DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Timothy Orford
v
RPMA No.1 Pty Ltd
(U2023/10059)

DEPUTY PRESIDENT ROBERTS — SYDNEY, 29 JANUARY 2024

Application for an unfair dismissal remedy

[1] On 15 October 2023, Mr. Timothy Orford (Applicant) applied to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (Act) for a remedy having alleged that he had been unfairly dismissed from his employment with RPMA No. 1 Pty Ltd (Respondent). The Applicant sought orders for compensation pursuant to s.392 of the FW Act.

[2] The matter was listed to be heard on 25 January 2024 after the parties were directed to file material in support of their respective cases. Limited material was filed in response to those directions. The parties were self-represented. After taking into account the views of the parties, I determined that the matter would be dealt with by way of private conference under s.398 of the Act.

When can the Commission order a remedy for unfair dismissal?

[3] Section 390 of the Act provides that the Commission may order a person's reinstatement, or the payment of compensation to a person if satisfied that the person was protected from unfair dismissal at the time of being dismissed and the person has been unfairly dismissed. Section 382 provides that a person is protected from unfair dismissal if the person is an employee who has completed a period of employment of at least the minimum employment period and the person is covered by a modern award, an enterprise agreement applies to the person, or the person earns less than the high-income threshold.

[4] Section 385 relevantly provides that a person has been unfairly dismissed if the Commission is satisfied of four matters: the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy.

[5] It was not contested, and I am satisfied, that the Applicant is protected from unfair dismissal for the purposes of s.382 as he was employed for longer than the minimum employment period and was covered by a modern award. The Applicant gave uncontested evidence that he was employed as a casual on a regular and systematic basis for more than 12

months. I am satisfied that during his period of service he had a reasonable expectation of continuing employment on a regular and systematic basis. The Respondent accepted that the Applicant was employed under the Hospitality Industry (General) Award. There being no argument to the contrary I am also satisfied that the dismissal here was not consistent with the Small Business Fair Dismissal Code.

[6] The Applicant was dismissed on 6 October 2023 and lodged his application for relief within the requisite time period.[1] No jurisdictional issues arise with the application. That being the case, the question of whether the Applicant has been unfairly dismissed will depend on whether the Commission is satisfied that the dismissal was harsh, unjust or unreasonable within the meaning of s.385.

Evidence

[7] The evidence was uncontested. The Applicant said that he was employed as a casual chef by the Respondent at the Royal Hotel in Wallerawang from approximately June 2022. He worked approximately 25 hours per week, six days per week. He was residing in one of the rooms of the hotel which was provided to him by the Respondent. At 9.08am on 5 October he texted Mr. Mathew Andrews, one of the two directors of the Respondent, to say he was unable to work his shift on that day. The shift was to commence at 5pm that day. He received no reply from Mr. Andrews. The Applicant did not attend the shift.

[8] At 2.35pm on 6 October 2023 the Applicant received a text from the other director of the Respondent, Mr. Robert Parrott. The text said "*Tim you no longer have job with us. I need you out of room by morning. You are not allowed on licensed premises.*" Shortly after, the Applicant responded by text saying "*What's the reason for the dismissal and you need to give me notice to exit the room otherwise I'll seek legal action against RPMA.*" The response from Mr. Parrott was *"Ok you abandoned your post (not for the first time) and did not reply to manager. You are on licensed premises and if u do not leave tomorrow I will have you removed and fined for failure to quit licensed premises."* The Applicant replied *"I don't abandoned my post. I informed Matt yesterday that can't make my shift yesterday. I'm lodging a fair work complaint against RPMA."* Some further text exchanges followed. Ultimately the Applicant was permitted to stay in his room for a further four weeks but did no further work for the Respondent.

[9] The Applicant said that he had communicated by text message with Mr Andrews at an earlier stage in his employment. He said he had first tried to notify the Hotel's operations manager of his absence on 5 October but had been unable to do so because his text messages were not going through. He said at that point he thought it appropriate to notify Mr. Andrews of his imminent absence.

[10] The Respondent did not contend that Mr. Andrews did not receive the Applicant's text message advising of his absence. They said Mr. Andrews was not at that stage involved in the running of the business. They said the Applicant should have contacted the operations manager who also lived in the hotel. The Respondent said that as a result of the Applicant's absence, the bistro where he worked was unable to open on the night of 5 October.

Was the dismissal harsh, unjust or unreasonable?

[11] In considering whether the dismissal was harsh, unjust or unreasonable I am required to take into account the matters listed in s.387.

[12] The Applicant was dismissed for "abandoning his post" that is, his absence from work on 5 October 2023. I accept the Applicant's evidence that he attempted, unsuccessfully, to notify the operations manager of his absence. It was uncontested that Mr. Andrews received the Applicant's message on the morning of 5 October 2023. In my view the Applicant took reasonable steps to advise the Respondent of his absence. In that case there was no valid reason related to his capacity or conduct for his termination. This weighs in favour of a conclusion that the termination was harsh, unjust or unreasonable.

[13] Since there was no valid reason for the termination, the issue of notification of the reason and opportunity to respond are not relevant here. There was no unreasonable refusal to allow a support person to be present for discussions about dismissal as there was no opportunity for such a request to be made.

[14] The dismissal occurred because of the Applicant's absence from work, not because of work performance. In any event there was uncontested evidence from the Applicant, which I accept, that he had never received any warnings of any kind prior to his dismissal. This is a neutral consideration here.

[15] Subsections (f) and (g) of s.387 relate to the degree to which the size of the Respondent's business and the lack of specialist human resource management resources would be likely to impact on the dismissal procedures. The Respondent said it had only 4 employees at the time of the dismissal. I regard the small scale of the Respondent's operations and its lack of specialist resources as having an impact on the processes that were followed. Nonetheless the processes that were followed were poor by any objective measure, even taking into account the size and resources of the Respondent. This weighs in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

[16] There are other relevant factors to take into account. First, the Applicant was dismissed summarily by text message. He was given no notice of his dismissal and the dismissal was not conveyed to him in person. When he was notified, he explained that he had given notice of his absence. That made no difference to the Respondent's decision even though they accepted that he had notified one of the two company directors. Second, the consequences of termination for the Applicant were serious. The Respondent told him that he was to leave the premises the following day. This meant the Applicant would have been homeless as well as unemployed. Later the Respondent allowed the Applicant to remain at the hotel, rent-free for another month. This ultimately tempered the impact of the demand to leave. However, the initial decision to require the Applicant to leave immediately would have put the Applicant in a very stressful position and exacerbated the adverse effect of the termination. It added an unnecessary element of harshness to the decision to terminate the Applicant's employment. Third, the Applicant said he had never received any warnings in the 16 months period of his employment. The Respondent did not challenge this. Summary dismissal for an absence which the Applicant notified of in those circumstances is a harsh outcome.

[17] Having regard to my conclusions above I am satisfied that the termination of the Applicant's employment was harsh and unreasonable.

Remedy

[18] The Applicant did not seek reinstatement. The Respondent gave evidence that it had ceased trading and was in financial difficulty. I accept that to be the case. I do not regard reinstatement as appropriate in the circumstances. The Applicant sought compensation. I am satisfied that it is appropriate in the circumstances to make an order for compensation in lieu of reinstatement. In doing so, I am required by s.392 to take account of all of the circumstances of the case, including the matters listed in subsections (2)(a) to (g) of that section.

[19] The Respondent gave evidence that creditors had already taken steps to have the company wound up. They said this was unlikely to be contested. They said are no longer trading or employing anyone. An order for compensation of the kind now contemplated is, in my view, unlikely to ultimately mean the difference between the company continuing as a viable entity or being placed into liquidation.

[20] The Applicant advised that he had obtained alternative employment on 6 November 2023 and continued in that position to the present time. His hours and earnings in that job were similar to those he had when working with the Respondent. The Applicant has taken reasonable steps to mitigate his loss. Because of the Respondent's poor financial position, I think it likely that the Applicant would have continued in his employment for only a limited period had he not been terminated. It is unlikely that this period would have extended beyond 1 December 2023. The Applicant said that he earned on average $650 to $700 gross per week while he was working with the Respondent. The Respondent accepted these figures. I have taken into account the earnings of the Applicant from his current employment from the period after his dismissal up until the making of the proposed order and the amount he would reasonably be likely to earn between the date of the proposed order and the compensation. I also take account of the Applicant's length of service.

[21] The well-established approach to the assessment of the quantum of compensation under s.392 of the Act is to apply the "Sprigg formula". That formula is derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*.[2]

[22] 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 5: Assess the figure against the compensation cap.

[23] Applying the above formula to this case I conclude that the remuneration lost by the Applicant was 8 weeks wages at $675 (gross) per week. I deduct the earnings the Applicant has received since termination. This reduces the amount to 4 weeks wages at the above amount. There should be no deduction for a failure to mitigate or for contingencies. The amount proposed does not exceed the compensation cap.

[24] For the reasons outlined above, I consider that the Applicant was unfairly dismissed and a payment of $2,700 (gross) should be paid by the Respondent to the Applicant as compensation in lieu of reinstatement is an appropriate remedy.

[25] An order requiring payment in this amount will issue separately.

DEPUTY PRESIDENT

Appearances:

Mr Timothy Orford for the Applicant.

Mr Rob Parrott and Mr Mathew Andrews for the Respondent.

Hearing details:

In-person on Thursday 25 January 2024 at the Fair Work Commission, Sydney.

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[1] s 394(2).

[2] (1998) 88 IR 21.