DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Shane Randall

v

SRG Global Asset Care Pty Ltd
(U2024/9504)

COMMISSIONER SLOAN SYDNEY, 25 NOVEMBER 2024

Application for an unfair dismissal remedy

[1] Shane Randall was employed by SRG Global Asset Care Pty Ltd ("SRG") as a Business Manager.[1] He was with the business for almost 37 years. He had planned his departure from SRG for some time.

[2] From as early as February 2022, Mr Randall began telling co-workers of his intention to retire in 2024. His plans were the subject of several conversations between himself and his manager, Julian Van Der Kley, in the first half of 2023. In those discussions, Mr Randall flagged leaving work in July 2024.

[3] On 6 August 2023, Mr Randall met with Mr Van Der Kley. He confirmed that he was retiring, and that his last day at work would be in July 2024. He stated that the precise timing would be subject to somebody being found to take over his position as Business Manager - Sydney and allowing time for Mr Randall to conduct a handover with them. Mr Van Der Kley took this to be Mr Randall "giving notice" of his resignation, which he accepted. The two discussed that the process to find Mr Randall's replacement would commence in 2024.

[4] Importantly, at all times Mr Randall made it clear that his intention was to take his accrued long service leave after he had finished at work. That is, he would take long service leave into retirement – while he would finish *working* in July 2024, his *employment* would not come to an end until after the period of long service leave.

[5] In the first part of 2024, Mr Randall assisted Mr Van Der Kley and Greg Mitchell recruit for his replacement. He attended interviews with potential candidates on 16 April 2024. In one of those interviews, Mr Randall stated that he intended to finish working on 5 July 2024 and that SRG would be seeking a handover period with the successful candidate before then.

[6] Mr Randall's replacement was offered the position of Business Manager – Sydney on 22 April 2024.

[7] On 13 May 2024, Mr Randall sent an email to Mr Van Der Kley. The email attached a long service leave application for the period 8 July 2024 to 13 January 2025.

[8] On or about 24 May 2024, Mr Van Der Kley had a conversation with Mr Randall. He told Mr Randall that taking long service leave into retirement was "against company policy".

[9] On 24 May 2024, Mr Van Der Kley sent an email to Mr Randall. In the email, Mr Van Der Kley did not expressly refuse Mr Randall's request to take long service leave into retirement. However, he offered an alternative – that Mr Randall leave work on 5 July 2024 as planned but that his "official retirement date", to which he would be paid, be changed to 29 July 2024. Mr Van Der Kley invited Mr Randall to send through a retirement notice for that date.

[10] Mr Randall did not accept the proposal in Mr Van Der Kley's email. He sent an email to Mr Van Der Kley on 21 June 2024 which did several things. First, it appeared to dispute that Mr Randall had retired. Second, it expressed Mr Randall's disappointment that after more than 36 years' service, SRG would seek to deprive him of the additional financial benefits that he would accrue during the period of long service leave. Third, it stated Mr Randall's intention to take long service leave as planned. Fourth, it raised the possibility of Mr Randall returning to some sort of employment with SRG at the end of the leave period, most likely "on a casual contract basis". Finally, it stated that Mr Randall would tender his resignation "at the appropriate point in the future".

[11] There is no evidence that Mr Van Der Kley responded to that email.

[12] SRG gave Mr Randall a farewell dinner on 4 July 2024 and a send-off on 5 July 2024. Mr Randall sent a farewell email to staff at SRG on 10 July 2024.

[13] On 15 July 2024, Mr Van Der Kley sent an email to Mr Randall. The email confirmed that SRG was unable to "facilitate" Mr Randall's long service leave request. However, Mr Van Der Kley stated that SRG would make a "goodwill payment" to him of five weeks' salary. There were no conditions attached to that payment.

[14] Mr Randall responded by email on 17 July 2024. He stated that the amount offered by SRG was less than the entitlements he would have accrued during the period of long service leave. He disputed that he had resigned from his position with SRG. He described SRG's conduct as amounting to a termination of his employment and requested a letter of termination from the company.

[15] SRG made the goodwill payment to Mr Randall, along with his accrued annual leave and long service leave balances.

[16] On 15 August 2024 Mr Randall filed an unfair dismissal application with the Fair Work Commission. The application was brought under Part 3-2 of the of the *Fair Work Act 2009* ("Act").[2]

The questions I need to determine, and the answers

[17] There is no dispute that Mr Randall is a person protected from unfair dismissal.[3] The primary dispute between the parties is whether Mr Randall was dismissed.

[18] By definition, an unfair dismissal requires that a person was dismissed.[4] Only a person who has been dismissed may apply to the Commission for a remedy for unfair dismissal.[5] SRG contends that Mr Randall was not dismissed but resigned.

[19] So, the first question for determination is whether Mr Randall was dismissed. If the answer to that is no, the proceedings would necessarily fall away.

[20] However, if I were to find that Mr Randall was dismissed, two further questions would arise. First, was the dismissal unfair – that is, harsh, unjust or unreasonable?[6] Second, and if so, should I order a remedy of either reinstatement or compensation?[7]

[21] For the reasons set out below, I have determined that:

a. Mr Randall was dismissed by SRG; and
b. the dismissal was unfair; but
c. it is not appropriate to order any remedy.

Why I have found that Mr Randall was dismissed

[22] A dismissal may occur in one of two ways. First, where a person's employment with their employer is terminated on the employer's initiative.[8] A termination will be "on the employer's initiative" if it is brought about by an employer without the employee's agreement. The focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which resulted, directly or consequentially, in the termination of the employment.[9]

[23] Second, where the person has resigned from their employment, but was forced to do so because of conduct, or a course of conduct, engaged in by their employer.[10] The test the Commission must apply is whether the employer engaged in the conduct with the intention of bringing the employment to an end, or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign.[11] The Commission might find an employer to have constructively dismissed an employee even though it did not engage in the relevant conduct with the subjective intention of forcing the employee to resign.[12]

[24] Mr Randall does not contend that he was forced to resign. The question is whether his employment was terminated on SRG's initiative.

[25] SRG relies on the conversation between Mr Randall and Mr Van Der Kley on 6 August 2023 as amounting to a resignation. It submitted that Mr Randall "resigned with his last day of employment to be in July 2024 subject to his replacement being hired and a period of handover".[13] It described the resignation as being "clear and unambiguous and capable of acceptance"[14]. It further submitted that Mr Randall "made no mention of long service leave being a condition of his resignation".[15]

[26] I have difficulty accepting that any resignation offered on 6 August 2023 was "clear and unambiguous". The date of resignation was uncertain and subject to matters outside

Mr Randall's control. On the evidence, Mr Randall's anticipated date of departure was not confirmed until 16 April 2024.

[27] More significantly, however, SRG's submissions mischaracterise Mr Randall's position and do not reflect the evidence. That is, there is no dispute that Mr Randall always made clear his intention to take long service leave into retirement. Mr Van Der Kley accepted as much in his oral evidence.

[28] It follows that to the extent that Mr Randall resigned, it was not on the basis that his last day of employment would be in July 2024. What he had always proposed was that his last day *at work* would be in July 2024, but that his last day *of employment* would be at the end of the period of long service leave.

[29] Importantly, Mr Randall had never been informed by SRG that there would be a problem with his plan, until he sought to implement it in May 2024. It is significant that Mr Van Der Kley gave evidence that he knew of Mr Randall's intentions from the outset. He also stated that he became aware in early 2024 of SRG's "policy" not to allow employees to take long service leave into retirement. Yet he did not pass that on to Mr Randall. He was unable to explain why he did not.

[30] In short, Mr Randall proceeded on the premise that he would be permitted to take long service leave into retirement. That was at least in part the result of a presumption – if not a sense of entitlement – on Mr Randall's part based on his length of service. But SRG had ample opportunity to tell Mr Randall that the premise was a false one, before he helped the company recruit his replacement and, to use his words, "did himself out of a job". It did not do so.

[31] I do not place any weight on the protestation in Mr Randall's email of 21 June 2024 that he had not indicated an intention to retire. He had clearly done so. His email, and that of 17 July 2024, sought to recast the basis on which he had proposed he would leave SRG. But by that stage, he was responding to a problem that was not of his making.

[32] In conclusion, it is clear that Mr Randall intended to leave SRG's employ. But it was SRG's decision to effect the termination on 5 July 2024. Mr Randall did not consent to that decision. I am satisfied that this amounted to a termination of the employment at SRG's initiative.

Why I have found the dismissal to be unfair

[33] In determining whether the dismissal was harsh, unjust or unreasonable, I am required to have regard to certain criteria.[16] The extent to which I am required to consider those criteria depends on the extent to which they are relevant to the case.[17]

[34] Not all of the criteria are relevant to this case.[18] I do not need to traverse those that are not. I will address the others in turn.

> *Whether there was a valid reason for the dismissal related to Mr Randall's capacity or conduct (including its effect on the safety and welfare of other employees)*

[35] Mr Randall was not dismissed due to his capacity or conduct. The question is whether there was otherwise a valid reason for the dismissal.

[36] In order to be a valid reason, the reason for the dismissal should be sound, defensible or well founded. It should not be capricious, fanciful, spiteful or prejudiced.[19] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were the employer.[20]

[37] SRG denied that Mr Randall was dismissed. Not surprisingly then, it did not lead any evidence as to the reason for dismissal.

[38] I have found that SRG effected the dismissal on 5 July 2024. This was the result of its decision not to agree to Mr Randall's request to take long service leave into retirement.

[39] SRG asserted that under the *Long Service Leave Act 1955 (NSW)*, Mr Randall was not entitled to take long service leave without its approval. It submitted that its refusal of Mr Randall's request for long service leave did not contravene any provisions of the that legislation. I accept that is the case. But it is not an answer as to why the request was refused.

[40] At the hearing, SRG submitted that its concern in allowing employees to take long service leave into retirement arose from the additional costs that are incurred as a result. That is, the employee continues to accrue leave, and the company must continue to make superannuation contributions on their behalf. These costs are not incurred if the employer "pays out" the accrued leave on termination. In isolation, this might be a legitimate basis on which to decline to allow the practice.

[41] In this case, though, I am mindful that SRG made an unsolicited payment to Mr Randall of five weeks' pay, being just under $16,500 gross. That payment was made without conditions. SRG submitted that this sum exceeded by about $4,200 the value of the annual leave and the public holidays to which Mr Randall would have become entitled had he taken the long service leave. This qualifies to a point the extent to which the financial impact of Mr Randall's request provided a valid reason for the dismissal.

[42] At the same time, Mr Randall claims that he has not been fully compensated for the benefits he would have received had SRG permitted him to take the long service leave. These include the value of superannuation contributions that SRG would have made on his behalf. He claims to be entitled to more than $5,000 beyond that which SRG has paid to date.

[43] Mr Randall's case rests on the contention that after almost 37 years in the business, he could expect SRG to accommodate his request to take long service leave into retirement. To my mind it is clear that he considers that he was entitled, even if not in a legal sense, to take the leave so as to maximise his financial return. From my observation, there was a clear sense of umbrage on Mr Randall's part that SRG did not allow him to do so.

[44] But SRG was not required to accede to Mr Randall's request. It was entitled to consider the financial consequences of doing so and to avoid those costs, even if only in part. I am satisfied that there was a valid reason for the dismissal.

Whether Mr Randall was notified of the reason for dismissal

[45] This criterion requires me to consider whether Mr Randall was notified of the reason for his dismissal before SRG made the decision to terminate.[21] The "reason" is the valid reason which I have found to exist. Being "notified" requires SRG to have explicitly put the reason to Mr Randall in plain and clear terms.[22]

[46] That did not happen. Mr Randall was not told why SRG had refused his application to take long service leave into retirement. Mr Van Der Kley simply told him that it was contrary to "company policy". Mr Randall asked for a copy of the policy, to no avail. (There is a likely reason for that. At the hearing, SRG moved away from referring to it as a "policy", but rather as "what we do".)

[47] The consequence is that Mr Randall was denied the opportunity to make a fully informed decision regarding his departure. It is a matter of speculation what he might have done differently had SRG made its position known earlier, and how SRG might have responded to any alternative proposal from him. But those are matters that Mr Randall did not know he had to explore, and was denied the opportunity of exploring.

The degree to which the size of SRG's enterprise, or the absence of dedicated human resource management specialists or expertise at SRG, would be likely to impact on the procedures followed in effecting the dismissal

[48] It is clear from the evidence that SRG is a significant enterprise. It has internal human resources capability. The company was represented at the hearing by its "IR/ER Manager". It follows that any deficiency in the process resulting in the dismissal cannot be attributed to the size of the business or the lack of appropriate internal expertise.

Any other matters that I consider relevant

[49] There are no other relevant matters that impact on the fairness of Mr Randall's dismissal.

Conclusions

[50] Having regard to the matters to which I have referred, I find that Mr Randall's dismissal was unreasonable. This is due to the failure by SRG to inform him at an early stage that he would not be permitted to take long service leave into retirement. I have significant doubts as to whether this would have greatly changed his plans or the ultimate outcome. But it was unfair and unreasonable for SRG to allow Mr Randall to proceed under a misapprehension and only take steps to correct it when he had no position to remain in.

[51] Accordingly, I find that the dismissal was unfair.

Why I have decided not to award any remedy

[52] My finding that the dismissal was unfair means that I have the discretion to order Mr Randall's reinstatement, or to order that SRG pay him compensation.[23]

[53] Mr Randall sought reinstatement, but only for the purposes of him being able to take long service leave. This would allow him to accrue his entitlements "as they would have fallen with [him] resigning [his] position giving four weeks' notice on or around the 10th February 2025".[24] He acknowledged, though, that it would be difficult for the Commission to reinstate him.

[54] I agree that an order for reinstatement would give rise to complications. First, the position which Mr Randall held is no longer available. He did not suggest that the person who had been hired as his replacement be displaced. There is no evidence of another position into which he could be reinstated which would provide the same terms and conditions as those he enjoyed prior to the dismissal.[25] Second, a reinstatement order would need to contemplate how the payments Mr Randall received on termination, including the goodwill payment, could be squared with him taking long service leave.

[55] More significantly, I am not satisfied that an order to the effect sought by Mr Randall would properly be one of "reinstatement".[26] It would not see him return to work in any meaningful way. Rather, he would proceed immediately onto long service leave in anticipation of resigning at the end of that leave.

[56] For these reasons, I am satisfied that an order for reinstatement is inappropriate.

[57] It does not automatically follow, however, that a payment for compensation ought to be ordered. The question of whether to order a remedy remains a discretionary one.[27] I must be satisfied that an order for payment of compensation is appropriate in all the circumstances of the case.[28] And I am not so satisfied.

[58] Mr Randall's case was advanced on the premise that he could expect SRG to allow him to take long service leave into retirement. The way he presented his case, it was tantamount to an entitlement. But he had no such entitlement. SRG had no obligation to allow him to take long service leave. Even had it informed Mr Randall at an early stage that it would not permit him to take long service leave into retirement, and Mr Randall had otherwise sought to utilise his long service leave, I could not be sure that the company would have agreed to allow him to take it: he had clearly telegraphed his intention to retire.

[59] I am also mindful that SRG made a goodwill payment to Mr Randall, unilaterally and without condition. The amount was significant. It was more than Mr Randall had a strict entitlement to receive. SRG did not explain why the payment was made, but its motivations might be inferred from the communications between Mr Van Der Kley and Mr Randall from May 2024.

Conclusion

[60] I have found that Mr Randall was dismissed, and that the dismissal was unfair. However, I have determined that it is not appropriate to exercise my discretion to order a remedy to Mr Randall in respect of that unfairness.

[61] These proceedings are concluded.

COMMISSIONER

Appearances:
Shane Randall, the Applicant
Jane Bourke, for the Respondent

Hearing details:
2024
Sydney (by video)
13 November

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[1] Mr Randall's evidence in this matter was contained in a document provided to the Commission dated 11 October 2024 together with a number of other documents. I do not need to separately identify them. SRG's evidence was contained in statements of Greg Fletcher, SRG's General Manager Asset Care, and Julian Van Der Kley, SRG's Regional Manager – East. SRG also relied on a bundle of 15 documents, referred to in those statements. Again, I do not need to identify each of those documents. The parties did not greatly disagree on the facts of the matter. The facts that I have stated in this decision are those which I have accepted and which I consider to be most relevant for present purposes.

[2] Unless otherwise stated, all references to legislative provisions in this decision are to provisions of the Act

[3] Section 382

[4] Section 385(a)

[5] Section 394(1)

[6] Section 385(b), having regard to the criteria in s 387. In this case, questions as to whether the dismissal was consistent with the Small Business Fair Dismissal Code (s 385(c)) or was a case of genuine redundancy (s 385(d)) do not arise.

[7] Under Part 3-2 Division 4

[8] Section 386(1)(a)

[9] *Saeid Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 at [75], citing *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200

[10] Section 386(1)(b). This provision is intended to reflect the common law concept of constructive dismissal: Explanatory Memorandum for the *Fair Work Bill* at par 1530; *City of Sydney RSL & Community Club Limited v Roxana Balgowan* [2018] FWCFB 5 at [9] and [13]

[11] *Bupa Aged Care Australia Pty Ltd v Tavassoli* (2017) 271 IR 245; [2017] FWCFB 3941 at [47]

[12] *Kylie Bruce v Fingal Glen Pty Ltd* [2013] FWCFB 5279 at [23]

[13] Respondent's Outline of Submissions at par 74

[14] Respondent's Outline of Submissions at par 62

[15] Respondent's Outline of Submissions at par 57

[16] Section 387

[17] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]

[18] Those referred to in s 387(c), (d) and (e).

[19] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373

[20] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[21] *Sydney Trains v Trevor Cahill* [2021] FWCFB 1137 at [60]

[22] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19] and *Sydney Trains v Trevor Cahill* [2021] FWCFB 1137at [60]

[23] Section 390(1)

[24] Mr Randall's Submissions, 11 October 2024, p 2

[25] Section 391(1)(b)

[26] Having regard to the discussion by the High Court in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539; [2005] HCA 22

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

[28] Section 390(3)(b)