DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Chen Xu
v
Hisense Australia Pty Ltd
(U2024/6583)

DEPUTY PRESIDENT MASSON MELBOURNE, 16 SEPTEMBER 2024

Application for an unfair dismissal remedy - termination not harsh, unjust, or unreasonable – application dismissed.

[1] On 9 June 2024, Mr Chen Xu (the Applicant) made an application to the Fair Work Commission (the Commission) under s 394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging he had been unfairly dismissed from his employment with Hisense Australia Pty Ltd (the Respondent) on 5 June 2024.

[2] Conciliation of the matter before the Commission was unsuccessful and the matter was then listed for determinative conference/hearing before me on 11 September 2024 to determine the merits of the application. Materials were filed by the Applicant and Respondent in advance of the proceedings in accordance with directions issued by the Commission. After hearing from the parties, I determined to conduct the proceeding as a hearing pursuant to s 399 of the Act.

[3] At the hearing, the Applicant appeared and gave evidence. The Respondent was granted permission to be legally represented by Mr Paris Lettau of Counsel pursuant to s 596(2)(a) of the Act. Mr Lettau called the following witnesses to give evidence for the Respondent;

- Ms Ran Sun – Operation Director for Hisense Australia
- Mr Da Xu – Assistant General Manager for Hisense Australia

Background and evidence

Applicant's role

[4] The Respondent is the Australian based subsidiary of Hisense Company Ltd which is based in Qingdao, China and is a leading global consumer electronics and home appliance brand[1]. The Applicant commenced employment with the Respondent on 4 July 2022 in the position of Product Line Manager having accepted employment on 2 June 2022[2] (the Employment Contract).

[5] Mr Xu described the organisational structure and reporting relationship of the Applicant. He explained that in his role as Assistant General Manager, he reported to the General Manager of the Respondent, Mr Finn Zhang. Mr Xu also states that he was promoted to his current position in March 2023 from which point he became the Applicant's direct manager. He also had five other Product Line Managers for white goods that reported to him. The Applicant disputed that he reported to Mr Xu and claimed to have reported directly to Mr Zhang. Mr Xu rejected the Applicant's evidence on the Applicant's reporting relationship and referred to the fact that he (Mr Xu) had undertaken the Applicant's performance review[3] (the 2023 Performance Review) for the 2023 performance year which the Applicant signed on 9 February 2024. According to Mr Xu the Applicant's duties consisted of the following;

a. Plan TV products to achieve the sales and profit annual target.
b. Manage the product planning and development of laser TV and soundbar to reach annual sales targets.
c. Manage the selling price and price policy for overall brown goods, including TV, laser TV and soundbar.
d. Coordinate the factory and the shipping line to ensure goods produced and shipped out on time.
e. Assist on the product quality improvement of brown goods.
f. Supervise the timely completion of plinth, endcap and gondola buildup.[4]

[6] During cross-examination the Applicant agreed that on accepting his Employment Contract he had read and understood the terms including the specific obligations set out at clauses 5.2(b), 6(a) and 6(c). These Employment Contract clauses dealt with the Applicant's obligations to 'at all times act faithfully, honestly and diligently' (clause 5.2(b)), comply with the Respondent's policies and procedures (clause 6(a)) and a failure to do so could lead to disciplinary action up to an including dismissal (clause 6(c)). The Applicant also confirmed that on commencement of employment he received a copy of the Hisense Australia Pty Ltd Employee Handbook (the Employee Handbook) which he acknowledged in signing that he had received and read it on 2 June 2022[5]. He acknowledged having read and understood the policies in the Employee Handbook including those dealing with the Whistleblower Policy (clause 10) and Bullying and Harassment (clause 13).

2023 Performance Review

[7] As stated above, the Applicant's 2023 Performance Review was signed and returned by the Applicant to Mr Xu on 9 February 2024. The outcome of the review was that Mr Xu agreed with and submitted a performance rating of 'B' for the Applicant to the Australian General Manager, Mr Zhang who was responsible for reviewing the preliminary ratings of staff before finalising final scores for employees. Mr Xu states that he did not receive a final score from Mr Zhang and had no role beyond submitting the preliminary assessment[6].

[8] The Applicant gave evidence that after submitting his signed 2023 Performance Review to Mr Xu on 9 February 2024, he sought confirmation of the final score and despite sending emails seeking confirmation of his final score in February and early March 2024, he did not receive the requested confirmation. He states it was not until on or about 20 March 2024 that he became aware that his final rating had been dropped from a 'B' to a 'C'. On becoming aware of the rating change, he appealed the rating downgrade to the Human Resources Department

on 20 March 2024[7]. An investigation of the Applicant's complaint by Human Resources resulted in a reversal of the rating downgrade with the initial rating of 'B' restored. The response to the Applicant's appeal provided by Shou Yang of Human Resources on 25 March 2024 read as follows;

> "Hi Sunny
>
> After understanding the matter, the situation is as follows:
>
> First, the department's initial evaluation was B; later the Australian company adjusted evaluation to C based on headquarters' requirements for the overall proportional distributions, combined with the product line performance results.
>
> However, based on the department's discussions with you, the headquarters will respect the employee's signed evaluation.
>
> Erin and Ryan please be responsible for actioning this and follow the process according to the evaluation change rules. After the process is completed, adjust the evaluation to B in the system.
>
> Thank you."[8]

Annual Planning Meeting

[9] The Applicant gave evidence that he was 'excluded' from the Annual Planning Meeting (the 2024 Planning Meeting) held in early 2024, having been invited to participate in the same meeting twelve months earlier (the 2023 Planning Meeting). He claimed that his exclusion from the 2024 Planning Meeting constituted workplace bullying, deliberate isolation and discrimination by Mr Zhang.

[10] Ms Sun explained that the Respondent holds annual planning meetings at the beginning of each year and that attendees may vary depending on dynamic business demands. She states that compared to the 2023 Planning Meeting; four managers were not invited to the 2024 Planning Meeting. She explained that the organisational structure change which led to the Applicant reporting to Mr Xu was the reason why he was not invited to the 2024 Planning Meeting.

[11] Mr Xu also rejected the Applicant's claims of bullying, isolation and discrimination. He explained that each year the Board of the Respondent determines attendees at the Annual Planning Meeting. He agreed that the Applicant had attended the 2023 Planning Meeting, but the organisational structure changed in early 2023 following the 2023 Planning Meeting when he was appointed to the position of Assistant General Manager. This change led to several direct reports including the Applicant not being invited to the 2024 Planning Meeting despite having attended the 2023 Planning Meeting. He referred to other direct reports of his that did not attend the 2024 Planning Meeting including the Research and Development Manager and Spare Parts Manager as well as the Applicant[9].

[12] Mr Xu was challenged by the Applicant during cross-examination about the Applicant's exclusion based on the Applicant's claim that he (the Applicant) did in fact report to the General Manager in his capacity as brown goods Product Line Manager. Mr Xu restated that he was responsible for both brown goods and white goods in his role as Assistant General Manager and that the Applicant reported to him. It was for reasons of his (Mr Xu's) responsibilities as Assistant General Manager that he was invited to the 2024 Planning Meeting. He agreed however that he did not explain to the Applicant at the time of the 2024 Planning Meeting why had not been invited to the meeting.

5 April 2024 email and formal warning

[13] At 4.27pm on 5 April 2024, the Applicant sent an email[10] to the Finance Manager Yaofa Zhang and copied in other finance and product team members. The email was written in mandarin and was said by Ms Sun to contain disrespectful language and cast blame on the Finance Manager for wasting the Applicant's time. She explained that the original email from the Finance Manager was written in mandarin and the Applicant's response was in red which in Chinese culture is rude. She also provided a translation of what was said by her to be the disrespectful language used by the Applicant. The idiom used by the Applicant was said by Ms Sun to be very offensive in Chinese, accusing the Finance Manager that he knows nothing but talking. This phrase literally translates to "standing there talking without getting down to work" and is used to describe people who only talk but do not do any actual work.[11]

[14] Ms Sun further explained that the Applicant in responding to concerns over his email later translated his response to English which then read "please do not waste our time replying to emails with opinions from those who don't do practical work". Ms Sun claims that the Applicant sought to neutralise the tone of the original email, however she claimed both versions were disrespectful of the Applicant's colleagues.

[15] The Applicant was cross-examined on his email and denied that the tone or use of red lettering in it was rude and was in fact common. He conceded however that the email suggested that the target of the email was lazy and accepted that offence might be taken by the email recipient although that was not his intention, and he rejected that the email was inappropriate. The Applicant also maintained that he was unsure what words he used were said to be offensive or disrespectful.

[16] Ms Sun states that after becoming aware of the email she had a conversation with the Finance Manager who advised her that he felt upset and humiliated by the disrespectful language and uncooperative working attitude displayed by the Applicant. She then discussed the matter with the General Manager with both agreeing that the Applicant had breached the Respondent's standards of professionalism and the bullying policy in the Respondent's Employee Handbook. She says it was concluded that the Applicant's behaviour contained 'abusive, insulting or offensive language or comments' and 'unjustified criticism or complaints'[12]. A warning letter (the 1st and Final Warning) was then issued to the Applicant in the following terms;

> **"Confirmation of 1st and final written warning**

> I am writing to address a serious matter that has been brought to my attention concerning your behaviour in the workplace. It has come to my notice through email that you have engaged in the use of abusive language towards your coworker. This behaviour is entirely unacceptable and goes against the values and principles that we uphold at Hisense.
>
> As an employee of Hisense, you are expected to maintain a professional and respectful demeanour at all times, especially when interacting with your colleagues. It is imperative to foster a positive and inclusive work environment where everyone feels valued and respected. Your use of abusive language not only violates company policies but also creates a hostile and uncomfortable atmosphere for your coworkers.
>
> I want to emphasize that such behaviour will not be tolerated under any circumstances. Everyone in our organization is entitled to a workplace free from harassment and verbal abuse. As such, this letter serves as a formal warning regarding your conduct. Any further instances of abusive language will result in disciplinary action, up to and including termination of employment.
>
> I urge you to take this warning seriously and reflect on your actions. It is crucial that you make a concerted effort to improve your behaviour and adhere to the standards of professionalism expected of you as an employee of Hisense. Additionally, I encourage you to seek out resources and support, such as counselling or anger management programs, if you feel that you may benefit from them.
>
> Please acknowledge this warning will be placed in your personnel file. If you have any questions or concerns regarding this matter, please do not hesitate to reach out to me."[13]

[17] Following the 1st and Final Warning the Applicant being issued, the Applicant was then directed by Ms Sun on 8 April 2024 to take a weeks' 'gardening leave' and not attend the workplace until 15 April 2024 at which point a face-to-face meeting would be held to discuss the issues. Ms Sun agreed that there was no direct discussion with the Applicant prior to him being issued with the 1st and Final Warning or being placed on 'gardening leave'. She also agreed that the use of 'gardening leave' to stand down the Applicant was incorrect as 'gardening leave' was reserved for where an employee had given or received notice of termination of employment.[14] She agreed that use of 'gardening leave' in the circumstances was not justified as the Applicant had neither given or received notice of termination of employment and nor was termination of employment being considered by the Respondent at that stage.

Rumours about resignation

[18] Following the Applicant being stood down on pay on 8 April 2024, Mr Zhang requested Hisense Headquarters to remove the Applicant's access to confidential information during his period of stand down. Ms Sun states that unbeknown to the Respondent's Australian leadership, this resulted in the Applicant's removal from several employee WeChat groups as well as loss of access to his work email account[15]. The Applicant claims that removal of IT access was unnecessary and additionally he says he became aware of rumours circulating that he had resigned, rumours he claimed were initiated by Mr Zhang. Because of those rumours the

Applicant sent a lengthy email[16] to Mr Zhang and Ms Sun complaining about the rumours, firmly stating that he had not resigned and requesting that the speculation and rumours cease.

[19] The Applicant was cross-examined on his accusation that Mr Zhang had spread the rumour of his resignation. He agreed that he had no direct evidence that the rumours were spread by either Mr Zhang or Ms Sun, but he suspected they had bad intentions. He did not accept that a more likely explanation for the rumour was that employees were independently speculating on his employment status because of his having been stood down and removed from certain WeChat groups. Ms Sun rejected that she had been party to spreading the alleged rumour and states she was not aware of the rumour until she received the WeChat messages and emails from the Applicant[17].

Complaint to Hisense headquarters

[20] On 10 April 2024, the Applicant sent an identical message[18] to four separate WeChat groups. According to Ms Sun, the WeChat groups comprised hundreds of recipients that included employees employed in Hisense subsidiaries around the globe, employees who were not part of the Respondent's management team and employees of the Respondent who were not authorised to receive complaints of the type contained in the message. On the same day, the Applicant sent a group email[19] to 45 personal email accounts and 13 department email accounts. The email was in identical terms to the message sent to the WeChat groups on 10 April 2024 and stated as follows;

> "To: Company Leadership Subject: Formal Complaint Regarding Conduct in the Australian Branch
>
> Dear Leaders,
>
> I hope this message finds you well. I apologize for the intrusion and any disruption this may cause to your schedules. Updated typo in the previous email.
>
> I am Chen Xu, employee number 20229724, serving as the Black Electric Product Line Manager at the Australia branch. I am writing to formally report actions conducted by the MD of the Australian branch, Zhang Xifeng, who is also the General Manager for the Asia-Pacific region, and Sun Ran, the Operations Director of the Australian branch.
>
> 1. Manipulation of Market Statistics for Gfk Reporting: There has been deliberate manipulation of market statistics reported to Gfk. Under instructions from Zhang Xifeng, product line managers, including myself, have been directed to submit altered sales data for Gfk's monthly reports. This was done to control and convey manipulated business performance figures to headquarters. I have documented evidence of the actual sell-out data versus the manipulated figures submitted to Gfk from September 2022 to the present.
>
> 2. Workplace Bullying and Discrimination: The management has utilized its authority to bully and isolate Chinese employees, coercing them into resignation through constant negation of their voices and spreading misinformation about their voluntary departure when, in reality, these employees were dismissed. This

ignores the importance of listening and talking things through to make the company better, and doesn't pay attention to the good ideas these employees have for improving the business.

3. Unlawful Termination of Pregnant and Nursing Employees: Directed by Sun Ran, there have been instances of illegal dismissals involving employees during their maternity and nursing periods. I am aware of a case where such dismissal led to depression and premature birth at seven months for one employee, and another nursing employee was dismissed shortly after returning from maternity leave. Both cases have been reported to local labor protection agencies in Australia and are pending legal proceedings.

4. Misappropriation of Funds Regarding Work Visa (482) Intermediary Services: There has been apparent embezzlement in handling the intermediary service fees for Zhang Xifeng's work visa (482), with costs significantly exceeding the market rate, as evidenced by the invoices provided by the Australian intermediary.

I trust that you will take this report seriously and investigate these matters thoroughly.

Thank you for your attention to these urgent issues.

Sincerely

Chen Xu Product Line Manager, Australia"

[21] Ms Sun states that the above email and WeChat messages in the same terms raised allegations against herself and against the General Manager of the Respondent, Mr Zhang. While not a member of the WeChat group or a recipient of the email, Ms Sun became aware of it when the notified by Mr Zhang and Mr Xu. She further states that Hisense Headquarters in response to the email and WeChat messages sent investigators to Australia to undertake an investigation into the allegations raised by the Applicant. This involved interviews with the Applicant and Australian staff of the Respondent including herself on 29 April 2024. She says that following conclusion of the investigation, the Respondent's leadership was notified of the outcome in a Teams meeting on 24 May 2024, the outcome being that the allegations were not substantiated[20].

[22] The Applicant gave evidence that he was interviewed by the investigation team and was subsequently advised in an on-line meeting on 16 May 2024 that all the complaints he had raised had been found to be untrue. He further states that he did not receive any written notification or a report of the outcome of the investigation beyond a perfunctory response in an email to him on 4 June 2024 stating that the outcome had been communicated to him orally during the 16 May 2024 meeting. Both Ms Sun and Mr Xu confirmed during cross-examination that neither of them received a formal report on the investigation or its outcome.

[23] The Applicant was cross-examined on his 10 April 2024 email and WeChat messages during which cross-examination he;

- agreed that he was aware of the requirement to raise a complaint with the persons in positions listed in the Whistleblower Policy, those positions being 'Directors, officers, senior managers and any appointed external auditor or actuary';

- claimed to have raised the complaints on an informal basis with an unnamed senior colleague prior to sending the 10 April 2024 email and WeChat messages;

- believed that the email and WeChat message distribution was in accordance with the process for raising 'reportable conduct' under the Whistleblower Policy;

- explained that the broad distribution of his email was because he was unsure who the complaint needed to be sent to within the Hisense organisation and at the time he sent the email and message, he did not have access to his work email account and therefore did not have access to relevant email account addresses;

- agreed that the nature of the four allegations he had raised in his email and WeChat messages fell within the Whistleblower Policy descriptions of 'reportable conduct' and also agreed that the policy aimed to ensure confidentiality and the controlled management of disclosures;

- denied that the allegations were raised to harm the General Manager of the Respondent and Ms Sun but agreed that the allegations could have harmed those two persons;

- agreed that the wide distribution of the complaints/allegations was in breach of the Whistleblower Policy but did so because he was unsure who to send the allegations to;

- agreed that the distribution of the message to several WeChat groups on 10 April 2024 resulted in the distribution of potentially damaging allegations to employees other than 'directors, officers or senior managers' as specified in that section of the Whistleblower Policy that deals with how to report misconduct[21]; and

- agreed when pressed on the WeChat message distribution that it was not the right thing to do.

Investigation and termination of employment

[24] Ms Sun states that after completion of the investigation into the allegations raised in the Applicant's 10 April 2024 email and WeChat messages, she discussed with Mr Xu the Applicant's behaviour of sending messages to unauthorised persons. She further states she proposed sending the Applicant a show cause letter. The proposed course of action was agreed to by Mr Xu and a letter[22] (the Show Cause Letter) was subsequently sent to the Applicant on 29 May 2024. The Show Cause Letter set out in detail the allegations including the number of persons that the email and WeChat messages went to, and the nature of the misconduct alleged. The letter, which was signed by Ms Sun, stated that the Respondent was considering the termination of the Applicant's employment for the following reasons;

"……

The purpose of this letter is to advise you that Hisense Australia is proposing to terminate your employment on the basis of serious misconduct, namely that the sending of the Offending Communications to Non-Authorised Persons amounts to:

1. Conduct that caused serious and imminent risk to:

   (a) The reputation, viability or profitability of Hisense Australia; and
   (b) The health and safety of myself and Mr Zhang.

2. Wilful or deliberate behaviour by you that was inconsistent with the continuation of your contract of employment.

3. Deliberate conduct with malicious intent to disparage myself and Mr Zhang across the entire Hisense global group.

4. Constitutes a breach of the Hisense Employee Handbook (and your contract of employment), in particular the following provisions in the Handbook:

   (a) Clause 12.3 - Rules covering unsatisfactory conduct and misconduct;
   (b) Clause 12.4 - Serious misconduct;
   (c) Clause 13.3 - the spreading of misinformation or malicious rumours; and
   (d) Clause 13.6 - making a complaint that is both untrue and has been brought with malicious intent.

…….”

[25] The Show Cause Letter invited the Applicant to respond to Ms Sun by 4pm on 30 May 2024 to show cause as to why the Respondent should not terminate his employment. The Applicant provided a lengthy response on 30 May 2024[23] and a further response on 5 June 2024[24]. In his response to the Show Cause Letter the Applicant raised several matters including;

- the alleged bullying, isolation and discrimination he had experienced over the previous six months;

- his downgraded (and restored) 2023 performance rating;

- His exclusion from 2024 Planning Meeting.

- the issuing of the 1st and Final Warning to him following his email exchange with the Finance Manager on 5 April 2024;

- the false rumours spread by the General Manager, Mr Zhang regarding his resignation of employment;

- submission of his formal complaint to Hisense’s head office on 10 April 2024 was justified;

- being incorrectly sent on 'gardening leave' on 8 April 2024 which was subsequently changed to a suspension pending finalisation of the investigation into his complaints;

- the outcome of the investigation of his complaints while communicated orally to him on 16 May 2024 was not confirmed formally by way of a written investigation report;

- his complaints sent on 10 May 2024 to multiple 'unauthorised persons' was justified given the subject of the complaints was the Asia Pacific General Manager, Mr Zhang, thus requiring distribution of his complaints to Hisense headquarters in China; and

- he denied any misconduct as alleged by the Respondent.

[26] Ms Sun states she considered the Applicant's responses but held the view that the Applicant did not appreciate the serious nature of his conduct. The Respondent confirmed the decision to terminate the Applicant's employment on 5 June 2024 when it sent a brief email to the Applicant relevantly stating, "We advise that your employment with Hisense Australia Pty Ltd has been terminated effective immediately without notice and on grounds of serious misconduct."[25]

Has the Applicant been dismissed?

[27] A threshold issue to determine is whether the Applicant has been dismissed from his employment. Section 386(1) of the Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[28] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant. There was no dispute, and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

Initial matters

[29] Under section 396 of the Act, the Commission is obliged to decide the following matters 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; and

(d) whether the dismissal was a case of genuine redundancy.

[30] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant was dismissed on 5 June 2024 and filed his unfair dismissal application on 9 June 2024, that latter date being within 21 days of the date of his dismissal;

- at the time of the Applicant's dismissal the Respondent employed approximately 119 employees and is therefore not a small business employer within the meaning of s 23 of the Act.

- the Applicant commenced employment with the Respondent on 4 July 2022 and at the time of his dismissal had been employed for a period of almost two years, that period being more than the minimum employment period of six months;

- the Applicant was in receipt of an annual salary of $115,000 at the time of his dismissal; and

- the Applicant was not dismissed due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[31] Having considered each of the initial matters, I am satisfied that the application was made within the required period in subsection 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application.

Was the dismissal harsh, unjust, or unreasonable?

[32] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission 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.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct – s.387(a)?

[33] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[26] and should not be "capricious, fanciful, spiteful or prejudiced[27]." However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer[28].

[34] It is uncontroversial that the Applicant sent an email and WeChat messages in the same terms to many staff within Hisense's global operations on 10 April 2024. The email and WeChat messages made serious allegations against Zhang Xifeng, who is the General Manager for the Asia-Pacific region, and Sun Ran, the Operations Director of the Australian branch. Those allegations included that the two named senior managers had engaged in market manipulation, bullying, harassment and isolation of unnamed Chinese staff, unlawful termination of pregnant staff members and misappropriation of funds regrading work visas. Self-evidently, the allegations were extremely serious and held the potential to damage the standing and reputation of the two named persons regardless of whether the allegations were found to be substantiated or not.

[35] The way the Applicant raised the allegations was contrary to the Whistleblower Policy which provides for the notification of 'reportable conduct' to either the employee's relevant Senior Manager or other 'Eligible Recipients'. 'Eligible Recipients' are defined in the Whistleblower Policy, which the Applicant agreed he had read and understood, as 'directors, officers, senior managers or any appointed external auditor or actuary' of Hisense. The Applicant agreed that the email and WeChat distribution list that he sent the email and WeChat messages to on 10 April 2024 included staff who did not fall into any of the 'Eligible Recipient' categories and as such were not authorised to receive such complaints. The Applicant also conceded that the Whistleblower Policy emphasises confidentiality of the process of reporting misconduct.

[36] The Applicant justified the broad distribution of the email and WeChat messages on the basis that he was unsure of who the complaints should be forwarded to in Hisense's headquarters hence his distribution of the email to many senior staff and departmental email groups across its global operations. This explanation or justification was entirely unconvincing. That is particularly so when it is considered that he also distributed the same message to several WeChat groups which he knew included colleagues and other staff who did not fall into the 'Eligible Recipient' categories. Tellingly, the Applicant conceded during cross-examination that the wide distribution of the allegations to the WeChat groups was the wrong thing to have done. I agree with that concession.

[37] While the Applicant seeks to cast his broad distribution of the allegations as motivated by a desire to secure a proper ventilation and investigation of his complaints, that must be rejected given his decision to 'broadcast' the allegations to persons who he did not know and/or had no role or responsibility in investigating such alleged misconduct. Rather than being motivated by a desire to ensure an effective investigation, I am disposed to accept that the more likely motivation was that of harming the two individuals who were the subject of the allegations, Mr Zhang and Ms Sun. The Applicant's broadcasting of such serious allegations via the 10 April 2024 emails and WeChat messages against two senior managers within the organisation was clearly likely to harm their reputations, even if the allegations were ultimately found to lack substance.

[38] It is important to state at this point that the Respondent's Whistleblower Policy emphasises the protections afforded to a person making a disclosure. Such protections should not be used as a literal cloak of immunity to shield behaviour that has the purpose of harming other staff within the organisation. The Applicant's claimed belief that his emails and WeChat messages on 10 April 2024 constituted reporting in accordance with the Whistleblower Policy must be rejected. That is for the simple reason that the emails and WeChat messages did not constitute the reporting of alleged misconduct in accordance with the policy. Rather, the email and WeChat messages were wilfully distributed in my view with the calculated objective of harming Mr Zhang and Ms Sun.

[39] The Applicant also seeks to justify the 10 April 2024 allegations made against Mr Zhang and Ms Sun because of his belief that he had been subject to bullying, isolation and discrimination. He specifically refers to his 2023 performance rating, his exclusion from the 2024 Planning Meeting and the 1st and Final Warning he received on 8 April 2024. The following may be said about the matters raised by the Applicant as examples of bullying, isolation and discrimination.

[40] Firstly, his 2023 performance rating was indeed adjusted down by Mr Zhang from 'B' to 'C' when Mr Zhang was finalising the performance ratings of the Respondent's Australian staff. While criticism may be rightly made of the failure of the Respondent to confirm the Applicant's rating in a timely manner, the fact that the rating was restored from 'C' to 'B' within five days of the Applicant's appeal, should dispel any concern of an organisational bias against the Applicant. The Applicant's claim that the initial downgrade of his 2023 performance rating is evidence of Mr Zhang and Ms Sun's bullying of him cannot be sustained based on mere suspicion.

[41] Secondly, the Applicant's exclusion from the 2024 Planning Meeting was driven by a change in the organisational structure and Mr Xu's assumption of responsibility for both white goods and brown goods and several other sales roles. Had the Applicant been the only staff member who attended the 2023 Planning Meeting who was excluded from the 2024 Planning Meeting, his suspicion of being singled out might have had some merit. As it was, there were four such managers (including the Applicant) who were not invited to the 2024 Planning Meeting despite having attended the planning meeting the previous year.

[42] Mr Xu's failure to talk to the Applicant at the time as to why he was not invited to the 2024 Planning Meeting discloses an impressive lack of sensitivity and certainly did not assist.

Nevertheless, I am satisfied that that the Applicant's 'exclusion' as he described it, was driven by changes to the organisational structure and not by a strategy of bullying, isolation or discrimination as claimed by him.

[43] Turning finally to the 1st and Final Warning issued on 8 April 2024. It must be said that the way the Respondent approached the Applicant's conduct of sending a disrespectful email to a colleague on 5 April 2024 left much to be desired. The fact that it chose to issue a 1st and Final Warning without any direct discussion with the Applicant and then advise him that he was to be stood down for several days on 'gardening leave' is hard to fathom. Ordinarily, if conduct were so serious as to warrant a 1st and Final Warning, a more thorough investigation would have preceded such a warning. That ought to have involved speaking directly to the Applicant to afford him an opportunity to provide an explanation of what had occurred. Such a discussion did not happen.

[44] Ms Sun claimed that the idiom used by the Applicant in his 5 April 2024 email was highly offensive in Chinese culture, a point the Applicant challenged. While I am unable to resolve that difference in opinion, it can be said at the very least that suggesting to a colleague that he is lazy and that his opinions are not welcome is apt to be disrespectful in Australian workplaces as well. Whether that less than subtle suggestion of laziness made by the Applicant to the Finance Manager warranted a 1st and Final Warning is open to debate. It does not however require resolution by me as the warning was ultimately not relied on by the Respondent in its decision to dismiss the Applicant on 5 June 2024. What the incident does disclose is that of the Respondent's (and Ms Sun's) apparent reluctance to engage in direct discussions with respect to alleged misconduct of the Applicant. Ms Sun appeared happy to simply rely on the reported hurt feelings and humiliation of the Finance Manager as a basis for issuing the 1st and Final Warning to the Applicant.

[45] What then followed the issuing of the 1st and Final Warning is rather puzzling. Having issued the formal warning to the Applicant, Ms Sun then directed the Applicant to take a week's 'gardening leave' for what purpose is unclear, given the Applicant had already been disciplined for his intemperate email. There was mention of a meeting to be held the following week however subsequent events with the Applicant's 10 April 2024 email and WeChat messages overtook the original apparent purpose of the 'gardening leave'. That is also putting to one side that Ms Sun wrongly placed the Applicant on 'gardening leave' in circumstances where it was not permitted as the Applicant neither gave nor received notice of termination.

[46] The Respondent then took the additional step of restricting the Applicant's access to confidential information during the period of his stand down. The purpose of such restriction was also unclear in circumstances where the conduct that drew the 1st and Final Warning was that of disrespectful behaviour towards a colleague. How such conduct disclosed a particular risk to the business that required restriction of the Applicant's access to confidential information was not properly explained. In truth, the Applicant's stand down and restriction of access to confidential information on 8 April 2024 did not appear justified based on the material before me. Subsequent events of 10 April 2024 may have justified that action; however, the Applicant's stand down and information access restriction preceded the 10 April 2024 events.

[47] Considering what I regard as a poorly managed, if not ham-fisted approach adopted by the Respondent in dealing with the Applicant's 5 April 2024 email to the Finance Manager, the

Applicant could have been forgiven for believing that he was being subjected to ill-treatment by Ms Sun. Not only was he issued with a 1st and Final Warning which would ordinarily bring a disciplinary process to its conclusion. He was then subject to a stand down and had his access to emails and certain WeChat groups removed, actions that appear disproportionate to the Applicant's conduct and which were also not referenced in the 1st and Final Warning he received on 8 April 2024. It is also unsurprising that rumours started circulating about his employment status. While the Applicant places responsibility for such rumours with Mr Zhang, it is not possible for me to draw such a conclusion.

[48] I have found that the matters of the Applicant's 2023 performance rating and his exclusion from the 2024 Planning Meeting did not provide a sound basis for the Applicant's sense of grievance at his treatment by Ms Sun and Mr Zhang. However, the process that led to his 1st and Final Warning and the actions taken by the Respondent in standing him down and restricting his access to IT systems do however assist to explain the Applicant's perception that he was being ill-treated by Ms Sun and Mr Zhang. That sense of grievance is likely in my view to have provoked the Applicant's conduct on 10 April 2024 when he sent the above-referred emails and WeChat messages to staff across Hisense's organisation.

[49] The Applicant's conduct of broadcasting his allegations about Mr Zhang and Ms Sun was subsequently investigated and while the investigation found that the allegations were unsubstantiated, no final report or confirmation in writing to the Applicant was provided. That failure of any formal documentary close out of the investigation also reflects poorly on the Respondent. That said, whether the Applicant's allegations were ultimately found to be substantiated or unsubstantiated is in my view irrelevant to assessing the conduct of the Applicant. He purported to rely on the Whistleblower Policy which seeks to protect employees that make disclosures but in broadcasting his allegations to hundreds of staff he had no regard to the consequences of those allegations being publicly aired on the individuals concerned.

[50] I am satisfied that the Applicant's conduct breached his obligations under the Whistleblower Policy. It was wilful, deliberate and reckless behaviour aimed at damaging the reputation of Mr Zhang and Ms Sun across Hisense's global group. I am further satisfied that the conduct was also likely to have been in breach of other elements of the Employee Handbook including that of threatening the health and safety of colleagues (clause 12.3), deliberate acts of unlawful harassment (clause 12.4), spreading misinformation or malicious rumours (clause 13.3) and making a complaint that is untrue or brought with malicious intent (clause 13.6).

[51] I am comfortably satisfied that by the Applicant sending out emails and WeChat messages on 10 April 2024 that were intended to harm Mr Zhang and Ms Sun, he engaged in serious misconduct within the meaning of Reg 1.07 of the *Fair Work Regulations.* The conduct was 'wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment'[29] It was also conduct that had the potential to cause 'serious and imminent risk to: (i) the health or safety of a person; or (ii) the reputation, viability or profitability of the employer's business.'[30] That is because of the serious nature of what were unsubstantiated allegations and the seniority of the persons against whom those allegations were made. Having been satisfied that the conduct constituted serious misconduct I am further satisfied that the conduct established a valid reason for his dismissal. This weighs in favour of a finding that the dismissal was not unfair.

Notification of the valid reason – s.387(b)

[52] 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,[31] and in explicit[32], plain and clear terms[33].

[53] The Applicant received the Show Cause Letter on 29 May 2024 which set out the allegations against him. Specifically, that he distributed an email and WeChat messages on 10 April 2024 that made serious and ultimately unsubstantiated allegations against Mr Zhang and Ms Sun. The letter went to on to detail the alleged policy and contract of employment breaches, put the Applicant on notice that the termination of his employment was being considered and invited a response from him. I have found above that this alleged misconduct established a valid reason for the Applicant's dismissal. In these circumstances I am satisfied that the Applicant was notified of a valid reason for his dismissal before a decision was made to dismiss him. This weighs in favour of a finding that the dismissal was not unfair.

Opportunity to respond to any dismissal reason related to capacity or conduct – s.387(c)

[54] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[34]

[55] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.[35] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to the concern, this is enough to satisfy the requirements.[36]

[56] The Applicant was initially given only 24 hours within which to provide a written response to the Show Cause Letter sent to him on 29 May 2024. The Show Cause Letter was not preceded by an interview with the Applicant regarding the alleged misconduct. Nor was the Applicant invited to a meeting to respond to the allegations set out in the Show Cause Letter. The approach taken by the Respondent was consistent with its earlier handling of the 1st and Final Warning arising from the Applicant's 5 April 2024 email. It was a sub-standard process in my view in which the Respondent seeks to hide behind the 'fig leaf' of the Show Cause Letter and argue that it afforded an opportunity for the Applicant to respond.

[57] The fact that the investigative and disciplinary process was undertaken by Ms Sun, who was one of the subjects of the Applicant's allegations in his 10 April email and WeChat messages, calls into some question her objectivity in investigating and then determining the disciplinary outcome. Tellingly, the Applicant's immediate manager had no role in the process. Nor did the Respondent ultimately confirm in writing on what basis it had decided to dismiss the Applicant. It simply confirmed in a perfunctory email on 5 June 2024 that the Applicant was to be dismissed. It is not readily apparent what consideration was in fact given by the Respondent to the matters raised by the Applicant, if at all. The absence of any direct meetings between the Respondent and the Applicant for the purpose of investigating the allegations or

considering the Applicant's responses tells against a finding that his responses were genuinely considered.

[58] By imposing an unreasonably tight deadline on the Applicant's initial response to the Show Cause Letter and by failing to hold any direct discussions with the Applicant prior to the decision being made to dismiss the Applicant is far from the gold standard of managing a disciplinary process. That is particularly so in circumstances where the Respondent describes itself as a leading global consumer electronics and home appliance brand. The procedural failures were manifest in its handling of the 1st and Final Warning, the lack a formal documented close-out of the investigation into the Applicant's 10 April 2024 allegations, the disciplinary process that led to the Applicant's dismissal and the failure of the Respondent to identify in the 5 June 2024 email from Ms Sun to the Applicant the reasons for his dismissal. In all these circumstances I am satisfied that Ms Sun's handling of the disciplinary process had the effect of denying the Applicant a genuine opportunity to respond to the reasons relied on to dismiss him.

[59] It follows from the foregoing that while the Applicant was afforded an opportunity to provide a written response to the Show Cause Letter, I am not persuaded that the Respondent considered the matters raised by the Applicant. That combined with the other deficiencies I have identified causes me to conclude that the Applicant was not afforded a genuine opportunity to respond to the reasons for his dismissal. This weighs in favour of a finding that the dismissal was unfair.

Support person – s.387(d)

[60] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. There were no meetings conducted regarding the dismissal of the Applicant and as such, this criteria is a neutral consideration.

Warnings regarding unsatisfactory performance – s.387(e)

[61] While the Applicant was issued a 1st and Final Warning on 8 April 2024, that warning was not relied on by the Respondent in dismissing the Applicant. The dismissal related to alleged serious misconduct arising from the Applicant's distribution of allegations against Mr Zhang and Ms Sun on 10 April 2024. As such, the dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed and impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(f)

[62] The Respondent's *Form F3 - Employer Response* indicates that at the time of the Applicant's dismissal it employed approximately 119 employees. There is no evidence before me, and nor did either party contend, that the Respondent organisation's size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g)

[63] The evidence in this matter indicates that the Respondent had access to the services of an in-house human resources specialist. This factor weighs neutrally in my consideration.

Other relevant matters – s.387(h)

[64] The Applicant submits that an additional matter that ought to be considered in assessing the fairness or otherwise of his dismissal is that of his 10 April 2024 allegations which he claims to have made in good faith. He submits that the Respondent's decision to dismiss him was retaliatory against a whistleblower.

[65] For the reasons earlier set out, I do not accept that the Applicant's allegations were made in good faith or in accordance with the Whistleblower Policy. The Applicant broadcast his allegations to cause maximum harm to Mr Zhang and Ms Sun who he was aggrieved with. No matter how well based that sense of grievance may have been in the Applicant's mind, there was simply no justification in distributing the allegations to hundreds of Hisense staff, the vast majority of whom had no authority to receive or a role in the investigation of the allegations. Having made these findings I am not persuaded that this matter raised by the Applicant weighs in favour of a finding of unfairness.

[66] The Applicant also raises the negative impact the dismissal has had on his professional reputation as well as causing emotional distress. Neither of these matters are rare or unusual and are in fact likely to flow from a dismissal for serious misconduct. They do not in my view mitigate the Applicant's conduct and do not weigh in favour of a finding that the dismissal was unfair.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust, or unreasonable?

[67] I have made findings in relation to each matter specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.[37]

[68] As set out above, I am satisfied that a valid reason for the Applicant's dismissal related to his serious misconduct on 10 April 2024 is established. I have also found that the dismissal was not related to the Applicant's performance and the size and capacity of the Respondent did not impact on the procedures that it followed and as such these matters weigh neutrally in my consideration of whether the dismissal was unfair. Nor do any other relevant matters weigh in favour of a finding that the dismissal was unfair. Turning to whether the Applicant was afforded procedural fairness, I have found that the Applicant was notified of the valid reason for his dismissal prior to the decision being made, that weighing in favour of a finding that the dismissal was not unfair.

[69] The remaining matter is that of whether the Applicant had an opportunity to respond to the reasons relied on to dismiss him. I have found there were several procedural failures in the process followed by the Respondent which have led me to conclude the Applicant was not

provided with a genuine opportunity to respond to the reasons for his dismissal. While that weighs in favour of a finding that the dismissal was unfair, I do not accord those failures significant weight. That is because in my assessment it is unlikely that the Applicant could have reasonably influenced a different outcome. That is because of the wilful nature of his misconduct and the opportunity I have had to review and largely dismiss the basis for the grievances raised by the Applicant in his response to the Show Cause Letter.

[70] In weighing all the relevant s 394(3) criteria, I am not persuaded that the procedural failures I have identified are of sufficient weight such as to render the dismissal unfair. That is because of the gravity of the misconduct which I have found. It follows that having considered each of the matters specified in s 387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust, or unreasonable because there was a valid reason for the dismissal and the other factor weighing in favour of a finding that the dismissal was unfair was not sufficient to displace the weight I accord to other s 387 criteria and in particular the valid reason for dismissal.

Conclusion

[71] Not being satisfied that the dismissal was harsh, unjust, or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act.

[72] The application is dismissed. An Order will be separately issued giving effect to my decision.

DEPUTY PRESIDENT

Appearances:
C Xu, Applicant.
P Lettau of Counsel for the Respondent.

Hearing details:
2024.
Melbourne:
September 11.

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[1] Exhibit R2, Witness Statement of Ran Sun, dated 2 August 2024, at [2]

[2] Exhibit R2, Annexure RS1, Employment Contract, dated 2 June 2022

[3] Exhibit R1, Annexure DX-1, Chen Xu, Annual Performance Appraisal Form for 2023

[4] Exhibit R1, Witness Statement of Da Xu, dated 2 August 2024, at [10]

[5] Exhibit R2, Annexure RS-10, Hisense Australia Pty Ltd Employee Handbook

[6] Exhibit R1, at [11[- [13]

[7] Exhibit A2, Email chain dealing with 2023 Performance Review outcome and appeal, dated 28 December 2023 – 20 February 2024

[8] Exhibit R2, Annexure RS-2, Email from Shou Yang to Applicant, dated 25 March 2024, titled 'Re: Appeal Regarding 2023 Annual Performance Evaluation Results – Hisense Australia

[9] Exhibit R1, at [15]-[17]

[10] Exhibit R2, Annexure RS-3, Email from Applicant to Yaofa Zhang

[11] Exhibit R2, at [19]-[21]

[12] Exhibit R2, at [24]-[26]

[13] Exhibit R2, Annexure RS-4, 1st and Final Warning issued to Applicant, dated 8 April 2024

[14] Exhibit R2, Annexure RS-10, Hisense Australia Pty Ltd Employee Handbook, clause 20.4 Gardening Leave

[15] Exhibit R2, at [29]-[32]

[16] Exhibit A7, Email titled 'Clarification of Departure Rumours'

[17] Exhibit R2, at [29]

[18] Exhibit R2, Annexure RS-5, WeChat message, dated 10 April 2024

[19] Exhibit R2, Annexure RS-6, Email dated 10 April 2024, titled 'To: Company Leadership Subject: Formal Complaint Regarding Conduct in the Australia Branch'

[20] Exhibit R2, at [36]-[43]

[21] Exhibit R2, Annexure RS-10, clause 10.5 'How to Report'

[22] Exhibit R2, Annexure RS-8, Letter to Applicant, dated 29 May 2024, titled 'Proposal to terminate your employment'

[23] Exhibit R2, Annexure RS-9, Applicant responses to Show Cause Letter

[24] Ibid

[25] Exhibit R2, Annexure RS-11 C

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

[27] Ibid.

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

[29] *Fair Work Regulations 2009*, Reg 1.07 (2)(a)

[30] Ibid, Reg 1.07 (2)(b)

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

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

[33] Ibid.

[34] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[35] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[36] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[37] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]– [7].