21 June 2024 is $33,333.33 gross, plus superannuation of $3666.66.

Step 2

[101] Only monies earned since termination for the anticipated period of employment are to be deducted.[29]

[102] Mr Margaritis did not earn any remuneration duration the anticipated period of employment and I am satisfied he has made effort to mitigate his loss but has been unsuccessful. Accordingly, there are no deductions.

Step 3

[103] I now need to consider the impact of contingencies on the amounts likely to be earned by Mr Margaritis for the remainder of the anticipated period of employment.[30]

[104] I have already determined Mr Margaritis' earnings during the anticipated employment period. Therefore, I do not need to make a deduction for contingencies.

Step 4

[105] I have considered the impact of taxation but have elected to settle a gross amount of $33,333.33 plus superannuation of $3666.66.

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

[106] 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 Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[107] I am satisfied that there was some misconduct of the Applicant, involving his communication language, tone, and failure to respond to informal requests of a supervisor which contributed to the employer's decision to terminate his employment.

[108] In all the circumstances, I am satisfied that the appropriate amount by which to reduce the amount of the order for compensation on account of misconduct is 10%.

[109] Applying this reduction to the amount determined at step 4, the gross amount of compensation to be ordered is $29,999.99 plus superannuation of $3,299.99.

Compensation – how does the compensation cap apply?

[110] Section 392(5) of the Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under s.392(6); and

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

[111] Section 392(6) of the Act provides:

The amount is the total of the following amounts:

(a) The total remuneration:

i. Received by the person; or

ii. To which the person was entitled;

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

[112] Given Mr Margaritis' annual salary rate of $100,000.00 a compensation cap of 50,000.00 applies in accordance with s.392(6) of the Act.

Is the level of compensation appropriate?

[113] Having applied the formula in *Sprigg,* I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate have regard to all the circumstances of the case.[31]

[114] The application of the Sprigg formula has resulted in an outcome where Mr Margaritis would be awarded compensation of is $29,999.99 gross plus superannuation of $3,299.99

[115] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the Act.

Compensation Order

[116] Given my findings above, an order [PR777838] will be issued requiring the Respondent to pay Mr Margaritis the amount of $29,999.99 less taxation as required by law, plus superannuation of $3,299.99 to be paid into Mr Margaritis' nominated fund, with both payments to be made withing 14 days of the date of this decision.

COMMISSIONER

Appearances (via videoconference):

Mr A Jewell *on behalf of the Applicant*
Mr B Loxton *on behalf of the Respondent*

Hearing details:

2024.
Melbourne.
27 May

Final written submissions:

5 June 2024.

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[1] Court Book page 53.

[2] Respondent's Outline of Evidence and Witnesses to Be Called at [2], Court Book page 42.

[3] Witness Statement of Con Margaritis at [CM-4], Court Book page 22.

[4] Ibid.

[5] (1995) 131 ALR 422 at [128].

[6] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB Ross VP, Lacy SDP, Simmonds C, 21 March 2002, at [69].

[7] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at [373].

[8] Ibid.

[9] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at [685].

[10] *Edwards v Justice Giudice* [1999] FCA 1836 at [7].

[11] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].

[12] [2020] FWC 2989.

[13] Court Book page 48.

[14] See *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFB Ross VP, Williams SDP, Blair C, 21 August 2000) at [43]-[44]; also: *Read v Gordon Square Child Care Centre* [2013] FWCFB 762 at [46]-[49]; *Rizvi v Salini* [2023] FWC 3112 at [48]-[50], [56]-[57].

[15] Ibid.

[16] Witness Statement of Con Margaritis at [CM-3], Court Book page 20.

[17] Ibid, Court Book Page 21.

[18] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533 at [55].

[19] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [151].

[20] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[21] Ibid.

[22] *Read v Gordon Square Child Care Centre* [2013] FWCFB 762 [46]-[49]; also *Rizvi v Salini* [2023] FWC 3112 at [48]-[50], [56]-[57].

[23] *Fastidia Pty Ltd v Goodwin* Print S9280 (AIRCFB Ross VP, Williams SDP, Blair C, 21 August 2000) at [43]-[44].

[24] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [9].

[25] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550 at [20]; *Jeffery v IBM Australia Ltd* [2015] FWCFB 4171 at [5]-[7].

[26] *He v Lewin* [2004] FCAFC 161 at [58].

[27] Ellawala v Australian Postal Corporation Print S5109 (AIRCFB Ross VP, Williams SDP, Gay C, 17 April 2000) at [34].

[28] [2013] FWCFB 431.

[29] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFC 7206 at [17].

[30] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Action SDP, Gay C, 31 October 2001) at [39].

[31] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFC 7206 at [17].