DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Naser Taghizanjani
v
Harkola Pty Ltd
(U2024/5853)

DEPUTY PRESIDENT WRIGHT SYDNEY, 14 NOVEMBER 2024

Application for an unfair dismissal remedy – no valid reason – dismissal found to be unfair – order for compensation appropriate.

Introduction and outcome

[1] On 22 May 2024, Mr Naser Taghizanjani made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Harkola Pty Ltd (Harkola).

[2] Harkola is a family-owned and run business which has been in operation since 1981 and is based in Auburn, New South Wales. Harkola sources and purchases groceries and food produce from both overseas and local distributors and manufacturers. It supplies that produce to private and government institutions, such as restaurants, supermarket chains and NSW Government Departments.[1] Mr Tony Isaac is the Chief Operations Manager of Harkola and his wife Ms Julie Isaac is a Director.[2]

[3] Mr Taghizanjani was employed by Harkola initially as a packer, then a nut roaster from 2018 until he was dismissed on 13 May 2024. Mr Taghizanjani was initially employed on a casual basis from 2018 then on a employed on a permanent, full time basis from 2019.[3]

[4] The reason for dismissal was refusal to comply with management instructions to operate the 'tumbler' machine on 13 May 2024, communication issues and because he had received multiple warnings in relation to the use of his mobile phone.

[5] In summary, I have found that Mr Taghizanjani had a reasonable excuse for not complying with management instructions with respect to operating the tumbler machine and that there was insufficient evidence to establish that he had received multiple warnings about the other issues.

[6] As such, there was no valid reason for the dismissal. On the basis of this and other findings, I have determined that Mr Taghizanjani's dismissal was harsh, unjust and unreasonable and that an order for compensation is appropriate.

The hearing

[7] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[8] After taking into account the views of Mr Taghizanjani and Harkola, and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing pursuant to s.399 of the FW Act.

[9] At the hearing, Mr Taghizanjani represented himself. Harkola was represented by Mr Ian Latham of Counsel who I granted permission to appear pursuant to s.596(2) of the FW Act as I was satisfied that it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[10] Mr Taghizanjani gave evidence on his own behalf, and was cross-examined by Mr Latham.

[11] The following witnesses gave evidence on behalf of Harkola:

1. Mr Tony Isaac, Chief Operations Manager.

2. Mr Dave Stevenson, formerly employed as Warehouse Assistant, Forklift Driver, and Production Assistant

3. Mr Ray Ghattas, Operations Manager

4. Mr George Isaac, formerly employed as Retail Warehouse Assistant

[12] The evidence of Mr Tony Isaac, Mr Ghattas and Mr George Isaac was admitted without objection by Mr Taghizanjani and they were not required for cross-examination. Mr Stevenson was required for cross-examination.

[13] Mr Taghizanjani filed submissions in the Commission on 26 July 2024 and Harkola filed submissions in the Commission on 12 August 2024. I have considered the submissions made by the parties and all of the evidence before me in my determination of this matter and the conclusions I have reached.

Background facts

[14] As a nut roaster, Mr Taghizanjani's primary responsibilities were to roast unsalted and salted nuts. However, Mr Taghizanjani also undertook other duties in his role at Harkola which included packing nuts and attending Harkola's stand at the Flemington Markets in Sydney on a frequent basis to sell nuts and dried fruit.[4]

[15] Mr Isaac's evidence is that the task of roasting nuts, which involves a machine like a cement mixer, requires the utmost concentration and attention so injuries or incidents do not occur.[5]

[16] During the hearing, Mr Taghizanjani explained that on 4 December 2023, he talked to his supervisor, Mr Ray Ghattas, about his hand. It became clear during the hearing that when Mr Taghizanjani was referring to his hand, he was in fact referring to his elbow.[6] Mr Taghizanjani said to Mr Ghattas:

> I have got a problem with my hand. Something happened when I lift the bag. I'm just going to go to the doctor.[7]

[17] Mr Taghizanjani went to his doctor who advised Mr Taghizanjani to talk to his supervisor about making a workers compensation claim in relation to his elbow. Mr Taghizanjani then informed Mr Ghattas about his conversation with his doctor. Mr Ghattas told Mr Taghizanjani that he would call the insurance company and that he would advise Tony and Julie Isaacs about making a claim.[8]

[18] On 10 May 2024, Mr Isaac asked Mr Taghizanjani to operate the tumbler machine soon after Mr Taghizanjani signed in for the day. Mr Taghizanjani said that he did not usually operate the tumbler machine and that it involved lifting bags of nuts that weighed up to 25 kilograms. Mr Taghizanjani said that he tried to explain to Mr Isaac about the injury to his elbow, which had been sustained at work, but Mr Isaac talked over Mr Taghizanjani and said:

> If you don't want to do this, I don't need you anymore. You can go home.[9]

[19] Mr Taghizanjani said that he was unable to speak as he was shocked and did not know what was going on. He said that Mr Isaac was rude and was 'yelling loudly with many F-words.' Mr Taghizanjani said that he tried as much as possible to lower Mr Isaac's anger by saying repeatedly, 'please relax, Boss.'[10]

[20] Mr Taghizanjani then dressed in his work attire and headed back to his station to begin his work. Mr Isaac then burst in, jerking the tray out of Mr Taghizanjani's hands and said,

> I don't want you here anymore. You will do what I asked, or you don't have a job or no pay today.[11]

[21] Mr Taghizanjani said that he was mortified and humiliated in front of his coworkers. He could not believe that this situation was happening to him, when he had always been recognised as one of the greatest workers and most dedicated employees at Harkola.[12]

[22] Mr Taghizanjani decided to talk to Ms Julie Isaac. Mr Taghizanjani advised Ms Isaac about the actions of Mr Isaac. Ms Isaac said that she would talk to Mr Isaac and later advised Mr Taghizanjani that Mr Isaac told her:

> I don't want him anymore if Naser doesn't do that job….I will give him the termination on Monday.[13]

[23] Mr Taghizanjani said that he explained to Mr Isaac that he has a problem with his elbow and had a doctor's certificate which showed he had a medical reason for not being able to do the job that Mr Isaac had asked him to do.

[24] Mr Taghizanjani produced a radiologist report dated 20 May 2024 which confirmed that he has 'mild common extensor tendinosis'.[14] Mr Taghizanjani also produced a physiotherapist report which relevantly provided:

> Naser has tennis elbow, which has developed due to overuse from his work duties. Onset of this injury was the 13/12/2023 meaning he has not been suffering with this injury for almost 7-8 months. The pain he suffers from what would be considered easy daily tasks such as vacuuming is a 7/10 which is very high. Upon testing he has pain on wrist extension, resisted wrist extension as well as pronation and gripping. Naser reports pain on palaption ++ on the lateral epicondyle when assessed. Physio is vital to guide his rehab to strengthen his elbow and surrounding tissues.[15]

[25] During the hearing, Mr Taghizanjani produced a 'Certificate of capacity/certificate of fitness', completed by his doctor and dated 1 August 2024, which confirmed that the date of the injury was 14 December 2023 and that he first saw his doctor on that date. The certificate states that the diagnosis of the work related injury is right extensor tendinitis and PTSD and that the injury is related to work because 'worker's job involved constantly mixing nuts with sugar or salt liquid using R hand, developed pain in elbow.' The certificate said that Mr Taghizanjani has capacity to work for 4 hours a day on three days per week from 8 August 2024 to 6 September 2024 and that he has a lift capacity of 2kg.[16]

[26] Mr Isaac's version of the events is that on 13 May 2024 on or around 9am, he gave a reasonable direction to Mr Taghizanjani to roast almonds.[17]

[27] Mr Isaac said that Mr Taghizanjani refused to follow Mr Isaac's direction and a conversation took place to the following effect:

Mr Taghizanjani:	I'm not doing other people's jobs, that's a Al Hassan [in reference to another staff member - Mr EI Badwi] job….I can't do it, I'm tired".
Mr Isaac:	That's your job for today, do it or leave.
Mr Taghizanjani:	No, I'm doing the packaging.
Mr Isaac:	You leave now, otherwise I'm calling the Police.[18]

[28] Mr Isaac said that Mr Taghizanjani then advised him that he wanted to speak with Mr David Isaac, a previous Director of Harkola who is still employed in a management position. Mr David Isaac had employed Mr Taghizanjani. Mr Tony Isaac advised Mr Taghizanjani to wait outside the factory until 2pm for Mr Ghattas, who would provide Mr Taghizanjani with written notice of the termination of his employment. As Mr Ghattas did not attend the workplace at that time, Mr Taghizanjani logged off on the Bundy Clock on or around 3pm and left the factory.[19]

[29] Mr Isaac said the statement given by Mr Taghizanjani is very exaggerated and does not reflect the way events actually happened on the day that Mr Taghizanjani was dismissed. Mr Isaac accepts that he may have spoken to Mr Taghizanjani in an assertive voice with clear instructions to what should be done but as the Chief Operations Manager, Mr Isaac was entitled to do this. Further, the job given to Mr Taghizanjani was within his scope of work.[20]

[30] Mr Isaac said that he was not aware of Mr Taghizanjani's claim in relation to the injury to his elbow at the time of termination on 16 May 2024. Mr Isaac said that he only became aware of Mr Taghizanjani's injury, when Harkola received a workers compensation letter on 4 June 2024.[21]

[31] Mr Isaac said that on 16 May 2024, Mr Taghizanjani attended the workplace like it was a normal day. Upon seeing him, Mr Isaac told Mr Taghizanjani that he no longer had a job. Mr Taghizanjani demanded a termination letter and was provided the letter of termination dated 13 May 2024.[22] The letter states that the reason for termination was:

- Multiple use of mobile phone during work hours, only permitted during breaks
- Multiple refusal in completing required work
- Multiple communication issue with management.[23]

[32] Mr Ghattas said that he was informed over the weekend of Mr Taghizanjani's termination on Friday 13 May 2024 and planned to create a termination letter to email to him.[24] On 16 May 2024, Mr Ghattas was walking into his office when he was told that Mr Taghizanjani was on the premises. Mr Ghattas decided to see why Mr Taghizanjani was in the workplace and to understand what he wanted, so Mr Ghattas walked into the roasting room with Mr Isaac. Mr Taghizanjani was dressed ready to work next to the commercial fryer waiting for the machine to be at the right temperature to start cooking. Mr Ghattas said that Mr Isaac asked Mr Taghizanjani 'what are you doing here?' and informed him 'you have been dismissed'. Mr Taghizanjani did not want to speak with Mr Isaac but requested that Mr Ghattas provide him with 'a paper' regarding his termination. Mr Ghattas then created a termination letter which Mr Isaac signed and provided it to Mr Taghizanjani.[25]

[33] Mr Isaac said that Mr Taghizanjani is being paid workers compensation payments of $1,102.00 gross from ICare Insurance. Mr Taghizanjani's gross weekly wage is $1,255.00 and his net weekly wage is $1,005.00.[26]

[34] In his evidence, Mr Isaac raised the following additional performance concerns in relation to Mr Taghizanjani:

- During the period from 25 June 2021 and 23 February 2024, the bundy clock record shows Mr Taghizanjani's average working hours per day are 7 hours and 15 minutes, although Mr Taghizanjani is required to work 38 hours per week.[27]
- Mr Isaac has witnessed Mr Taghizanjani finishing work on or around 2pm, then heading to the changing rooms to change his clothes and logging off on the bundy clock after this. This contravenes Harkola's policy.[28]
- From 18 January 2023 to 1 May 2024, Mr Taghizanjani took 17 days of sick leave and has only provided doctor's certificates on two occasions.[29]
- Mr Taghizanjani has had confrontations with staff on different occasions during his employment with Harkola. Mr Taghizanjani has been rude and abrupt to other staff members in the roasting room.[30]
- Mr Taghizanjani is not a team player and will not assist other staff members if requested to. Mr Isaac has witnessed this firsthand when on many occasions he asked Mr Taghizanjani to get salt to salt the nuts, which was in the ambit of his role, and Mr Taghizanjani said to Mr Isaac words to the effect that: 'It's not my job'.[31]

- Mr Taghizanjani has been provided with many warnings between 2019 to 2024, both oral and one in writing in relation to the following matters:
    - During the month of May 2021, Mr Isaac told Mr Taghizanjani that he couldn't leave early and that he needs to work the same time as his colleagues.
    - During June 2021, Mr Isaac told Mr Taghizanjani that he couldn't wear his headphones while roasting.
    - On 8 July 2021, Mr Taghizanjani was issued with a written warning.
    - During March 2024, Mr Isaac walked into the roasting room and noticed Mr Taghizanjani sitting in a chair in the corner of the room watching his iPad. Mr Isaac advised Mr Taghizanjani that he could not do this and that he was acting against Harkola policy and workplace health and safety guidelines.
    - During March 2024, while Mr Isaac was helping in the roasting room, Mr Taghizanjani who was also in the room, was shouting on his mobile phone. Mr Isaac called out to Mr Taghizanjani to get off his mobile phone and continue working, but Mr Taghizanjani did not hear Mr Isaac due to having his headphones in. Mr Isaac then had to walk up to Mr Taghizanjani and tap him on his shoulder. Mr Isaac asked Mr Taghizanjani to take out his headphones, and Mr Taghizanjani continued to speak on his mobile phone and ignored Mr Isaac's instruction.[32]

[35] The warning letter dated 8 July 2021 said that Mr Taghizanjani had breached his employment contract which provided that laptops and mobile phones cannot be used during work time, and are only permitted during breaks, and that no headphones are to be used at any time, due to occupational health and safety. The letter concluded:

> If the unacceptable behaviour reoccurs, you can be subject to further disciplinary action, up to and including termination.[33]

[36] The warning letter was not signed by Mr Taghizanjani and Mr Taghizanjani denied ever receiving it. Mr Taghizanjani was aware of an employment contract referred to in Mr Isaac's evidence but said he was not present at the workplace when it was distributed to employees and did not sign it.[34]

[37] Harkola relied upon evidence from Mr Dave Stevenson,[35] Mr Ray Ghattas[36] and Mr George Isaac.[37] Mr Stevenson was employed by Harkola from October 2022 to March 2024 as a Warehouse Assistant, a forklift driver, and assisting with production. Mr George Isaac was employed by Harkola from 2000 to 2021 in the role of Retail Warehouse Assistant. Mr Ghattas is an Operations Manager at Harkola and has been employed by Harkola for over seven years.

[38] Mr Stevenson, Mr George Isaac and Mr Ghattas did not give evidence about the tumbler machine incident which led to Mr Taghizanjani's dismissal.

[39] Mr Stevenson and Mr George Isaac referred to incidents where they alleged that Mr Taghizanjani had confrontations with them. The incident that Mr George Isaac referred to in his statement occurred in April 2019. Mr Stevenson did not provide any dates or particulars about the events he described in his witness statement.

[40] During the hearing, Mr Taghizanjani denied that he had any confrontations with or had been rude and aggressive towards Mr Stevenson and Mr George Isaac. He pointed out that he rarely saw Mr Stevenson as they worked in different sections of the factory. Mr Taghizanjani also said that Harkola had asked him to work on Saturdays selling its products at Sydney

Markets in Flemington for more than five years and that he would serve over 500 customers in a two to three hour period. Mr Taghizanjani said that Harkola would not have asked him to perform such duties if he did not have good communication skills.[38]

[41] Mr Stevenson, Mr George Isaac and Mr Ghattas all said that they had witnessed Mr Taghizanjani using his mobile phone and headphones while undertaking work in the factory. Mr Taghizanjani accepted that he used the phone and explained that he needed to answer the phone due to personal circumstances that he described during the hearing. I do not record these circumstances in this decision due to their confidential nature. Mr Taghizanjani also said that sometimes he used headphones as the workplace was noisy. Mr Taghizanjani said that if Harkola had an issue with him using his phone, it could have told him.[39] Mr Taghizanjani denied that he had received any verbal warnings about this matter or that he had received the warning letter dated 8 July 2021. Mr Taghizanjani said that he also received instructions about what to do at work from Harkola via text message.[40]

Submissions

Mr Taghizanjani

[42] Mr Taghizanjani submitted that if his communication with management was truly poor, he should have been given a warning earlier or the opportunity to address any alleged issues before his termination. Mr Taghizanjani submitted that despite the alleged poor communication, he was trusted enough to be sent to the Sydney Market to represent Harkola every weekend. This proves a level of trust and confidence in his abilities and an indication that his performance was satisfactory.

[43] Mr Taghizanjani submitted that he had numerous positive interactions with customers, which can be verified and has been involved in special tasks for the business, which further proves his competence and good communication skills.

[44] Mr Taghizanjani submitted that he hurt his right elbow from the physically demanding and monotonous work that he does. This badly affected his working capability and was painful and stressful.

[45] Mr Taghizanjani submitted that he was unable to complete the required work due to a documented medical condition. This was the first instance where such an issue occurred. He has always been dedicated to his responsibilities and has consistently fulfilled them to the best of his ability.

[46] Mr Taghizanjani submitted that the dismissal has had a severe impact on his career prospects and financial stability.

[47] Mr Taghizanjani submitted that if there were concerns about his performance or ability to complete tasks due to medical reasons, it would have been appropriate to discuss this and provide a warning notice, allowing him an opportunity to address any issues. Instead, the decision to terminate his employment was made abruptly and without prior warning.

Harkola

[48] Harkola submitted that the reason for termination was that Mr Taghizanjani refused to perform the duties of roasting almonds. The direction was a reasonable and lawful direction. Mr Taghizanjani regularly performed roasting duties. If Harkola can prove that refusal, the Commission is entitled to find there was a valid reason for termination. The issue then falls to a broader discussion about whether the dismissal was unfair.

[49] Harkola submitted that Mr Taghizanjani had previously been warned as to safety issues. Mr Taghizanjani had a history of not attending work with often little notice. Mr Taghizanjani's coworkers gave a very unflattering account of his work. The breach of procedural fairness alleged did not give rise to any unfairness. Mr Taghizanjani would have been dismissed in any event.

When can the Commission order a remedy for unfair dismissal?

[50] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that Mr Taghizanjani was protected from unfair dismissal at the time of being dismissed; and

(b) Mr Taghizanjani has been unfairly dismissed.

[51] Both limbs must be satisfied. I am therefore required to consider whether Mr Taghizanjani was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Taghizanjani was so protected, whether Mr Taghizanjani has been unfairly dismissed.

When has a person been unfairly dismissed?

[52] Section 385 of the FW 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.

Initial matters

[53] A threshold issue to determine is whether Mr Taghizanjani has been dismissed from his employment.

[54] There was no dispute and I find that Mr Taghizanjani's employment with Harkola was terminated at the initiative of Harkola. I am therefore satisfied that Mr Taghizanjani has been dismissed within the meaning of s.385 of the FW Act.

[55] Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

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

[56] I have decided these matters below.

[57] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[58] Both parties submitted that the termination took effect on 13 May 2024. There were differences between the parties about whether the incident which led to the dismissal took place on 10 or 13 May 2024 and whether the letter of termination was issued on 13 or 16 May 2024. I believe that it is more likely than not that the incident which led to the dismissal occurred on 10 May 2024, as this was a Friday, and that the letter of termination was issued on 13 May 2024, as this was a Monday. These are more logical dates as there was no suggestion that there were any working days between the date of the incident and the issuing of the termination letter. It is not disputed, and I find, that Mr Taghizanjani made the application on 22 May 2024. I am therefore satisfied that the application was made within the period required in s.394(2).

[59] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or his employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[60] It was not in dispute, and I find, that at the time of dismissal, Mr Taghizanjani completed at least the minimum period of employment with Harkola, and that his annual remuneration was less than the high income threshold.

[61] I am therefore satisfied that, at the time of dismissal, Mr Taghizanjani was a person protected from unfair dismissal.

[62] It was not in dispute, and I find, that Mr Taghizanjani's dismissal was not a case of genuine redundancy and that the Small Business Fair Dismissal Code does not apply.

[63] Having considered each of the initial matters, I am required to consider the merits of the application.

Was the dismissal harsh, unjust or unreasonable?

[64] 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.

[65] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[41]

[66] I set out my consideration of each of these criteria below.

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

[67] In order to be a valid reason, the reason for the dismissal should be 'sound, defensible or well founded'[42] and should not be 'capricious, fanciful, spiteful or prejudiced.'[43] 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.[44]

[68] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[45] 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.[46]

[69] The termination letter referred to three reasons for the termination, being mobile phone use during work hours, communication issues with management and refusal in completing required work. However, there was only one event which immediately preceded Mr Taghizanjani's dismissal, which was a conversation about whether Mr Taghizanjani was willing to operate the tumbler machine as directed by Mr Isaac. Mr Taghizanjani said that he tried to explain to Mr Isaac about the injury to his elbow, which had been sustained at work, but Mr Isaac talked over Mr Taghizanjani and said, 'If you don't want to do this, I don't need you anymore. You can go home.' Mr Isaac's version is that Mr Taghizanjani said 'I'm not doing other people's jobs….I can't do it, I'm tired.'

[70] Mr Taghizanjani gave evidence about this conversation at the hearing, however Mr Isaac did not, as he was not required for cross-examination. It is therefore difficult for me to make findings about Mr Isaac's credit. I found Mr Taghizanjani to be a credible witness. I do not accept Harkola's submission that Mr Taghizanjani was argumentative, that he often didn't answer questions at all and that his evidence was often quite self-contradictory.[47] The transcript shows that this simply was not the case and that Mr Taghizanjani gave direct and genuine responses to the questions that he was asked during the hearing.

[71] Mr Taghizanjani's claim that he had an injury to his elbow at the time that he was asked to operate the machine is supported by the medical evidence that he produced at the hearing which included documentary evidence from a general practitioner, radiologist and physiotherapist. Together, this evidence establishes that Mr Taghizanjani first sought treatment for the injury on 14 December 2023, that it caused him to experience pain, and that his lifting capacity was two kilograms as at 1 August 2024. Based on this evidence, I find that on 10 May 2024, Mr Taghizanjani was injured, that he was experiencing pain, that he may have been concerned about the heavy lifting involved in operating the machine and that he informed Mr Isaac that he could not operate the tumbler machine because of his injured elbow. In these circumstances, Mr Taghizanjani had a reasonable excuse for not operating the machine. A further issue arises as to whether Mr Isaac was aware, or should have been aware of this matter.

[72] Mr Taghizanjani's evidence at the hearing was that he had advised Mr Ghattas of the injury, who told Mr Taghizanjani that he would relay this information to Mr Isaac. Mr Ghattas attended the hearing but was not required for cross examination. I asked Mr Latham whether, in light of some of the additional evidence that Mr Taghizanjani gave verbally at the hearing, Harkola's witnesses wished to provide additional evidence. Mr Latham indicated they did not.[48] In the circumstances, Mr Taghizanjani's claim that he had advised Mr Ghattas of the injury was not disputed by Harkola, although it was given the opportunity to do so. Mr Taghizanjani was therefore entitled to assume that Mr Isaac was aware of the injury and knew what Mr Taghizanjani was talking about when Mr Taghizanjani said he could not operate the machine.

[73] Mr Isaac claims that he was not aware of the injury until after the termination. I am prepared to accept that this is possible and that Mr Ghattas may have not informed Mr Isaac of Mr Taghizanjani's injury although he said he would. This potential communication breakdown may well explain why Mr Taghizanjani and Mr Isaac have different recollections of the conversation which took place on 13 May 2024. On Mr Taghizanjani's version of events, he tried to explain to Mr Isaac about the injury to his elbow, assuming that Mr Isaac already knew about this. This may have resulted in the explanation not being as clear as it could have been, resulting in Mr Isaac not understanding that Mr Taghizanjani had a legitimate reason for being unable to operate the tumbler machine. Nevertheless, having regard to all of the evidence before

me, I find that Mr Taghizanjani had a reasonable excuse for not operating the machine, being his injured elbow, and that he informed Mr Isaac of this reason. I therefore find that Mr Isaac's direction to Mr Taghizanjani that he operate the tumbler machine to be unreasonable and that Mr Taghizanjani declining to operate the machine was not a valid reason for Mr Taghizanjani's dismissal.

[74] The letter of termination refers to additional reasons for termination being Mr Taghizanjani using his mobile phone during work hours and communication issues with management.

[75] Harkola has not provided any specific evidence about the communication issues with management that are referred to in the termination letter so I make no findings about those matters. I accept that Harkola had signs up in the factory prohibiting the use of mobile phones and that Mr Taghizanjani admitted to using his mobile phone in specific circumstances. Mr Stevenson, Mr George Isaac and Mr Ghattas all said that they had witnessed Mr Taghizanjani using his mobile phone and headphones while undertaking work in the factory, however they did not provide any specific times or dates as to when this occurred.

[76] Mr Taghizanjani's evidence was that he had never received any verbal or written warnings in relation to using his mobile phone. Mr Isaac's evidence was that he issued Mr Taghizanjani with a written warning in relation to Mr Taghizanjani using his mobile phone in July 2021, then issued a verbal warning three years later in March 2024. Harkola relied heavily on its record of giving Mr Taghizanjani verbal warnings. In my view, this approach was fraught with difficulty, firstly, because it gave rise to the possibility that Mr Taghizanjani would dispute that the warnings were issued (which in fact occurred). Secondly, Mr Taghizanjani may have not understood that any verbal warnings issued were in fact warnings, as his first language is Persian, not English.

[77] I accept Mr Taghizanjani's evidence that he did not receive the written warning and find that it is possible that the warning letter was written by Mr Isaac but not issued to Mr Taghizanjani. I accept that Mr Isaac may have told Mr Taghizanjani not to use his mobile phone in March 2024 but that Mr Taghizanjani may not have understood this to be a verbal warning. On the basis of Harkola's own evidence, Mr Taghizanjani's use of the mobile phone in March 2024 was not regarded as sufficiently serious to warrant more than a verbal warning. In the circumstances, this matter, by itself, was not a valid reason for dismissal, particularly as there is no evidence that Mr Taghizanjani used the mobile phone after March 2024, when Mr Isaac claims that he issued the verbal warning.

[78] In conclusion, Mr Taghizanjani's refusal to operate the tumbler machine, and his use of the mobile phone were not valid reasons for dismissal, when considered both together and separately.

Was Mr Taghizanjani notified of the valid reason?

[79] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Taghizanjani 'was notified of that reason'. Contextually, the reference to 'that reason' is the valid reason found to exist under s.387(a).[49]

[80] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[50]

Was Mr Taghizanjani given an opportunity to respond to any reason related to his capacity or conduct?

[81] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[51] However, I note that Mr Tony Isaac did not advise Mr Taghizanjani that he was considering dismissing Mr Taghizanjani and Mr Taghizanjani was not given an opportunity to respond to this proposal. I had considered his matter below with regard to s.387(h).

Did Harkola unreasonably refuse to allow Mr Taghizanjani to have a support person present to assist at discussions relating to the dismissal?

[82] There were no discussions relating to the dismissal before it occurred so there was no opportunity for Mr Taghizanjani to have a support person in relation to the dismissal. This is a matter which weighs in favour of a finding that the dismissal was unfair.

Was Mr Taghizanjani warned about unsatisfactory performance before the dismissal?

[83] 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 Harkola's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[84] I note that Harkola is a small enterprise with only 25 employees, however it has been operating since 1981 so I would expect it to have some knowledge of workplace relations matters. However, the parties made no submissions about these matters.

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

[85] There is no evidence in relation to this matter and the parties did not make any submissions about this matter.

What other matters are relevant?

[86] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. A number of matters raised by the parties are potentially relevant to my consideration under this provision, including Mr Taghizanjani's performance record, procedural fairness, and the impact of the dismissal on Mr Taghizanjani.

<u>Mr Taghizanjani's performance record</u>

[87] Harkola claimed that Mr Taghizanjani had a poor performance record and relied upon Mr Taghizanjani's attendance and sick leave records and the evidence of Mr George Isaac and Mr Stevenson to claim that Mr Taghizanjani had been rude and abrupt to other staff members in the roasting room. I deal with these matters for completeness although they are likely to be

irrelevant given that I have found that there was no valid reason for Mr Taghizanjani's dismissal.

[88] If Mr Isaac had concerns about Mr Taghizanjani's attendance and sick leave records, he could have raised these concerns with Mr Taghizanjani at any time. According to Mr Isaac, the only time that he raised concerns with Mr Taghizanjani about his attendance was verbally in May 2021 three years before the dismissal. Mr Isaac then relied upon almost three years of bundy clock records commencing from 25 June 2021 to complain that Mr Taghizanjani was not completing his contracted hours. Mr Isaac does not explain why he never discussed this matter with Mr Taghizanjani, which leads me to conclude that Mr Isaac accepted that the hours that Mr Taghizanjani was working during that period were appropriate and fulfilled Mr Taghizanjani's obligations to Harkola. In these circumstances, there is no basis for me to make any adverse findings against Mr Taghizanjani based on his attendance record.

[89] Harkola complained that from 18 January 2023 to 1 May 2024, Mr Taghizanjani took 17 days of sick leave and only provided doctor's certificates to support these absences on two occasions. During this period, Mr Taghizanjani would have accrued approximately 13 days sick leave and may have had access to additional accrued sick leave given that he was employed for over six years. Section 107 of the FW Act does not mandate that an employee provides a medical certificate but rather evidence that would satisfy a reasonable person that the employee is unfit for work. Mr Taghizanjani's evidence is that he provided medical certificates when asked by Harkola to do so, but not at other times.

[90] I have difficulty understanding Mr Isaac's concerns in relation to Mr Taghizanjani's sick leave record. The nature of sick leave is that it is usually unplanned leave and employees are often unable to advise their employer of an absence until the commencement of their working day. In my view, it is unfair for Harkola to criticise Mr Taghizanjani for not attending work with often little notice. There is no evidence which establishes that Mr Taghizanjani was not entitled to the sick leave taken or that he failed to adhere to the notice and evidence requirements of the FW Act when required to do so by Harkola.

[91] The evidence that Harkola relied upon to allege that Mr Taghizanjani had been rude and abrupt to other staff members in the roasting room was sparse and unconvincing. Although Harkola has 25 current employees who could have been called to give evidence about Mr Taghizanjani's conduct and behaviour in the workplace, Harkola relied upon witness statements from two former employees. The first of these, Mr George Isaac, gave evidence about an incident which occurred five years prior to the dismissal. The second of these, Mr Stevenson, provided vague details about various incidents involving Mr Taghizanjani. There is no suggestion that Mr Stevenson ever felt so concerned about Mr Taghizanjani's alleged conduct that he complained to Mr Isaac. It appears that Mr Stevenson blamed Mr Taghizanjani for his own shortcomings as he complained that 'Mr Taghizanjani took no responsibility when [Mr Stevenson] made mistakes' and that 'this made Tony Isaac, unhappy with [Mr Stevenson's] performance.'[52]

[92] I find that there is limited evidence to support Harkola's claim that Mr Taghizanjani had a poor performance record and that in the circumstances these are not matters which weigh in favour of a finding that the dismissal was fair.

Procedural fairness

[93] There was no dispute between the parties that Mr Taghizanjani's employment was terminated without any disciplinary procedure being followed by Harkola and without any warning to Mr Taghizanjani that he was at risk of dismissal if he did not operate the tumbler machine. If Mr Isaac had followed a procedurally fair process which involved, for example, asking Mr Taghizanjani why he was not prepared to operate the machine, this would have resulted in Mr Isaac understanding that Mr Taghizanjani had a legitimate reason for his actions, based on his fitness for work. To the extent that Mr Isaac may have not understood this to be the reason during his brief conversation with Mr Taghizanjani, a procedurally fair process would have cleared up any misunderstanding. It also would have given Mr Isaac the opportunity to seek medical evidence from Mr Taghizanjani if he had any doubt as to the genuineness of Mr Taghizanjani's claims.

[94] By not putting Mr Taghizanjani on notice that he was at risk of dismissal, Mr Isaac deprived Mr Taghizanjani of the opportunity of persuading Mr Isaac to refrain from proceeding with the dismissal. Even if Mr Isaac was not satisfied that Mr Taghizanjani had a reasonable excuse for not operating the machine, there were a range of matters which were relevant to Mr Isaac's consideration of whether it was appropriate to dismiss Mr Taghizanjani. These included Mr Taghizanjani's six years of service, that he was trusted to represent Harkola at the Flemington Market stall and the impact of the dismissal on Mr Taghizanjani and his family. Apart from the fact that Mr Taghizanjani was unable to raise these and other matters with Mr Isaac, there is no evidence that Mr Isaac considered any other outcome apart from dismissal. In circumstances where there is no allegation that Mr Taghizanjani had ever previously refused to operate a machine during his six years of service with Harkola, I believe that dismissing Mr Taghizanjani for such conduct, even if it was the case that Mr Taghizanjani had no reasonable excuse for his actions, was a disproportionate outcome and that a written warning would have been sufficient. This is particularly the case when most of the other conduct issues which Harkola relied upon during the proceedings occurred a number of years prior to the dismissal and there was little evidence of any recent concerns about Mr Taghizanjani.

[95] I find that the lack of procedural fairness afforded to Mr Taghizanjani and Mr Isaac's failure to consider outcomes other than dismissal are factors weighing in favour of a finding that the dismissal was unfair.

Consequences of the dismissal

[96] At the time of the hearing, Mr Taghizanjani had not found alternative employment and was certified as fit to work for 4 hours a day on three days per week from 8 August 2024 to 6 September 2024. Although Mr Isaac claims that he was not aware that Mr Taghizanjani had a workplace injury until after the dismissal, Harkola was on notice of this matter because Mr Taghizanjani had informed Mr Ghattas of this in December 2023. Further, Mr Isaac would have become aware of Mr Taghizanjani's injury prior to the dismissal if he had followed a procedurally fair process. I find that Harkola dismissed Mr Taghizanjani at a time when he was an injured worker and that this is likely to have resulted in Mr Taghizanjani having greater difficulty in obtaining alternative employment because of his medical restrictions. This is a matter which weighs in favour of a finding that the dismissal was unfair.

[97] Mr Taghizanjani gave evidence that the dismissal caused Mr Taghizanjani distress and financial hardship as he supports his wife and three daughters.[53] I accept Mr Taghizanjani's evidence about these matters. I note that although Mr Taghizanjani is now in receipt of workers' compensation, he is receiving a weekly amount which is less than the weekly pay that he

received while working at Harkola. These are matters which weigh in favour of a finding that the dismissal was unfair.

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

[98] I have made findings in relation to each matter specified in s.387 as relevant.

[99] I must consider and give due weight to each of these matters as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[54]

[100] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Taghizanjani was harsh, unjust and unreasonable because:

- there was no valid reason related to Mr Taghizanjani's conduct,
- there was no procedural fairness or consideration of alternatives to dismissal and
- of the harsh consequences of the dismissal due to the financial impact of the dismissal on Mr Taghizanjani and the adverse impact on his employment prospects given that he was dismissed at a time that he was injured.

[101] I am therefore satisfied that Mr Taghizanjani was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[102] Being satisfied that Mr Taghizanjani made an application for an order granting a remedy under s.394, was a person protected from unfair dismissal, and was unfairly dismissed within the meaning of s.385 of the FW Act, I may, subject to the FW Act, order Mr Taghizanjani's reinstatement, or the payment of compensation to Mr Taghizanjani.

[103] Under s.390(3) of the FW Act, I must not order the payment of compensation to Mr Taghizanjani unless:

(a) I am satisfied that reinstatement of Mr Taghizanjani is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of Mr Taghizanjani inappropriate?

[104] Mr Taghizanjani has not sought reinstatement and Harkola has not made any submissions in relation to this matter. On this basis I consider that reinstatement is inappropriate.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[105] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, '[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…'[55]

[106] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[56]

[107] The evidence established that Mr Taghizanjani has suffered financial loss as a result of the dismissal. At the time of the hearing, Mr Taghizanjani had not obtained alternative employment. It is likely that this has been compounded by his medical restrictions. If Mr Taghizanjani had remained employed with Harkola, it is likely that he would be able to continue to work despite the injury because of the specific obligations which Harkola has in relation to providing suitable duties to an employee in receipt of workers compensation. Prospective employers have no such obligations towards Mr Taghizanjani.

[108] Although Mr Taghizanjani is in receipt of workers compensation payments, he is receiving less pay than when he was employed by Harkola and it is uncertain how long the workers compensation payments will continue. If the workers compensation payments cease or decrease before Mr Taghizanjani is able to obtain alternative employment, the financial loss that Mr Taghizanjani has suffered as a result of the dismissal will increase. Having regard to all of these circumstances, I consider that an order for payment of compensation is appropriate.

Compensation – what must be taken into account in determining an amount?

[109] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to Mr Taghizanjani in lieu of reinstatement including:

(a) the effect of the order on the viability of Harkola's enterprise;

(b) the length of Mr Taghizanjani's service;

(c) the remuneration that Mr Taghizanjani would have received, or would have been likely to receive, if he had not been dismissed;

(d) the efforts of Mr Taghizanjani (if any) to mitigate the loss suffered by Mr Taghizanjani because of the dismissal;

(e) the amount of any remuneration earned by Mr Taghizanjani 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 Mr Taghizanjani 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.

[110] At the time of the hearing, Mr Taghizanjani was not fit to resume all of his pre-injury duties and was in receipt of workers compensation payments. These payments are less than the weekly pay that Mr Taghizanjani received while working at Harkola. In assessing compensation, I am required to take into account numerous matters including workers' compensation payments received by Mr Taghizanjani and attempts made by Mr Taghizanjani to seek employment. I therefore require updated evidence from Mr Taghizanjani including in

relation to his current capacity to work and the workers compensation payments he has received and is likely to receive in the future.

[111] In the circumstances, I will be issuing directions requiring the parties to file further evidence and submissions in relation to the Commission's determination of an amount to be paid as compensation to Mr Taghizanjani.

Conclusion

[112] I have found that Mr Taghizanjani did not operate the tumbler machine as directed by Mr Isaac because he had a workplace injury. As such, Mr Isaac's direction was not reasonable. I have also found that the other reasons relied upon by Harkola, including Mr Taghizanjani's use of the mobile phone, did not justify Mr Taghizanjani's dismissal.

[113] I have found that there was no procedural fairness afforded to Mr Taghizanjani in relation to the dismissal and that Harkola did not consider outcomes other than dismissal. I have found that Harkola dismissed Mr Taghizanjani at a time when he was an injured worker and that this is likely to have resulted in Mr Taghizanjani having greater difficulty in obtaining alternative employment. I have accepted hat the dismissal caused Mr Taghizanjani distress and financial hardship.

[114] Based upon these findings, I have concluded that there was no valid reason for Mr Taghizanjani's dismissal and that the dismissal was harsh, unjust and unreasonable.

[115] I consider that an order for payment of compensation is appropriate and will determine that amount after receiving further evidence and submissions from the parties.

DEPUTY PRESIDENT

Appearances:

Mr N. *Taghizanjani*, Applicant

Mr I. *Latham*, Counsel, for the Respondent
Mr S. *Paige*, Instructing Solicitor from New South Lawyers, for the Respondent

Hearing details:

2024
28 August
In person, Sydney

Printed by authority of the Commonwealth Government Printer

<PR781272>

---

[1] Affidavit of Tony Isaac sworn on 12 August 2024, [12]-[14], Digital Hearing Book (DHB), 49.
[2] Ibid, [7]-[8], DHB, 48.
[3] Ibid, [16]-[18], DHB, 49.

[4] Ibid, [18], DHB, 49.
[5] Ibid, [19], DHB, 49.
[6] Transcript, PN73.
[7] Transcript, PN64.
[8] Transcript, PN64.
[9] DHB, 26.
[10] DHB, 26.
[11] DHB, 26.
[12] DHB, 26.
[13] DHB, 26-27.
[14] DHB, 38.
[15] DHB, 36.
[16] Exhibit 3.
[17] Affidavit of Tony Isaac sworn on 12 August 2024, [32], DHB, 52.

[18] Ibid, [32], DHB, 52-53.
[19] Ibid, [32], DHB, 53.
[20] Ibid, [33], DHB, 53.
[21] Ibid, [33], DHB, 53.
[22] Ibid, [34], DHB, 53.
[23] DHB, 100.
[24] Statement of Ray Ghattas, [13], DHB, 89.
[25] Statement of Ray Ghattas dated 12 August 2024, [14], DHB, 89.
[26] Affidavit of Tony Isaac sworn on 12 August 2024, [36], DHB, 54.
[27] Ibid, [25], DHB, 50.
[28] Ibid, [25], DHB, 50.
[29] Ibid, [26]-[27], DHB, 51.
[30] Ibid, [28], DHB, 51.
[31] Ibid, [31], DHB, 52.
[32] Ibid, [29], DHB, 51-52.
[33] DHB, 93.

[34] DHB, 40.

[35] DHB, 86-88.

[36] DHB, 89.

[37] DHB, 91-92.

[38] Transcript, PN111.

[39] Transcript, PN107.

[40] Transcript, PN110.

[41] *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].

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

[43] Ibid.

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

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

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

[47] Transcript PN479

[48] Transcript PN 395.

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

[50] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[51] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[52] Statement of Dave Stevenson, [12], DHB, 86.

[53] DHB, 32.

[54] *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].

[55] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[56] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].