DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Ramlan Abdul Samad

v

Phosphate Resources Ltd T/A Christmas Island Phosphates
(U2024/7715)

DEPUTY PRESIDENT O'KEEFFE PERTH, 16 OCTOBER 2024

Application for relief from unfair dismissal – dismissal harsh and unjust – parties to confer on remedy.

[1] On 4 July 2024, Mr Ramlan Abdul Samad (the Applicant) applied to the Fair Work Commission (FWC) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Phosphate Resources Limited (the Respondent).

The Hearing

[2] The Applicant was represented by the Union of Christmas Island Workers (UCIW), being an organisation registered under the Fair Work (Registered Organisations) Act. The Applicant is a member of the UCIW and as such pursuant to s.596(4) of the Act permission to be represented was not required. The Respondent was represented by Mr Andrew Kennedy who is an employee of the Respondent and so again as per s.596(4) permission to appear was not required.

[3] At the hearing, the parties agreed that the Applicant:

(1) Had been dismissed from his employment by the Respondent; and
(2) The application under s.394 was made within the 21-day time limit; and
(3) The Applicant had completed a period of service greater than the required minimum employment period of six months; and
(4) An enterprise agreement, being the Christmas Island Phosphates and UCIW Enterprise Agreement 2018, applied to the Applicant's employment; and
(5) The Respondent is not a small business and as such the Small Business Fair Dismissal Code is not relevant; and
(6) The termination was not a case of genuine redundancy.

[4] As such, I am satisfied that the Applicant was a person protected from unfair dismissal who was dismissed by the Respondent and the FWC has jurisdiction to deal with his application.

Background

[5] The Applicant had been employed by the Respondent since 2004 and at the time of his dismissal was working as a truck driver. Commencing in April 2024 the Applicant began to make comments to another employee, a Mr Ismail Rahman, stating that Mr Rahman "knew how to suck the boss" while imitating a person performing fellatio. Mr Rahman initially did not respond to this behaviour albeit that his evidence was that it was repeated. However, on 24 May 2024 the Applicant again made a comment about "sucking the boss" and Mr Rahman asked him to stop the behaviour, or he would make a complaint of harassment.

[6] Following this, Mr Rahman gave evidence that the Applicant made repeated comments to other employees within his earshot about not being able to joke with Mr Rahman because he would report it to management. This matter came to a head on 1 June 2024 when the Applicant again made comments about Mr Rahman making harassment complaints. Mr Rahman challenged the Applicant and this resulted in an altercation where the Applicant displayed some aggression towards Mr Rahman.

[7] Ultimately the behaviour of the Applicant was reported to the Respondent, who conducted an investigation. The outcome of the investigation was that the Respondent determined that the Applicant had engaged in behaviour that it regarded as being in breach of several of its policies and dismissed him from his employment.

Was the dismissal harsh, unjust or unreasonable?

[8] Section 387 of the FW 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.

[9] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[1]

[10] I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[11] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[2] and should not be "capricious, fanciful, spiteful or prejudiced."[3] 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.[4]

[12] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[5] "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 in the proceedings 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."[6]

Submissions and Evidence

[13] In his evidence the Applicant conceded that he had engaged in some of the behaviours attributed to him, albeit that he did not concede they had occurred as often as was alleged. Rather, with respect to the suggestion that he had made the comments about "sucking up to the boss", he said that he could recall making such a comment but not on a daily basis. He further stated that such banter was common at the workplace. With respect to making comments about Mr Rahman making harassment complaints the Applicant again admitted to making such a comment but could not recall making it repeatedly. He did however concede to being angry during the altercation with Mr Rahman on 1 June 2024.

[14] However, it was his evidence that he was unaware of the four policies that the Respondent claimed he had breached. Those policies, as per the correspondence from the Respondent to the Applicant[7] were the Respondent's Code of Conduct, Standards of Behaviour Policy, Anti-Discrimination and Harassment Procedure and Psychosocial Safety in our Workplace policy. In his statement the Applicant said as follows:

> *"I don't know anything about the new policies the company say I breached. Then they sacked me. I don't know why I should be dismissed."*[8]

[15] In his submissions the Applicant proposed that employees should be made aware of policies if the employer intends to hold them to the standard of the policy. He submitted that in the absence of being introduced to those policies, he was unaware that explicit language was

prohibited by policy and unlawful. Further, it was submitted that the Applicant had never received any other advice from the Respondent via counsellings or warnings that the type of conduct in which he had engaged was considered a breach of policy. In addition, it was submitted that the policies had never been raised with the workplace Joint Consultative Committee, which would have been an appropriate forum for raising awareness of the policies.

[16] The Applicant further submitted that he had demonstrated contrition by virtue of approaching his supervisor and saying that he wanted to apologise to Mr Rahman and accepting that a written warning would be appropriate for his behaviour and advising the Respondent accordingly.

[17] The evidence of Mr Rahman for the Respondent was that the Applicant began his comments about "sucking the boss's dick" and accompanying hand gestures when he returned from his holiday. Mr Rahman states that comments of this nature were made to him every day by the Applicant until 24 May 2024 when he told the Applicant to stop making the comments or he would make a harassment claim. Mr Rahman's further evidence is that after this the Applicant refused to speak to him but began to tell other workers that they should not joke or talk around him because he would claim it was harassment. Mr Rahman says that these comments to other workers were often made while he was in earshot.

[18] Mr Rahman states that on 1 June 2024 the Applicant again suggested to another employee while he was in earshot that he should not joke because he might get a harassment complaint. Mr Rahman says he responded by asking the Applicant to stop talking about him whereupon the Applicant became very angry and threatened to hit him.

[19] Ms Lucinda Locke, the Respondent's People and Culture Manager also gave evidence. With respect to valid reason, she confirmed the investigation process and stated that the Respondent had found no evidence that behaviour such as that alleged against the Applicant was commonplace at the worksite. She gave evidence that during the interviews of the Applicant about the complaint the Applicant had said things about Mr Rahman such as "I know his father" and "why is he angry with me". She also stated that apart from acknowledging that he had upset Mr Rahman, the Applicant did not in her view demonstrate any particular remorse for his actions.

[20] It was Ms Locke's further evidence that the Applicant was aware of the Respondent's Code of Conduct and specifically harassment as he had been to a toolbox talk in September 2023. Attached to Ms Locke's evidence was a record of attendance at the toolbox meeting. The Applicant had signed that attendance record to indicate he had been at the toolbox meeting. Ms Locke stated that the other policies referred to by the Respondent (and set out in paragraph 14 above) were available on the Respondent's intranet.

[21] Further evidence for the Respondent was given by Mr Peng Tong Ma, the Respondent's Mining and Haulage Manager. In his evidence, Mr Ma states that during a meeting with the Applicant held on 19 June to discuss the complaint he felt that the Applicant was not accepting that he had done anything wrong and wanted the Respondent to show him what he had done wrong. Mr Ma states that he was concerned and sought to speak with the Applicant in Malay. However, the Applicant's representative had stopped him from doing so. Instead, Mr Ma states that he asked the Applicant in English what he was remorseful about. He states that the

Applicant responded that he did something wrong and he upset Mr Rahman but did not know what was wrong about what he did.

[22] The final witness for the Respondent was Mr Brian Tonkin, the Respondent's Maintenance Manager. It was Mr Tonkin's evidence that some short time after his termination, the Applicant had confronted him in a public location and called him "arsehole".

[23] In its submissions, the Respondent sets out its process for investigating the complaint made by Mr Rahman. It submits that it was satisfied based on this investigation that the Applicant had made the accusations of "sucking the boss's dick" and had done so repeatedly and had also repeatedly joked with other employees in front of the Applicant about the Applicant making a harassment complaint. The Respondent also submitted that there had been no evidence of remorse from the Applicant. Having satisfied itself that the behaviour took place, and in the absence of remorse, the Respondent submits that the behaviour met the test of serious misconduct. As such, termination of employment was the appropriate remedy.

[24] The Respondent further submitted that Regulation 1.07 of the Fair Work Regulations supported its characterisation of the behaviour as serious misconduct. Specifically, in its definitions of serious misconduct, Regulation 1.07 called out harassment and conduct that causes an imminent and serious risk to the health and safety of a person. The Respondent also took issue with the notion that the Applicant was contrite.

[25] In cross-examination, the Applicant claimed that he could not recall threatening to hit Mr Rahman on 1 June 2024 but conceded that he had told him to shut his mouth and accused him of not being able to take a joke. When asked if his comment about sucking the boss had made reference to the "boss's dick" he stated that he could not recall. When asked if he made hand gestures when talking about sucking the boss he stated that he could not recall.

[26] The Applicant was also taken to his witness statement, where he made the following comments about the Mr Rahman's reaction to his comments – specifically the threat to make a harassment complaint. Those comments were:

> *"I was surprised and upset that he said that. I thought he was a good man."*
>
> *"He had made clear his attitude to me, which was disappointing."*[9]

The Applicant was asked about those comments and why he was disappointed. He said that he had been upset at the Mr Rahman's reaction to what he claimed were jokes. When asked if he had said sorry to the Mr Rahman he admitted that he had not.

[27] The Applicant was also taken to his response to the Respondent's "show cause" letter. In that response, he had stated that he was "stunned" that Mr Rahman was upset by his jokes.[10] He was then asked how it was that he had not apologised after realizing this. Again, the Applicant said that he had been upset. The Applicant was further questioned about whether he was still unsure about what it was that he had done wrong, and the Applicant confirmed that this was the case but that he had not understood the meaning of the word remorse.

[28] With respect to the evidence of Mr Tonkin, the Applicant claimed that he wanted to speak to Mr Tonkin about his son, who worked under Mr Tonkin. Specifically, the Applicant wanted to ensure his son was not drawn into the issues arising from his termination. He denied calling Mr Tonkin "arsehole" but claimed instead that he had called out "hey mate".

[29] During cross-examination I asked the Applicant if in the "show cause" meeting he had made the statement, attributed to him by Ms Locke in her statement[11] that the Respondent needed to tell him what he had done wrong and he admitted that he had done so.

[30] Under cross-examination, Ms Locke conceded that she could not be certain if any handouts had been provided to employees at the toolbox meeting where the Code of Conduct was discussed, but her evidence was that the usual practice was to leave such handouts for employees to peruse. However, it was clear that as Ms Locke had not been present she was unable to provide any detailed evidence of what occurred at that meeting. I questioned her about the other policies the Applicant was claimed to have breached – specifically how the policies other than Code of Conduct were rolled out. It appeared that there was little in the way of evidence that the Applicant had been introduced to those policies.

[31] She did, however, confirm her view that the Applicant had not been sufficiently contrite, albeit that she had some concerns that the Applicant's representative had operated in such a way that it was difficult for the Respondent to hear directly from the Applicant. She stated that she still had concerns about exactly what the Applicant had wanted to apologise for.

[32] In closing submissions, the Applicant proposed that he had known he was wrong and that he was then obliged, under his own system of beliefs, to apologise and he had sought to apologise at the first available opportunity. He further submitted that Ms Locke had been wrong to believe that he was not sincerely remorseful about his actions and that Ms Locke's views had been an important factor in the decision to dismiss him. He submitted that the Respondent had been trying to enforce new standards of behaviour by reference to policies that had never been properly explained.

[33] I challenged the Applicant on some of his submissions. Firstly, the notion that the Applicant had sought to apologise at the first opportunity did not seem to me to be borne out by the evidence. I put this to the Applicant and it was conceded that this interpretation was open to be taken. The Applicant then suggested that the intent to apologise came in response to the incident on 1 June 2024. Secondly, I suggested that it was difficult to accept that an employee needed a policy to tell him not to accuse other employees of sucking the boss's dick and that simple life experience should have provided this knowledge. It was conceded by the Applicant that he did not need such a policy.

[34] I also questioned the Applicant about his claims, made in his written submissions, about discriminatory treatment. The Applicant was not able to provide any examples of such treatment that were relevant to this matter.

[35] In closing submissions the Respondent noted the admissions made by the Applicant regarding his behaviour and the impact it had on Mr Rahman, and suggested that on the Applicant's own evidence there was a valid reason for termination. It noted that the Applicant had not apologised for his behaviour and had been upset and surprised by Mr Rahman's reaction

to his behaviour. It noted further that the Applicant had, after being asked to stop the comments about sucking up to the boss, started to talk about Mr Rahman to other employees and suggest that he could not take a joke and would claim harassment against them. The Respondent reiterated the lack of remorse shown by the Applicant and suggested that the Applicant had in effect tried to blame the victim.

Consideration

[36] Having reviewed the evidence given by the various witnesses, I have formed the view that I should prefer the witness evidence of the witnesses for the Respondent where there is an inconsistency between that evidence and the evidence of the Applicant with the exception of the evidence regarding the incident with Mr Tonkin, which I will address separately. The Applicant tended – at times - to be a somewhat evasive witness when faced with direct questions where an admission would have been unhelpful to his case. At other times he claimed he could not recall what had happened. In those cases where he lacked recall and the Respondent's witnesses were unwavering, I find it appropriate to accept their evidence over that of the Applicant.

[37] As a consequence of this, I find that I am satisfied of the following. Firstly, that the Applicant repeatedly made comments to Mr Rahman about sucking up to the boss and sucking the boss's dick. Secondly, that Mr Rahman made offensive hand gestures accompanying these comments. Thirdly, that when asked to stop making those comments, the Applicant made no apology to Mr Rahman but instead made remarks to other employees about Mr Rahman within Mr Rahman's hearing and those remarks were to the effect that Mr Rahman could not take a joke and would report employees for harassment. Fourthly, I am satisfied that the Applicant displayed anger towards Mr Rahman during the altercation on 1 June 2024 and this anger was primarily because the Applicant did not like Mr Rahman calling out his behaviour.

[38] The question then turns to whether these behaviours should be taken to be serious misconduct warranting termination in the first instance without the employee being warned and given an opportunity to remedy his behaviour. In the first instance I find that I need to determine a proper industrial characterisation of the Applicant's behaviour as this may have some bearing on how it ought be viewed in terms of disciplinary outcomes.

[39] The Respondent describes the Applicant's behaviour as "harassment" and relies (see paragraph 24 above) on Regulation 1.07 of the Fair Work Regulations for the proposition that harassment may be regarded as serious misconduct. However, with respect to harassment, Regulation 1.07 actually states as follows:

> *"3…serious misconduct includes each of the following:*
> *(a) the employee, in the course of the employee's employment, engaging in:*
> *i. theft; or*
> *ii. fraud; or*
> *iii. assault; or*
> *iv. sexual harassment;*

[40] It is clear that the definition above sets out a specific kind of harassment, being sexual harassment. Clearly, what might colloquially be described as harassment will not always

contain a sexual element. I note that in her witness evidence, Ms Locke states that she believed that the harassment was partly sexual in nature.[12] If this was to be accepted, then it may be that the Applicant's behaviour falls within the ambit of Regulation 1.07.

[41] As per s.12 of the Act, "sexually harass" has the meaning given by section 28A of the *Sex Discrimination Act 1984* (the SD Act). Section 28A of the SD Act provides as follows:

> ***Meaning of sexual harassment***
>
> *(1) For the purposes of this Act, a person sexually harasses another person (the* ***person harassed*** *) if:*
>
> *(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
> *(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*
>
> *in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*
>
> *(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:*
>
> *(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;*
> *(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;*
> *(c) any disability of the person harassed;*
> *(d) any other relevant circumstance.*
>
> *(2) In this section:*
> ***"conduct of a sexual nature"*** *includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.*

[42] I am not necessarily persuaded to the view that the actions of the Applicant fall neatly within the description above. I accept that there are many shades of grey rather than a strict black / white definition when it comes to what is and what is not sexual harassment. I also accept that the actions of the Applicant involved accusations of Mr Rahman performing a sexual act and suggestive hand gestures. However, I do not accept that there was any genuine sexual undertone to what the Applicant was doing. I think what he was instead doing was using a common – but totally unacceptable - form of insult for people who are considered as being too close to their boss.

[43] I also note that the Fair Work Act draws a distinction between different forms of unacceptable behaviour. In Part 3-5A – Prohibiting sexual harassment in connection with work,

the FWC is empowered to take steps to stop sexual harassment in workplaces. In Part 6-4B – Workers bullied at work, the FWC is granted powers to stop bullying occurring in workplaces. In my view this makes it clear that the Act regards those behaviours as separate and distinct. I also note that of the two concepts only one, being sexual harassment, is listed in the definition of serious misconduct found in Regulation 1.07.

[44] In terms of a definition of bullying, Vice President Hatcher (as His Honour then was) proposed a list of behaviours that could constitute bullying in *Mac v Bank Of Queensland* as follows (with my emphasis):

> *"My list included the following: intimidation, coercion, threats, **humiliation**, shouting, **sarcasm**, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, **emotional abuse**, belittling, bad faith, **harassment**, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, **disrespect**, mobbing, mocking, victim-blaming and discrimination."*[13]

It is clear to me that those behaviours emphasized are the sorts of behaviours in which the Applicant has engaged. Given this, I have formed the view that the behaviour of the Applicant is best characterised as bullying.

[45] Having found that the Applicant has engaged in bullying rather than sexual harassment does not necessarily mean his actions fall outside the ambit of Regulation 1.07. The Respondent also submitted – correctly – that Regulation 1.07 additionally defines conduct that causes serious and imminent risk to the health and safety of a person as serious misconduct. However, while I accept that Mr Rahman was upset, unhappy and uncomfortable with the actions of the Applicant, there is no evidence that his health and safety was at serious and imminent risk – noting that the behaviour needs to meet both of those tests.

[46] In saying that I do not in any way seek to trivialise the discomfort that Mr Rahman experienced. Going to work each day knowing that he would be on the receiving end of taunts from the Applicant would have been stressful and deeply unpleasant and would no doubt have impacted his wellbeing. However, in the absence of evidence I cannot be satisfied that the Applicant's behaviour created a risk that was both serious and imminent, despite how foolish and nasty it clearly was.

[47] Summarising my findings thus far would suggest that the Applicant had not quite met the standard of serious misconduct that would warrant termination without a chance to improve his behaviour. However, I believe that I must also give consideration to two further relevant factors. Firstly, the fact that the Applicant, having been advised that Mr Rahman did not like his comments, did not seek to apologise but rather "doubled down" and began to attempt to humiliate Mr Rahman by telling other employees in front of him that he could not take a joke and was likely to make a harassment complaint if someone joked about him.

[48] I should say that I do not accept the suggestion from the Applicant that he was simply warning other employees out of concern that they might get a harassment complaint about them. Such concern is not consistent with his angry outburst at Mr Rahman on 1 June 2024. I find that his actions were deliberate, intended to embarrass Mr Rahman and a petulant response to having been called out for his poor behaviour.

[49] The second issue of concern is that of the level of remorse demonstrated by the Applicant. The Respondent submitted that he showed a lack of remorse and instead engaged in what it described as "victim-blaming". I find that there is some merit to this submission. In his own statements the Applicant states that he was disappointed in Mr Rahman for his reaction to what the Applicant referred to as his "jokes". He made comments such as that he had thought Mr Rahman was a good man – with the clear implication that this was no longer the case. The Applicant admitted to asking the Respondent during his show cause meeting to explain to him what he had done wrong. I accept the evidence of Ms Locke that the Applicant had also complained that he did not know why Mr Rahman was angry at him.

[50] While the Applicant made much of his desire to apologise to Mr Rahman, it is clear - and indeed conceded in submissions - that he only formed a view that he should apologise after the altercation of 1 June 2024. Clearly, he did not feel the need to apologise for his comments about sucking the boss's dick.

[51] The alleged altercation between the Applicant and Mr Tonkin, while occurring post-termination, is a matter that may be relevant in considering a valid reason. However, both the Applicant and Mr Tonkin were unwavering in their evidence on this matter and I have formed the view that even on balance of probability I cannot be satisfied that the Applicant called Mr Tonkin an arsehole. I tend instead to the view that Mr Tonkin was sincere in his evidence but may have misheard what was spoken. Given this, I have given this interaction no weight in my decision.

[52] In summary, I find that the comments from the Applicant to Mr Rahman while reprehensible, of themselves would not have warranted termination. However, I am also considering the Applicant's reaction to being asked to stop his comments, which was to engage in different but still inappropriate behaviour towards Mr Rahman in lieu of an apology. I am also taking into account the fact that I find that while there was some level of remorse, it was poorly conveyed. I find this because it was interspersed with statements that suggested the Applicant was not really sure what he had done wrong and statements that appeared to seek to shift blame to Mr Rahman.

[53] Given all of this, it is understandable that the Respondent had serious concerns about the Applicant's behaviour and as a consequence, I find that the Respondent had a valid reason for termination of the Applicant's employment.

Was the Applicant notified of the valid reason?

[54] 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).[14]

[55] In his submissions, the Applicant sought to argue that there had been some procedural deficiencies in the Respondent's management of the Applicant's termination. With respect to this consideration, it was argued that the Applicant should have been presented with all of the allegations against him in writing. I queried this submission at hearing because it appeared to

me that the allegations against the Applicant were set out in some detail in the letter presented to him on 7 June 2024[15].

[56] The Applicant conceded that this was the case but said that no allegations arising from the further investigations had been put to him. I pointed out that there were no allegations upon which the Respondent was relying other than those that were in that 7 June 2024 letter. Given this, even if other allegations had arisen the Respondent was not seeking to use those allegations against the Applicant.

[57] The Respondent submitted that the Applicant had been made aware of its concerns in the Letter of Allegations dated 7 June 2024 and in subsequent correspondence given to him throughout the investigation process. In the correspondence subsequent to the 7 June 2024 letter the Respondent has, in addition to its concerns about the comments made towards Mr Rahman, raised its concerns regarding the Applicant's level of contrition. I have examined all of those items of correspondence, and I am satisfied that the Applicant was notified of the reason for his termination.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[58] 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.[16]

[59] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.[17] 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 this concern, this is enough to satisfy the requirements.[18]

[60] As with notification of the reason, the Applicant made an argument that he was not given a chance to respond to all of the allegations against him. However, as I found above, the allegations upon which the Respondent relied were put to the Applicant, including in writing. It is clear from the submissions and evidence of both parties and I am satisfied that the Applicant was provided with an opportunity to respond – including in writing – to the allegations against him.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[61] It was not in dispute that the Respondent allowed the Applicant to be represented at all relevant times by his union.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[62] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[63] The Respondent submitted that the size of its enterprise was such that it had no material impact on the procedures followed in effecting the dismissal. The Applicant made no submissions on this factor. I find that the Respondent's size has no relevant bearing on the fairness of the dismissal.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[64] The Respondent submitted that it had a dedicated human resources function and as such this factor had no impact on the procedures followed. The Applicant made no submissions on this factor. I accept the Respondent's submission and as such this factor has no relevant bearing on the fairness of the dismissal.

What other matters are relevant?

[65] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. The Applicant made submissions with respect to other matters that the FWC should consider.

[66] Firstly, the Applicant noted the length and quality of the Applicant's service. It was not in contest that the Applicant had approximately twenty years of service with the Respondent. The Applicant submitted that this service had been unblemished. While the Respondent did not necessarily concede this, it nevertheless noted that there was nothing in the Applicant's record that was relevant to this matter. In my view, this is a relevant factor in deciding on the fairness or otherwise of the dismissal.

[67] The Applicant further submitted that his age and the employment market in a remote location such as Christmas Island were such that his prospects of gaining any employment let alone equivalent employment were very limited. It is not in dispute that the Applicant is sixty-two years of age. It is also not in dispute that the Applicant's work history over the past twenty years has been in truck driving and associated activities. During the hearing it became clear that his English skills are, while adequate for the role that he had, such that he may struggle to find white collar work. Given this, his employment prospects may well be limited to blue-collar jobs and it is likely that his age may play a factor in his attempts to find work, albeit that this factor may not be overtly acknowledged. I am also mindful that the Applicant has family living – and employed – on Christmas Island. It is therefore not unreasonable to accept his submission that his employment options are limited to that location.

[68] According to the 2021 Census data, the population of Christmas Island is 1,692 persons, which logically suggests a small employment market. According to the website of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, the main economic activities on Christmas Island are the mining of phosphate, limited tourism and the provision of government services. Clearly, phosphate mining is not an area of employment the Applicant can consider.

[69] On 9 October 2024 I conducted a search of the SEEK website to determine how many job vacancies existed on Christmas Island. There were four such jobs, all requiring skills beyond the scope of the Applicant's skillset. A further search of the internet revealed a fifth job, being a position for a casual Tourism Operator. Although this is a somewhat rudimentary method, it does seem to lend some support to the anecdotal evidence of the Applicant and his union that there is very little in the way of employment to be found on Christmas Island. As with the Applicant's service, I find this is a relevant consideration in my assessment of the dismissal.

[70] The final issue that the Applicant submits that should be considered is the status of the four policies that he was alleged to have breached. The Applicant says that it is unreasonable to require him to abide by the provisions of policies of which he is unaware and that he was unaware of all four policies named. I believe it is important that I consider whether or not the Applicant can be said to be aware of the various policies that are set out in paragraph 14 above. In the first instance, I will consider the Code of Conduct policy.

[71] The evidence of the Respondent is that the Applicant was present at a toolbox meeting where the Code of Conduct was discussed. The Applicant claims that he cannot remember the meeting. I think on balance of probability the Applicant did attend the meeting, but I am in this instance prepared to accept that his recollection is hazy. The evidence of Ms Locke with respect to this toolbox meeting is limited by virtue of her not having been in attendance. However, her evidence was that the usual process was that the presentation was made and then copies of the presentation were left for employees to take.

[72] If this is indeed the process, there is no guarantee that the Applicant, or indeed any other employee, took copies of the presentation. Further, the toolbox meeting – as per the signed attendance sheet – was scheduled to last thirty minutes and had some twenty-three attendees. This does not appear to me to be a process and a timeframe that would be conducive to explaining and promoting serious workplace behavioural requirements to employees, particularly in an environment where there may have been some language barriers. Regrettably, it has all of the hallmarks of a "tick and flick" exercise designed to demonstrate compliance.

[73] It emerged through the process of dealing with this application that Ms Locke did not spend much time on Christmas Island. I make no criticism of that. However, when pressed for details of how the other policies referenced in the termination documentation had been presented to employees, she was unable to provide any satisfactory answers. Indeed, the Respondent was restricted to essentially saying that the policies had been around for a while so they assumed that they had been rolled out. In the absence of some records or other indication I am not satisfied that this is the case. I am particularly concerned about the psychosocial safety policy. In my assessment – which was not contradicted by the Respondent - this is likely to be a fairly recent policy, created in light of the recent changes to the Western Australia Work Health Safety legislation which have sought to bring the issue of psychosocial hazards at work to the fore.

[74] Given that it is likely to be a recent policy, I would have expected some ability for the Respondent to demonstrate that it had rolled the policy out but this was not the case. It is my finding that on balance of probability, the employees of the Respondent on Christmas Island

are not likely to be familiar with the Psychosocial Safety Policy, the Standards of Behaviour Policy and Anti-Discrimination and Harassment Procedure. Further, I do not think they are likely to be fully cognizant of the Code of Conduct. In my experience the fact that a remote work location has not fully implemented Company policies is not unusual and I do not seek to criticize the Respondent. However, I find that I must give some consideration to what impact these policies might have had.

[75] I suggested at the hearing and it remains my view that an employer cannot, and indeed does not need to, have a policy for everything. There are some behaviours that are so extreme that they do not need to be codified and any reasonable person would know not to engage in them. It might perhaps be hoped that this extends to other unwanted behaviours such as bullying and sexual harassment, but experience teaches that this is not the case. As such, I am minded to consider what may have happened if the Applicant had been properly trained in acceptable workplace behaviours. Not through a tick and flick exercise but through a culturally and linguistically appropriate interactive training course that dealt with not just the "what" but also the "why".

[76] I am satisfied that this may have changed his behaviour. It may not have changed his underlying personal views but if he was working in an environment where everyone clearly knew the standards that were expected, why they were expected and the consequences for breach, I think the likelihood of his engaging in the behaviours that he did would have been reduced. Given this, I believe that I must give some weight to my finding that the Applicant's lack of exposure to and understanding of the relevant policies may have been a contributory factor in his behaviour.

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

[77] I have made findings in relation to each matter specified in section 387 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.[19]

[78] In the first instance, I have found that there was a valid reason for termination, which was communicated to the Applicant, and he was given an opportunity to respond to the allegations against him accompanied by a representative. These findings support a conclusion that there was no unfairness. The issues of size of the Respondent and Human Resources specialists are neutral in any consideration of the dismissal.

[79] However, the Applicant's length of service with no history of discipline for similar issues, his age and employment prospects lean towards a finding that the dismissal was harsh in the circumstances. Additionally, there is the issue of the Applicant's lack of exposure to and understanding of the policies cited in his termination documentation. I believe this adds an element of injustice to the termination.

[80] I have spent some time analysing my findings above, as when all the factors are weighed together the scales do tip one way but only slightly. However, I have concluded that despite the valid reason for termination, the dismissal of the Applicant was nevertheless harsh and unjust.

Conclusion

[81] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[82] Being satisfied that the Applicant:

- made an application for an order granting a remedy under section 394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of section 385 of the FW Act,

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

[83] Given the circumstances of this matter, I have resolved to conduct a conference between the parties to discuss the issue of remedy. A listing notice will be sent once this decision is published.

DEPUTY PRESIDENT

Appearances:

G Thompson of the Union of Christmas Island Workers for the applicant.
A Kennedy of PRL Group for the respondent.

Hearing details:

2024.
Perth (by video):
September 30.

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

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

[3] Ibid.

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

[5] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

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

[7] See Court Book page 33

[8] Witness statement of Ramlan Samad page 2 paragraph 11

[9] Witness statement of Ramlan Samad page 3 paragraph 21

[10] See Court Book page 37 paragraph 2

[11] See Court Book page 75 paragraph 42

[12] Witness statement of Lucinda Locke page 8 paragraph 46

[13] *Mac v Bank of Queensland* [2015] FWC 774 at [99]

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

[15] See Court Book page 28

[16] *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].

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

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

[19] *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].