DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Craig Brown
v
Port Produce Pty Ltd
(U2024/4187)

COMMISSIONER HUNT BRISBANE, 11 NOVEMBER 2024

Application for an unfair dismissal remedy – jurisdictional objection – was there a dismissal at the employer's initiative – dismissal – merit decision – remedy – applicant in receipt of workers' compensation weekly payments – compensation will be ordered in respect of superannuation only – applicant required to provide further information before a compensation order is made.

[1] On 10 April 2024, Mr Craig Brown made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that he had been dismissed from his employment with Port Produce Pty Ltd (the Respondent) and that the dismissal was harsh, unjust or unreasonable.

[2] In its Form F3 – Employer Response to Unfair Dismissal Application, the Respondent raised a jurisdictional objection pursuant to s.368(1)(b) of the Act contending that Mr Brown was a casual worker and had 'walked off the job'. It submitted that if Mr Brown had resigned from his employment, he was not forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

When has a person been unfairly dismissed?

[3] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission 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.

[4] As set out above in s.385 of the Act, only employees who have been dismissed are able to make an application for an unfair remedy application under the Act.

[5] Section 386(1) of the Act provides that a person has been dismissed if:

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

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

[6] It is necessary in this decision to determine if the Respondent terminated the employment on its initiative, or, if Mr Brown resigned his employment, whether he was forced to do so because of conduct, or a course of conduct engaged in by the Respondent.

Hearing

[7] The matter was listed for hearing on 19 August 2024 by video using Microsoft Teams. Mr Brown represented himself, supported by Ms Christine Gilewicz, Community Development Worker, Port Douglas Neighbourhood Centre. Mr Ray Scicluna, Group CEO appeared for the Respondent. Mr John Brunsdon, DC Manager also gave evidence.

Evidence of Mr Brown

[8] Mr Brown commenced employment with the Respondent in June 2018 as a Seafood Processor. He was employed on a casual basis with regular and systematic work. He was paid $31.09 per hour. Mr Brunsdon was his supervisor. On 8 July 2022, Mr Brown was angry at work, dissatisfied with work practices. As he was leaving that day, Mr Brunsdon said to him, "*I'll see you tomorrow?*" Mr Brown replied, "*Yes.*"

[9] The following day, Mr Brown attended for work, however Mr Brunsdon said, "*No, we are done*." Mr Brown's evidence is that it took 10 minutes for him to beg for his job, at which point Mr Brunsdon reinstated him. They both agreed that Mr Brown would seek assistance for mental health issues he was experiencing. Mr Brown considered that he ought not speak up about dissatisfaction with workplace issues.

[10] On 13 July 2022, Mr Brown went to visit upon his GP, Dr Ron Blier, however he was not available. Mr Brown was seen by Nurse Gabby, who prescribed him medication and issued a medical certificate. The certificate was for a period of two weeks, however Mr Brown returned to work after one week at the request of Mr Brunsdon.

[11] In late February/early March 2024, Mr Brunsdon informed Mr Brown that another employee, whom I shall call Rodney, was returning to work for the Respondent. Mr Brown had worked with Rodney in the past and considered that Rodney was often under the influence of drugs and alcohol at work. Mr Brown did not want to work with him.

[12] Mr Brunsdon asked Mr Brown if he knew of anybody else who could shuck oysters. Another colleague, Pete, was soon leaving, and Mr Brown knew that this would leave him with a heavy workload. Mr Brown requested a pay rise. Mr Brunsdon asked him how much he thought that ought to be. Mr Brown said he would think about it, and when he learned that

senior management was soon visiting from Cairns, he thought he might approach them to discuss a pay rise.

[13] On 20 March 2024, Pete was working, having returned from holidays, and Mr Brown considered that all of the orders had been completed by 9:00am. Mr Brown had been working on two boxes of crustaceans/bugs, while Pete had worked on the salmon. He said that there was no fish that day.

[14] Mr Brown told Mr Brunsdon that he would be leaving for the day. Mr Brunsdon was unhappy about that. Mr Brown assured him that all of the orders had been completed, and in any event, his arm was sore and he needed to rest it.

[15] Mr Brunsdon asked Mr Brown if he would see him the next day, to which Mr Brown said yes. Mr Brown asked if Mr Brunsdon had asked senior managers about him being made permanent and receiving a pay increase. Mr Brunsdon said that he had not, and again asked Mr Brown how much he thought he ought to be paid. Mr Brown answered, "*I don't know, maybe $90k?*" Mr Brunsdon said that was not feasible and he would have to find another job if he wanted that kind of money.

[16] Mr Brown left the premises. He had in his possession the keys to the processing area and the back gate, as he usually did.

[17] That evening, while he was visiting his mother, Mr Brown noticed his mobile phone was broken. He ordered a new phone online, however he had lost all of his contacts on the broken phone.

[18] On the morning of 21 March 2024, while driving to work, he stopped to fill his car with petrol. He then noticed smoke coming from his car and heard a grinding noise. He drove the vehicle across the road to a mechanic, his friend, and asked if the car would make it to his mother's house. The mechanic said yes.

[19] The car made it to his mother's house, and Mr Brown idled it there for approximately 30 minutes. Using his mother's landline, he attempted to call the Respondent's landline advertised on its webpage, as Mr Brown did not know Mr Brunsdon's mobile phone number on account of his phone being broken. Nobody answered the landline.

[20] Mr Brown decided to go to the medical centre. He was examined by Nurse Gabby and was issued a medical certificate for a one-week period to be absent from work.

[21] He parked his car across the road from work and then went in to see Mr Brunsdon. He was going to explain that he needed time off work due to his arm being sore. He located Mr Brunsdon, standing over a fish bin, scraping ice off fish which had been delivered that morning. Mr Brown started to explain that his phone had broken and he had experienced difficulty trying to reach him.

[22] Mr Brown saw Mr Brunsdon's facial expressions; he looked like he was in pain. Mr Brown asked him if he was OK. Mr Brown's account of the conversation is as follows:

Mr Brunsdon: We are done!

Mr Brown: What?

Mr Brunsdon: We are fucking done!

Mr Brown: What about my arm?

Mr Brunsdon: Go see a doctor.

Mr Brown: I already have [handed him the medical certificate]

[23] Mr Brunsdon commenced walking towards Mr Brown, and Mr Brown did not feel safe. He started to walk towards the exit. Mr Brunsdon said, "*I want your keys.*" When Mr Brown didn't reply, Mr Brunsdon screamed, "*I want your fucking keys.*"

[24] Mr Brown responded, "*I'm going to get them. Is this the route we're going down?*"

[25] Mr Brown went to his vehicle and drove halfway down the driveway and met Mr Brunsdon. He handed him the keys. Mr Brown went to find some of his possessions when Mr Brunsdon said, "*Can we talk?*" Mr Brown responded, "*Fuck off you idiot, you sacked me twice.*" Mr Brunsdon denied that he had sacked him and said there was 100kg of fish needing processing.

[26] Mr Brown laughed at Mr Brunsdon and suggested that there was not 100kg of fish needing processing. As Mr Brown entered the storeroom, he considered that Mr Brunsdon was in a rage, and three times warned him to leave him alone. He considered that Mr Brunsdon then calmed down but said, "*You would do something like this.*" Mr Brown responded, "*I wouldn't, but you call the shots. I'll see you in court.*" Mr Brown grabbed his belongings and left the premises.

[27] Mr Brown's injury to his arm is so severe that he has been unable to work. His workers' compensation claim was accepted. and he has been in receipt of workers' compensation payments as follows:

DATE (2024)	**Taxation**	**Craig Brown**	**Total**
4 April – 27 April	534.00	2,822.34	3,356.34
28 April – 4 May	157.00	830.16	987.16
5 May – 11 May	157.00	830.16	987.16
12 May – 18 May	157.00	830.16	987.16
19 May – 25 May	157.00	830.16	987.16
26 May – 1 June	157.00	830.16	987.16
2 June – 8 June	157.00	830.16	987.16
9 June – 15 June	157.00	830.16	987.16
16 June – 22 June	157.00	830.16	987.16
23 June – 29 June	157.00	830.16	987.16
1 July – 6 July	139.00	848.16	987.16
7 July – 13 July	139.00	848.16	987.16

14 July – 20 July	139.00	848.16	987.16
21 July – 27 July	139.00	848.16	987.16
28 July – 3 August	139.00	848.16	987.16

[28] In evidence given during the Hearing, Mr Brown stated that he has a partially torn forearm. He will need to find other forms of work. He stated, "*i don't think I can return to filleting*."

Evidence of Mr Brunsdon

[29] Mr Brunsdon is the DC Manager at the Cairns location.

[30] On 8 July 2022, Mr Brown left work without approval. On 9 July 2022, Mr Brunsdon was preparing to find a replacement for Mr Brown, when he appeared at work. Mr Brunsdon informed him that he was dismissed because of the way he had conducted himself the day earlier, including being angry. Mr Brown apologised for his behaviour and stated that he was going through mental health issues. Mr Brunsdon agreed to reinstate him on the condition that he did not repeat his behaviour, and his doctor contact Mr Brunsdon to discuss the medication Mr Brown would be prescribed to assist with his mental health issues.

[31] On 13 July 2022, Mr Brown came to work with a medical certificate requiring two weeks' absence. Mr Brunsdon asked him if he could return after one week, which Mr Brown agreed to.

[32] When Mr Brown returned to work, Mr Brunsdon considered that the medication Mr Brown was on made him more mellow, but he was having difficulties with memory retention and completing tasks required of him. Mr Brunsdon considered he would not be able to request Mr Brown complete complex work, and he would only be able to continue to do 'menial' work.

[33] In late February/early March 2024, Mr Brunsdon informed Mr Brown that he would have Rodney assisting in processing, and this would not affect Mr Brown's hours of work. Mr Brown asked for an increase in his rate of pay. Mr Brunsdon replied that he might be able to consider permanent employment for him, but this would result in a reduced rate of pay to cover entitlements such as paid leave. Mr Brunsdon asked Mr Brown to advise the rate of pay he was seeking. He did not respond.

[34] On 19 March 2024, Mr Brunsdon considered that Mr Brown's mood had changed, similar to what it was in July 2022. The following exchange occurred:

> Mr Brown: If Rodney comes back you will have to find someone else.
>
> Mr Brunsdon: Yes, Craig, he will be returning.
>
> …….
>
> Mr Brown: If I don't get a pay rise, I'm leaving.
>
> Mr Brunsdon: In the current climate, a pay rise is unlikely.

[35] On 20 March 2024, after approximately two hours of work, Mr Brown informed Mr Brunsdon, "*There's no work here, everything done, I'm going.*" Mr Brunsdon replied that there was plenty of work to do. Mr Brown responded, "*nah, nah, there's not anything to do, I'm going.*"

[36] Mr Brunsdon considered he had had enough and said if he wants to leave, that would be fine, but that is his decision. Just prior to him leaving, Mr Brown asked Mr Brunsdon if he had asked management for a pay rise for him. Mr Brunsdon said, "*No, because you haven't told me what you wanted.*" Mr Brown replied, "*We can start at $95k.*" Mr Brunsdon said, "*That's unrealistic, but good luck finding that somewhere else.*" Mr Brown laughed and left the premises.

[37] Mr Brunsdon considered that as a casual employee, Mr Brown had terminated his employment by complaining to others that there wasn't much work to do and walking off the job.

[38] On 21 March 2024, after 10:00am, Mr Brown arrived and handed to Mr Brunsdon a letter. The following exchange occurred:

Mr Brunsdon:	What is it?
Mr Brown:	A doctor's certificate.
Mr Brunsdon:	As far as I was concerned, you walked out yesterday, done and not coming back.

[39] Mr Brunsdon stated that prior to being handed the medical certificate he was not aware of any injury, and certainly not a workplace injury; there had not been a request to complete workplace injury forms.

[40] Mr Brunsdon asked Mr Brown for his work keys and Mr Brown provided them to him.

[41] In evidence given during the Hearing, Mr Brunsdon agreed that he did say to Mr Brown, "*Can we talk?*", to which he replied, "*Fuck off.*" Mr Brunsdon does not remember saying that there was still 100kg of fish to process. He agreed that both he and Mr Brown were angry on 21 March 2024.

[42] Mr Brunsdon stated that Mr Brown had a lot of personal belongings on the premises, including quite bulky items. On 21 March 2024, he spent a lot of time collecting his items. Mr Brunsdon conceded that Mr Brown did not collect any personal belongings on 20 March 2024.

Evidence of Mr Scicluna

[43] Mr Scicluna is the Group CEO of Total Food Network, employing approximately 90 employees across the group of companies. The Respondent is an associated entity of Total Food Network.

[44] He considered that Mr Brown and Mr Brunsdon had a good relationship. He said Mr Brown was a good worker.

[45] Following the Hearing, Mr Scicluna provided records demonstrating that in the period July 2023 – March 2024, Mr Brown's average weekly earnings were $1,221.53.

Consideration as to dismissal

[46] Section 386 of the Act provides that a person has been dismissed in several circumstances, including when their employment has been "terminated on the employer's initiative". Such a situation refers to a termination that is brought about by an employer and which is not agreed to by the employee.[1]

[47] When analysing whether there has been a "termination at the initiative of the employer" for the purpose of s.386(1)(a) of the Act, it is necessary for the analysis to be conducted by reference to termination of the employment relationship. It is not conducted by reference to the termination of the contract of employment in operation immediately before the cessation of the employment.[2]

[48] Although applied under the previous Act,[3] the following approach of the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*[4] in my view remains generally apposite to the consideration of s.386(1) of the Act:

> "[21] In this Commission the concepts have been addressed on numerous occasions and by a number of Full Benches. In *Pawell v Advanced Precast Pty Ltd* (Pawel) a Full Bench said:
>
> > '[13] It is plain that the Full Court in *Mohazab* considered that an important feature in the question of whether termination is at the initiative of the employer is whether the act of an employer results directly or consequentially in the termination of the employment and that the employment relationship is not voluntarily left by the employee. However, it is to be noted that the Full Court described it as an important feature. It plainly cannot be the only feature. An example will serve to illustrate this point. Suppose an employee wants a pay rise and makes such a request of his or her employer. If the employer declines and the employee, feeling dissatisfied resigns, can the resignation be said to be a termination at the initiative of the employer? We do not think it can and yet it can be said that the act of the employer i.e. refusing the pay rise, has at least consequentially resulted in the termination of the employment. This situation may be contrasted with the position where an employee is told to resign or he or she will be terminated. We think that all of the circumstances and not only the act of the employer must be examined. These in our view, will include the circumstances giving rise to the termination, the seriousness of the issues involved and the respective conduct of the employer and the employee. In the instant case the uncontested factual findings are that the applicant had for almost the whole of his employment performed welding duties; that there was no objective threat to his health and safety involved in the requirement that he

undertake welding duties so long as it was not on a continuous basis and that the welding he was required to do was not continuous.'

[22] In the Full Bench decision of *ABB Engineering Construction Pty Ltd v Doumit* (*ABB Engineering*) it was said:

'Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that the line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than of the employer, that gives rise to the termination. The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.'

[23] In our view the full statement of reasons in *Mohazab* which we have set out together with the further explanation by Moore J in *Rheinberger* and the decisions of the Full Benches of this Commission in *Pawel* and *ABB Engineering* require that there to be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether 'the act of the employer [resulted] directly or consequentially in the termination of the employment." Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in *Mohazab*. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign." (footnotes omitted).

[49] A more recent Full Bench reinforced the relevance of the above approach in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli*[5] in the following terms:

"[33] Notwithstanding that it was clearly established, prior to the enactment of the FW Act, that a 'forced' resignation could constitute a termination of employment at the initiative of the employer, the legislature in s.386(1) chose to define dismissal in a way

that retained the 'termination at the initiative of the employer' formulation but separately provided for forced resignation. This was discussed in the Explanatory Memorandum for the *Fair Work Bill* as follows:

> '1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200).
>
> 1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).
>
> 1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:
>
> - where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
>
> - where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign.'

[34] It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd*, that 'The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No. 1*) and summarised by the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*' (footnotes omitted). The body of pre-FW Act decisions concerning 'forced' resignations including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen Pty Ltd (in liq); Ryan v ISS Integrated Facility Services Pty Ltd; Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust*." (footnotes omitted)

[50] Accordingly, the general principles to be applied in this case are well settled. Stated succinctly, they include:

- the question as to whether the resignation was forced within the meaning of the Act is a jurisdictional fact that must be established by the applicant;

- a termination at the initiative of the employer involves the conduct (or course of conduct) engaged in by the employer as the principal constituting factor leading to the termination. There must be a sufficient causal connection between the conduct and the resignation such that it 'forced' the resignation;

- the employer must have engaged in some conduct that intended to bring the employment relationship to an end or had that probable result;

- conduct includes an omission;

- considerable caution should be exercised in treating a resignation as other than voluntary where the conduct of the employer is ambiguous, and it is necessary to determine whether the employer's conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign; and

- in determining the question of whether the termination was at the initiative of the employer, an objective analysis of the employer's conduct is required.

[51] Having regard to the legislation and the authorities, it is necessary to determine whether Mr Brown resigned his employment by leaving work early on 20 March 2024, as contended by the Respondent, or his employment ended in some other way.

[52] During the Hearing, it was conceded by the Respondent that when Mr Brown left on 20 March 2024, there was no request made by Mr Brunsdon for Mr Brown's keys to the premises. Yet, he requested them on 21 March 2024 and Mr Brown promptly handed them over.

[53] If possession of the keys to the premises was such an important issue to the Respondent, it would be expected that if Mr Brunsdon truly believed the employment relationship was at an end on 20 March 2024 because Mr Brown said he was done for the day without authority to leave, Mr Brunsdon would have required him to hand his keys over there and then.

[54] In the final moments of 20 March 2024, Mr Brown and Mr Brunsdon were still discussing Mr Brown's desired pay increase. If Mr Brunsdon had time to discuss Mr Brown's salary expectations, he had time to say to him that he considered that Mr Brown had resigned his employment and to request from him the keys to the premises.

[55] There was no direction from Mr Brunsdon to Mr Brown to remove his personal belongings from the premises on 20 March 2024. The items were removed commencing 21 March 2024, when, I consider, Mr Brown was informed his employment had been terminated.

[56] Mr Brown had an unfortunate set of events befall him on the evening of 20 March 2024 and the morning of 21 March 2024. This led to him not attending for work until around 10:00am and not notifying his absence earlier. Mr Brunsdon's anger was high when Mr Brown did attend for work and present his medical certificate, notifying his injury.

[57] I consider that Mr Brunsdon did mention to Mr Brown on 21 March 2024 that there was 100kg of fish to process. Why he said that to Mr Brown when he considered Mr Brown had resigned his employment the day earlier is demonstrative of an attempt to discuss the pressures the Respondent was facing.

[58] On the evidence before the Commission, I am not satisfied that Mr Brown resigned his employment on 20 March 2024. I am satisfied that Mr Brunsdon, by his words and deeds,

terminated Mr Brown's employment on 21 March 2024. He had done a similar thing in July 2022 and on account of Mr Brown having to grovel at that time for his job back, Mr Brunsdon reinstated him.

[59] I consider that Mr Brunsdon replicated his July 2022 conduct in March 2024.

[60] I am satisfied that the Respondent dismissed Mr Brown pursuant to s.386(1)(a) of the Act on 21 March 2024.

[61] Having determined that Mr Brown was dismissed pursuant to s.386(1)(a) of the Act, I must now determine if Mr Brown has been unfairly dismissed having regard to the criteria in s.387 of the Act.

Was the dismissal unfair?

[62] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[6]

> "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."

[63] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.[7] I will address each of the criteria set out in s.387 of the Act separately.

s.387(a) - Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)

[64] When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

> "In its context in s.170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly."

[65] 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.[8]

[66] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[9] "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."[10]

[67] The Respondent must have a valid reason for the dismissal of Mr Brown, although it need not be the reason given to the applicant at the time of the dismissal.[11]

[68] Having dismissed Mr Brown on 21 March 2024, there cannot have been a valid reason to do so. Mr Brown was attempting to explain to Mr Brunsdon his required absence from work due to injury, but Mr Brunsdon was convinced that Mr Brown had finished up the day before by his actions of leaving work early. In my view, Mr Brunsdon acted out of anger, frustration and impatience in dismissing Mr Brown on 21 March 2024.

[69] I am not satisfied that there was a valid reason for the dismissal.

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

[70] Mr Brown was informed by Mr Brunsdon that he considered that he had walked out the day before and therefore his employment ended at that time. I have earlier concluded that it cannot be held that Mr Brown's conduct on 20 March 2024 be treated as a resignation.

[71] The frustration, anger and impatience of Mr Brunsdon was the reason for the employment coming to an end. Mr Brown was entitled to present his medical certificate to his employer, notifying his injury and inability to attend for work.

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

[72] Mr Brown was not given any opportunity on 21 March 2024 to respond to Mr Brunsdon's declaration that the employment had come to an end. Following the dismissal, Mr Brunsdon agrees he did say, "*Can we talk*?", which was met with "*Fuck off*" by Mr Brown. Mr Brown was not agreeable to trying to salvage the employment relationship.

s.387(d) - Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal

[73] 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.

[74] There is no positive obligation on an employer to offer an employee the opportunity to have a support person. The Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at [1542] states the following:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."

[75] In the circumstances, I find that the Respondent did not unreasonably refuse to allow Mr Brown to have a support person present at discussions relating to the dismissal on 2 November 2023.

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[76] Mr Scicluna described Mr Brown as a good worker. There were discussions afoot as to a potential pay increase or making Mr Brown a permanent employee. Certainly, if Mr Brunsdon considered that it was inappropriate of Mr Brown to leave the premises on 20 March 2024 without authority, he could have dealt with that issue. On his evidence, he did not.

s.387(f) - Whether the respondent's size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[77] The Respondent is a member of a larger group of companies and is not a small business. There is no evidence before the Commission as to whether it employs a dedicated human resource management specialist. Clearly, Mr Brunsdon did not seek any advice from any senior manager before acting on 20 and 21 March 2024.

[78] Mr Brunsdon's evidence is that in 2022 when Mr Brown was having a mental health episode and he dismissed his employment, he agreed to reinstate Mr Brown on the condition that Mr Brown's doctor contact Mr Brunsdon to discuss the medication Mr Brown would be prescribed. This is a very peculiar position for an employer to take, and in my view, oversteps considerable boundaries. It is one thing for an employer to write to a doctor and seek information in respect of its employee with the employee's authority; but another to expect an employee's doctor to ring a manager and discuss the patient's medical condition and prescription medication.

s.387(h) – Other matters

[79] I note that Mr Brown was an injured worker and was attempting to inform his employer of his injury at around the time of the dismissal.

Conclusion

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

[81] The Respondent has contended that Mr Brown walked off the job on 20 March 2024, but I have determined that was not the reason for the dismissal; it was Mr Brunsdon's anger, frustration and impatience. Mr Brown was not informed of the reason for the dismissal.

[82] I have determined that Mr Brown was not given an opportunity to respond to the reasons for the dismissal.

[83] There was no unreasonable refusal by the Respondent to allow Mr Brown a support person.

[84] Mr Brown was a good employee and had not been warned about poor performance.

[85] The Respondent's enterprise is not small. There was likely an absence of a dedicated human resource management specialist impacting on the procedures followed.

[86] In respect of other matters, I have determined that Mr Brown was an injured worker and attempting to inform the Respondent of this when he was dismissed.

[87] I am satisfied that the dismissal was harsh, unjust and unreasonable. Having satisfied myself that the dismissal was harsh, unjust and unreasonable, pursuant to s.385(b) of the Act, I find that Mr Brown was unfairly dismissed.

Remedy

[88] Section 390 of the Act reads as follows:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies."

[89] Mr Brown is a person protected from unfair dismissal for the Act's purposes and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether he can be reinstated.

[90] Mr Brown is an injured employee and, on his evidence, unlikely to be able to return to the work of fish processing due to the injury. I am satisfied that it is inappropriate to order reinstatement.

[91] I now turn to consideration of compensation.

Compensation

[92] Section 392 of the Act provides:

> "**392 Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
>
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
>
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
>
> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
>
> (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

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

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

Authorities

[93] The approach to the calculation of compensation is set out in a decision of a Full Bench of Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.[12] That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;[13] *Jetstar Airways Pty Ltd v Neetson-Lemkes*;[14] and *McCulloch v Calvary Health Care* (*McCulloch*).[15]

[94] I have had regard to the above authorities, and I have considered the submission of each party.

The effect of the order on the viability of the respondent

[95] There is no evidence to suggest that an award of compensation would affect the viability of the Respondent's enterprise.

The length of Mr Brown's service

[96] Mr Brown had less than six years' service which I consider to be a reasonable period of time.

The remuneration that Mr Brown would have received, or would have been likely to receive, if he had not been dismissed

[97] Mr Brown was a casual employee and was injured from 21 March 2024, the day of the dismissal. He would not have received any remuneration in the form of wages had he not been dismissed.

[98] Mr Brown's workers' compensation claim was accepted, and he has been in receipt of weekly payments from 4 April 2024. Although there is a gap between the period 21 March 2024 and 4 April 2024, for which Mr Brown has not received workers' compensation, on account of Mr Brown being a casual employee, due to his injury, he would not have received any remuneration for that period.

[99] I have detailed above the workers' compensation payments Mr Brown has been receiving. Relevant authorities declare that workers' compensation payments constitute 'remuneration' for the purposes of this assessment.[16] Accordingly, on account of Mr Brown having been in receipt of workers' compensation payments due a workplace injury (not a mental incapacity), the Commission cannot order the payment of compensation when regard is had to the payments received.

[100] It is not the case, for example, that an employee is in receipt of workers' compensation payments on account of mental incapacity caused by or brought in connection with the dismissal. In that case, it might be left to the Commission to determine if the employee would otherwise have received other remuneration if they had not been dismissed. In this present case, even if Mr Brown had not been dismissed, on account of him being a casual employee and injured, he would not have been in receipt of any payments.

[101] Accordingly, there is no compensation to award to Mr Brown on account of the remuneration, being wages, that he would have been likely to receive if he had not been dismissed.

[102] However, I note that the *Food, Beverage and Tobacco Manufacturing Award 2020* provides the following provisions in respect of superannuation:

> "22.5 Absence from work

> Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 22.2 and pay the amount authorised under clauses 22.3(a) or 22.3(b):
>
> (a) Paid leave
> While the employee is on any paid leave.
>
> (b) Work related injury or illness
> For the period of absence from work (subject to a maximum of 52 weeks in total) of the employee due to work related injury or work related illness provided that:
> (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and
> (ii) the employee remains employed by the employer."

[103] The Respondent did not nominate an industrial instrument covering Mr Brown, however in the absence of an enterprise agreement applying to the work performed by Mr Brown, I consider that the above award would have applied.

[104] If Mr Brown had not been dismissed, he would have been likely to receive superannuation on his workers' compensation payments for a period of up to 52 weeks. I consider it appropriate to award to Mr Brown remuneration in the form of superannuation for the period from 4 April 2024 until the date of this decision.

[105] Mr Brown has been repeatedly invited to provide to the Commission details of his workers' compensation payments beyond the information already known; that is, beyond 3 August 2024. Mr Brown has failed to respond to communication sent from my Chambers.

[106] Upon Mr Brown providing evidence of the workers' compensation payments received by him beyond 3 August 2024, I will issue a further decision ordering compensation in respect of superannuation payments only.

[107] In the period 4 April 2024 – 30 June 2024, Mr Brown received $12,240.78 in workers' compensation payments. At the rate of 11%, Mr Brown would have received $1,346.49 in superannuation payments if he had not been dismissed.

[108] For the period covering 1 July 2024 until today's date, the rate of superannuation is 11.5%.

The efforts of Mr Brown (if any) to mitigate the loss suffered because of the dismissal

[109] Mr Brown is incapacitated and in receipt of weekly workers' compensation payments.

The amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[110] Mr Brown did not earn any remuneration from employment or other work in the above relevant period.

The amount of any income reasonably likely to be so earned by Mr Brown during the period between the making of the order for compensation and the actual compensation

[111] This factor is not relevant in the circumstances of this matter.

Other relevant matters

[112] I do not consider that there are any other relevant matters to consider.

Misconduct reduces amount

[113] Section 392(3) of the Act requires that if the Commission is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person then the Commission must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[114] The section requires that consideration be given by the Commission, amongst other things, as to whether a person's misconduct contributed to the decision to dismiss an employee even if the Commission has found that there was no valid reason for the person's dismissal. However, if there was no valid reason for the dismissal that may be relevant to the Commission's decision as to the appropriate amount by which the amount of compensation should be reduced.

[115] I am satisfied that Mr Brown did not engage in misconduct.

Shock, distress etc. disregarded

[116] I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Mr Brown by the manner of the dismissal.

Compensation Cap

[117] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the applicant, or to which the applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[118] The high income threshold immediately prior to the dismissal was $167,500, and the amount for 26 weeks was $83,750. The amount of compensation the Commission will order does not exceed the compensation cap.

Payment by instalments

[119] This is not a relevant consideration.

Compensation

[120] I have determined that I will award to Mr Brown compensation in the form of superannuation for the period 4 April 2024 until today's date. Further evidence of workers' compensation payments received by Mr Brown is required to be produced to the Commission before I will make an order awarding compensation. Mr Brown is urged to provide this evidence within seven days.

COMMISSIONER

Appearances:

C Brown, Applicant.
R Scicluna for the Respondent.

Hearing details:

2024.
Brisbane.
19 August.

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<PR781136>

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[1] *Khayam v Navitas English Pty Ltd T/A Navitas English* [2017] FWCFB 5167 at [75]; see also *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200.

[2] *Khayam v Navitas English Pty Ltd T/A Navitas English* [2017] FWCFB 5167 at [75].

[3] *Workplace Relations Act 1996* (Cth).

[4] [2006] AIRC 496 (PR973462).

[5] [2017] FWCFB 3491.

[6] (1995) 185 CLR 410, [465].

[7] *Sayer v Melsteel* [2011] FWAFB 7498 at [20].

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

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

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

[11] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

[12] (1998) 88 IR 21.

[13] [2013] FWCFB 431.

[14] [2013] FWCFB 9075.

[15] [2015] FWCFB 2267.

[16] *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21; refined in *Ellawala v Australian Postal Corporation*, Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para [31]; discussed in *Smith v Fearon Howard Real Estate Pty Ltd T/A Ray White (Balmain)* [2021] FWCFB 581 at paras [16] – [19].