DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Alex Yates

v

Stephanie Muir Ridge
(U2024/6365)

DEPUTY PRESIDENT DEAN CANBERRA, 11 NOVEMBER 2024

Application for an unfair dismissal remedy – resigned or dismissed – Applicant unfairly dismissed.

[1] On 4 June 2024 Mr Alex Yates (Applicant) made an application for a remedy pursuant to s.394 of the *Fair Work Act 2009* alleging that he was unfairly dismissed from his employment with Stephanie Muir Ridge (Respondent).

[2] The Respondent raised a jurisdictional objection on the ground that the Applicant voluntarily resigned and was therefore not dismissed. This is disputed by the Applicant.

[3] The application was heard on 10 October 2024. The Applicant was self-represented and gave evidence on his own behalf. Mr C Niven appeared with permission for the Respondent and evidence was given for the Respondent by Ms Stephanie Ridge and Ms Lisa Matters.

[4] For the reasons outlined below, I find that the Applicant did not resign and was unfairly dismissed.

Background

[5] The Respondent conducts a business called Intentional Care which provides NDIS and home care type services.

[6] The Applicant commenced employment with the Respondent on 14 March 2023 and was shortly thereafter promoted to Director of Operations.

[7] An issue arose in April 2024 in relation to the Applicant's rate of pay. Following a telephone call between the Respondent and the Applicant on 14 May 2024 in relation to the Applicant's pay, the Respondent asserts that the Applicant resigned verbally and in a text message that was sent just after the phone call ended. The text message is in the following terms:

> "Will be making a report to fair work and contacting a lawyer today. There's a reason staff talk to me, not you. Good luck doing it by yourself".

[8] About one hour after this text message was sent, the Respondent posted in the staff WhatsApp channel that the Applicant had resigned.

[9] The Applicant denies he resigned and that the text message constituted a resignation.

The case for the Applicant

[10] The Applicant says there was an agreement between him and the Respondent that they were to become business partners. In cross examination, the Respondent agreed that she referred to the Applicant as her 'business partner'. As a result of that agreement, a meeting took place with the Respondent's accountant on 25 September 2023 to organise the best way to structure a company and form a partnership. He provided evidence of an email with the accountant in support of this agreement.

[11] As there were insufficient funds in the business at that time to start a company, the Applicant agreed to work at a lower pay rate to allow the parties to save the necessary funds. He says that each time it seemed that enough money may have been saved, the money would 'disappear' from the account, because the Respondent had withdrawn the funds.

[12] On 25 April 2024 the Respondent informed the Applicant she intended to increase her weekly pay. The parties met on 26 April to discuss her pay increase. The Applicant says he was upset, given he was being paid for less hours than he was working, and he felt she was not honouring their agreement in relation to progressing the partnership. He was also upset because the business could not afford to the pay increase.

[13] At that time, he said, the business was utilising a large overdraw to cover staff wages, and the Respondent was also using funds that had been set aside for superannuation and BAS payments to pay staff wages.

[14] The Applicant gave evidence that during the meeting on 26 April he said he didn't believe she was serious about the partnership given they had been trying to save the money to restructure and set up a company for over one year, and that he believed he had already paid his way into the partnership. As a result, he wanted equal pay to her. He said the Respondent replied saying "I agree, you've paid your way, that's fine, put your pay up".

[15] On 3 May 2024 the Applicant emailed the Respondent's bookkeeper to say that his last pay was lower than it should have been and set out the amount he said he ought to have been paid. He sent a further email to the bookkeeper the same day saying that: "Stephanie is aware of the increase in my pay rate. After she increased her weekly draw to $2500 we agreed I would get the same. Its been this way for a couple of pays now, I'm guessing Mariana didn't update the template?" Mariana was the previous bookkeeper and the Applicant's former partner.

[16] The Applicant says he also spoke with the Respondent about his pay around this time.

[17] On 13 May his pay was again short, and the shortfall in the previous pay had not been rectified, so he called the bookkeeper on 14 May who said he needed to discuss the matter directly with the Respondent. He then called the Respondent and asked why his pay was short when it was meant to be $2500 per week. He gave evidence that the Respondent denied any agreement about increasing his pay. He said he was shocked and accused her of lying.

[18] He told the Respondent that she had agreed to equal pay and that he wouldn't continue to work for her for less than she was paying herself, as he "had already paid my own way and was doing the vast majority of the work". He said she would not be able to run the business on her own, and he couldn't believe that she would lie about their agreement. He also said it was likely she would lose staff members and she would struggle to run the business if he left. At that point, the Respondent ended the call by hanging up on the Applicant.

[19] The Applicant said he was "in absolute shock at having just been lied to, cheated and betrayed like that, I couldn't believe what was happening". He then sent the text message set out at paragraph [7] above to "drive the point home that she still needed me to run the company, as I felt like she was looking to get rid of me and nullify the partnership agreement".

[20] As noted earlier, about one hour later the Respondent posted in the WhatsApp chat that the Applicant had resigned.

[21] He then contacted the lawyer that had been used by the business to create the contracts for the partnership. It took some time to get hold of the lawyer who advised him not to reply to the Respondent and wait until he could discuss the matter with a different lawyer in the firm who specialised in employment law. He did not hear back from the lawyer for some days, at which time he was informed that the firm had a conflict of interest and could not represent him.

[22] The Applicant gave evidence that he was contacted by several staff members after the Respondent posted the WhatsApp message saying he had resigned, and he informed them he had not quit. One of those staff members, Ms La Spada, provided a written statement for these proceedings to the effect that the Applicant told her at that time he did not quit, and that he thought the Respondent was trying to get rid of him because of the dispute about his wage being lowered and because she did not want to proceed with the partnership. Ms Cook, another employee, also provided a statement to the effect that she spoke with the Applicant on 16 May who told her that he had not resigned and he was devastated about what had happened given the long hours and hard work he had put into the business.

[23] The Respondent had also advised staff via WhatsApp that another employee, Ms Matters, would take over some of the Applicant's responsibilities. The Applicant spoke with Ms Matters and told her he felt like she was taking his job and enabling the Respondent to fire him.

[24] The Applicant continued to perform some work for the next few days until on 16 May he received an email from the Respondent instructing him not to talk to staff or clients, and not to access any work accounts.

[25] The Applicant gave evidence that he had worked 7 days a week and had put his heart and soul into building the business, and there was no way he would walk away from the business in those circumstances.

[26] In response to the evidence given by Ms Matters, to the effect that the Applicant told her he did resign, the Applicant adamantly denied this, saying he had said he was upset about being fired and that the Respondent had falsely claimed he had resigned.

The case for the Respondent

[27] The Respondent gave evidence that she spoke with the Applicant on 14 May about what she said was a discrepancy in his pay, that being that the Applicant had increased his pay in excess of the $55 per hour that had been agreed. She said the Applicant: "was initially taken aback", and then went on to state:

> "a. He ran the Company and not me;
> b. He shouldn't have to justify being paid more;
> c. I was financially irresponsible;
> d. I would be able to do it (run the company) without him".

[28] She gave evidence that the Applicant then said: "I quit! I'm going! I'm going to take the staff with me. They will come with me. You won't be able to do it without me".

[29] The Respondent gave evidence that while the Applicant was initially taken aback, his voice changed over the course of the conversation which caused her concern and fear.

[30] The Applicant then sent her a text message which included the words: "Good luck doing it by yourself".

[31] The Respondent gave evidence that the former bookkeeper had been the Applicant's partner, and he had used his influence over her to change his pay rate above that which had been agreed.

[32] The Respondent's Form F3 Employer Response states that on 20 May 2024 the Respondent sought that the Applicant confirm his resignation in writing. On 21 May the Applicant replied saying that: "I have not resigned from my position with intentional care, nor do I have any intention of doing so".

[33] Ms Matters gave evidence that she received a telephone call from the Applicant on 14 May, during which he told her he had resigned, and he then proceeded to make a number of disparaging statements about the Respondent.

[34] In her oral evidence, the Respondent said she was not surprised the Applicant resigned because their relationship had been deteriorating for some time.

When is a person 'dismissed'?

[35] The meaning of 'dismissed' is defined in s.386(1) of the Act which states:

(1) A person has been dismissed if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

[36] In *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli*[1] (*Bupa*), a Full Bench of the Commission examined the relevant authorities as to what constitutes 'dismissed' under s.386(1) which included the following:

(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probably result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.

[37] In *Lance Gunther & Michele Daly v B & C Melouney T/A Easts Riverside Holiday Park*[2] Deputy President Sams noted the following when considering whether the applicant was dismissed:

a. Jurisdiction can only exist where termination of employment at the initiative of the employer has occurred. 'Initiative' is relevantly defined in the New Shorter Oxford Dictionary as: "the action of initiating something or of taking the first step or the lead; an act setting a process or chain of events in motion; an independent or enterprising act."

b. This definition was considered in *Mohazab v Dick Smith Electronics Pty Ltd* (*Mohazab*) where a Full Court of the Industrial Relations Court of Australia said, '… a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship.'

c. In *Mohazab*, the Full Court also said:

> 'In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.'

d. A Full Bench of the AIRC in *Stubbs v Austar Entertainment Pty Ltd* said, '… to constitute termination at the initiative of the employer the termination must be the direct or consequential result of 'some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect ...'[*Rheinburger v Huxley Marketing*, 16 April 1996 per Moore J].

Conclusion as to dismissal

[38] I am satisfied on the evidence that the Applicant did not resign for the following reasons:

a. To the extent there is a dispute about what was said in the phone conversation between the parties on 14 May 2024, I prefer the evidence of the Applicant. His actions after this conversation do not support a finding that he resigned at that time.

b. The text message relied on by the Respondent is ambiguous at best and is explainable for the reasons given by the Applicant in his evidence.

c. The Applicant continued to perform work between 14 and 16 May until he was directed by the Respondent to cease talking to staff or clients and not to access any work accounts. He would not have continued to work had he resigned.

d. I am not satisfied that the Applicant unilaterally changed his pay rate above that which had been agreed. I am satisfied that the agreement between the parties, consistent with their intention to be business partners, was that the Applicant and the Respondent would be paid the same amount. I am satisfied that the Applicant would not have resigned given his firm belief as to the agreement between him and the Respondent about becoming a partner in the business.

e. On 20 May the Respondent sought to have the Applicant confirm in writing that he resigned. The Applicant replied the following day in writing confirming that he had not resigned and had no intention of doing so. There is no evidence that the Respondent sought to clarify this position with the Applicant or reply asserting the Applicant had resigned on 14 May. This supports a finding that the Applicant did not resign.

f. Finally, I accept the Applicant had put significant work into building the business and entering into a partnership with the Respondent, and would not have simply walked away from this in circumstances where he felt he had already "paid his way" into the partnership.

[39] I am satisfied that this was a termination at the initiative of the Respondent and as a result I find the Applicant was dismissed within the meaning of the Act. I am also satisfied that he is otherwise a person protected from unfair dismissal. Accordingly, I now need to determine whether his dismissal was unfair.

Was the dismissal unfair?

[40] A dismissal is unfair if the Commission is satisfied on the evidence that the circumstances set out at s.385 of the Act existed. Section 385 provides the following:

> **385 What is an unfair dismissal**
> A person has been *unfairly dismissed* if the FWC is satisfied that:
> (a) the person has been dismissed; and
> (b) the dismissal was harsh, unjust or unreasonable; and
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
> (d) the dismissal was not a case of genuine redundancy.
> Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.

[41] I have found that the Applicant was dismissed, and subsections (c) and (d) do not apply.

Was the dismissal harsh, unjust or unreasonable?

[42] 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.

[43] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd*[3] as follows:

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

[44] The onus is on the Applicant to prove his dismissal was harsh, unjust and/or unreasonable.

[45] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[4]

Valid reason - s.387(a)

[46] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[5] and should not be "capricious, fanciful, spiteful or prejudiced."[6] 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.[7]

[47] There is no mandate for giving the 'valid reason' criterion any greater emphasis or weight than any of the other criteria in s 387. It is well settled that the statutory requirement to 'have regard to' or 'take into account' requires the Commission to give the matter(s) weight as a fundamental element in the decision-making process. Even if it is found that there was a valid reason for the dismissal, an overall assessment must be made as to whether the dismissal was harsh, unjust or unreasonable.

[48] The Respondent asserts that the Applicant unilaterally and without permission increased his pay rate, and this constituted serious misconduct warranting dismissal.

[49] I am not satisfied that this occurred. I find that the Applicant and the Respondent had agreed that the Applicant would be paid the same amount as the Respondent. It is clear in the evidence that the Respondent approved payments made to all employees within Xero, the business' accounting software, including payments made to the Applicant. She clearly approved

the payments made to the Applicant that she now disputes. I do not accept the Applicant used his relationship with the former bookkeeper (his former partner) to, in essence, misappropriate funds or engage in fraud. The Applicant's actions in contacting both the new bookkeeper and the Respondent to dispute his pay are not the actions of someone who has misappropriated funds. He was asserting what he genuinely believed were his pay entitlements.

[50] The Respondent asserts that there is a valid reason for dismissal which arises from the Applicant's post-employment conduct, that being inappropriate commentary regarding the Respondent and a breach of contractual obligations.

[51] I accept the Applicant's comments about the Respondent were not flattering. The comments included that her staff did not like her or respect her, that she has lied, that clients were unhappy with her, and that she was using business funds to pay for her wedding. Clearly, he was upset about what had occurred. As he described, he felt betrayed by the Respondent and said that never in his wildest dreams did he imagine she would be so dishonest. I am not satisfied, though, that his post-employment comments were serious enough to ground a valid reason for his dismissal in these circumstances.

[52] As a result, I find that there was no valid reason for the Applicant's dismissal.

Notification of the valid reason and opportunity to respond - s.387(b) and (c)

[53] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made,[8] in explicit terms[9] and in plain and clear terms.[10] In *Crozier v Palazzo Corporation Pty Ltd*[11] a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations Act 1996* stated the following:

> "[73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."[12]

[54] An employee protected from unfair dismissal must also be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person. Such requirement will be satisfied 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.[13] This criterion is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.[14]

[55] The requirement to notify of the reason, together with the requirement to provide an opportunity to respond to the reason, involves consideration of whether procedural fairness was afforded to the Applicant before his dismissal was effected.

[56] The Respondent submits that the Applicant was aware of her concerns regarding his pay and was given an opportunity to respond to these concerns.

[57] Because I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant in the present circumstances, as the inquiry to be made here is whether the Applicant was notified of the 'valid reason', and given an opportunity to respond to that reason, before a decision was made to dismiss him.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[58] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

[59] This is not a relevant consideration in this matter.

Warnings regarding unsatisfactory performance - s.387(e)

[60] A warning for the purposes of s.387(e) must clearly identify:

a. the areas of deficiency in the employee's performance;
b. the assistance or training that might be provided;
c. the standards required; and
d. a reasonable timeframe within which the employee is required to meet such standards.[15]

[61] The warning must also "make it clear that the employee's employment is at risk unless the performance issue identified is addressed."[16]

[62] This was not a dismissal related to unsatisfactory performance and so this consideration is not relevant in this matter.

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

[63] The Respondent submitted that the small business is 'not sophisticated' and does not maintain access to a dedicated human resource professional.

[64] I accept that the absence of dedicated human resource expertise impacted on the procedures followed by it in effecting the dismissal.

Other relevant matters - s.387(h)

[65] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[66] The Respondent submitted that the business was significantly impacted by matters involving the Applicant which affected its revenue and operational capacity.

[67] I do not consider there are any other matters that are relevant in this case.

Conclusion as to unfairness

[68] Having carefully considered each of the required matters, I am satisfied that the Applicant has discharged his onus of proving that his dismissal was harsh, unjust and unreasonable, and therefore unfair.

Remedy

[69] Having found that the Applicant's dismissal was unfair, it is necessary to consider what, if any, remedy should be granted to him. The Applicant seeks the remedy of compensation.

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

a. I am satisfied that reinstatement is inappropriate; and
b. I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[71] In this case, I am satisfied that reinstatement is inappropriate, and an order for payment of compensation is appropriate.

[72] In considering what is appropriate compensation, I must consider the factors which are set out in s.392(2) of the Act and which include:

a. the effect of the order on the viability of the Respondent's enterprise;
b. the length of the Applicant's service;
c. the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;
d. the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
e. the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
f. the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
g. any other matter that the Commission considers relevant.

[73] The evidence and submissions filed by the parties did not address these factors. Accordingly, directions will be separately issued for evidence to be filed so proper consideration can be given to the appropriate compensation.

DEPUTY PRESIDENT

Appearances:
A Yates on his own behalf.
C Niven of Tailored Legal for Stephanie Muir Ridge.

Hearing details:
2024.
By video:
October 10.

Printed by authority of the Commonwealth Government Printer

<PR780631>

---

[1] [2017] FWCFB 3941.

[2] [2012] FWA 2473.

[3] (1995) 185 CLR 410 at 465 per McHugh and Gummow JJ.

[4] *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].

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

[6] Ibid.

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

[8] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41].

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

[10] *Previsic v Australian Quarantine Inspection Services* Print Q3730.

[11] (2000) 98 IR 137.

[12] Ibid at 151.

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

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

[15] *McCarron v Commercial Facilities Management Pty Ltd t/a CFM Air Conditioning Pty Ltd* [2013] FWC 3034, [32].

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