DECISION

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

Breanna Roche

v

The Trustee For The Dolphin Hotel Unit Trust
(U2023/11370)

DEPUTY PRESIDENT CROSS SYDNEY, 10 MARCH 2024

Application for an unfair dismissal remedy – Casual employee – Application dismissed

[1] Ms Breanna Roche (the Applicant) commenced employment with the Trustee for the Dolphin Hotel Unit Trust (the Respondent) as a casual employee on 24 April 2021. Ms Roche was terminated on 10 November 2023. She lodged an Application pursuant to s.394 of the *Fair Work Act 2009* (the Act) on 17 November 2023 (the Application).

[2] In a jurisdictional objection, the Respondent contended that the Applicant was not protected from unfair dismissal on 10 November 2023 because she was a casual employee without regular and systematic employment.[1] Apart from the jurisdictional objection, the Respondent contended that the Applicant was dismissed due to issues with her performance and customer engagement.

[3] While directions were issued regarding the filing of statements by the parties, neither party filed any statements. In those circumstances it was concluded that the matter was appropriate to be heard by way of a determinative conference.

Relevant Facts

[4] The Applicant commenced employment on 24 April 2021. The Applicant's contract of employment dated 31 May 2021 contained the following provisions:

> *"I am pleased to offer you casual employment in the position of Sales Representative with us…*
>
> *1.1 Your position is set out in Item 3 and commencement date in Item 2 of the Schedule. You will be employed on a casual basis.*
>
> …

3.1 As a casual employee you will not have reasonably predictable or regular hours of work, and you may be required to work at any time of the week including late nights, weekends and public holiday. The Employer will notify you when you are required to work from time to time.

…

16.1 As a casual employee, your employment terminates at the end of each engagement and recommences on each new engagement. However, you or the Employer may terminate your employment or any engagement at any time for any reason by giving one hour's notice of termination, or the payment or forfeiture of one hour's wages in lieu of notice."

[Emphasis added]

[5] The Respondent submitted an Employee Payment Summary, which detailed the cycles of work the Applicant engaged in. From the Employee Payment Summary, it is apparent that the Applicant took the following breaks at her choice from her casual employment:

- The Applicant was paid on 20 June 2021 and was not paid again until 17 October 2021, taking 4-months off work;
- The Applicant was paid on 19 June 2022 and was not paid again until 17 July 2022, taking 1-month off work;
- The Applicant was paid on 18 December 2022 and was not paid again until 9 April 2023, taking 4-months off work;

[6] After she returned to work in April 2023, the Applicant's hours have ranged from 2 hours per week to 36 hours per week. Hours worked per week in that period, as outlined in the Employee Payment Summary were:

11 Dec 2022 (Sun)	17:15
18 Dec 2022 (Sun)	21:55
09 Apr 2023 (Sun)	2:00
30 Apr 2023 (Sun)	22:45
07 May 2023 (Sun)	19:50
14 May 2023 (Sun)	11:25
21 May 2023 (Sun)	20:55
28 May 2023 (Sun)	19:10
04 Jun 2023 (Sun)	32:30
11 Jun 2023 (Sun)	22:00
02 Jul 2023 (Sun)	27:20
09 Jul 2023 (Sun)	36:20
16 Jul 2023 (Sun)	35:15
23 Jul 2023 (Sun)	25:55
30 Jul 2023 (Sun)	34:40
06 Aug 2023 (Sun)	33:45

13 Aug 2023 (Sun)	39:00
20 Aug 2023 (Sun)	34:05
27 Aug 2023 (Sun)	32:20
03 Sep 2023 (Sun)	27:50
10 Sep 2023 (Sun)	36:30
17 Sep 2023 (Sun)	6:40
24 Sep 2023 (Sun)	27:40
01 Oct 2023 (Sun)	16:05
29 Oct 2023 (Sun)	5:40
05 Nov 2023 (Sun)	13:55
12 Nov 2023 (Sun)	19:15
Total	642:00

[7] The Employee Payment Summary also detailed other smaller breaks from employment.

[8] On 22 August 2023, Mr Dodds, the General Manager of the Respondent, and Mr Bailey, the Operations Manager, met with the Applicant. That meeting addressed what was described as a change in the Applicant's behaviour, involving ignoring management decisions or requests, and complaints from customers. The Applicant did not challenge that there had been a decline in her performance, but said it was from May 2023, when a co-worker passed away.[2] The issues included sending herself on breaks during peak trade and telling other staff they could go on break at inappropriate times, closing the bar without the approval of the manager on duty, customer complaints against her, and not arriving to shifts on time. The Applicant stated that she was not enjoying work as much as previously but still wanted to work for the Respondent. The Applicant further stated she would put effort into improving her customer interactions.

[9] The Applicant attended a bar supervisors meeting on 31 October 2023, that reinforced that focus would be on improved customer service standards, quality of service, following protocol/procedures, and being seen as 'one team' supporting management decisions. Following this meeting it was reported by several staff that the Applicant had posted on the Dolphin Fam Bam (Facebook Chat) criticizing the management team. That chat group was set up as a social platform only. It was for staff to invite each other to events or ask questions relating to work.

[10] The Applicant was spoken to about appropriate social media use but continued to use those platforms to vent her own opinions on the management team. The Respondent considered the Applicant's actions as inciting a negative and combative environment among the team by encouraging them to do the same.

[11] Around 9 November 2023, the Applicant began excluding certain employees, whom she considered *"managerial"*, from the Staff Group Chat on the WhatsApp.[3] The Applicant made various comments on the Staff Group Chat that the Respondent saw as a major concern as her

content used language that could incite bad behaviour and negativity toward leadership and management. Those messages were:

> Ms Roche: The dolphin family chat has always been a management free safe space for delfino's to vent. I want it to stay that way [heart emoticon].
>
> Its inappropriate to be cutting shifts when you're mad at staff without having a conversation about it. Were adults and their communication needs to be better. I'm always happy to fight for you guys without the fear of backlash but messaging me privately only gets us so far. Please speak to the management team and communicate your frustrations as well

[12] On the 10 November 2023, at the start of her shift, the Applicant was asked to meet with Mr Dodds. He explained that her continued decline in behaviour and attitude could no longer be accepted. He also spoke about the social media chats and how it was inappropriate to exclude people, and not appropriate to encourage people to speak poorly of management. The Applicant left the building after this meeting, and she was paid for the shift for that day. The Applicant was provided with a termination letter in the following terms:

> *Following our recent discussion and careful consideration, it is with regret that I must inform you of the termination of your employment with The Dolphin Hotel effective 10/11/2023.*
>
> *The decision to terminate your casual employment is a result of persistent concerns regarding your behaviour and attitude, particularly in relation to your role as a Bar Supervisor. Despite our efforts to address these issues, there has been a consistent pattern of behaviour that is incompatible with the standards and values we uphold.*
>
> *Of particular concern is your involvement in a group chat that has fostered negative comments about the management team, thereby creating a divisive atmosphere between the Front of House and the Management team. This behaviour is detrimental to our goal of building a cohesive and positive work environment and team culture.*
>
> *Having been a part of the Dolphin team since 2021, your tenure is notable in the hospitality industry. However, it has become evident that the current working relationship is no longer tenable.*
>
> *Your last day of employment with Dolphin Hotel will be 10/11/2023. We request that you return any company property or materials in your possession before your departure.*
>
> *I sincerely regret that it has come to this point, and I wish you the best in your future endeavours.*

[13] The Applicant was out of work for two weeks.[4]

Consideration

(a) Minimum Employment Period Ground

[14] Sections 383 and 384 of the Act relevantly provide as follows:

> ***"383 Meaning of minimum employment period***
>
> *The minimum employment period is:*
>
> *(a) if the employer is not a small business employer – 6 months ending at the earlier of the following times:*
>
> *(i) the time when the person is given notice of the dismissal;*
>
> *(ii) immediately before the dismissal; or*
>
> *(b) if the employer is a small business employer – one year ending at that time.*
>
> ***384 Period of employment***
>
> *(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.*
>
> *(2) However:*
>
> *(a) a period of service as a casual employee does not count towards the employee's period of employment unless:*
>
> *(i) the employment as a casual employee was on a regular and systematic basis; and*
>
> *(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; …"*

[15] It is the employment that must be on a regular and systematic basis, not the hours worked.[5] However, a clear pattern or roster of hours is strong evidence of regular and systematic employment.[6]

[16] I have no difficulty in rejecting the Respondent's submissions, and conclude, in respect of s.384(2)(a)(i) and (ii), that the Applicant's employment as a casual employee was on a regular and systematic basis, and she had a reasonable expectation of continuing employment.

[17] In *Yaraka Holdings Pty Ltd v Giljevic*,[7] the Court of Appeal of the ACT gave consideration to the proper construction of s.11 of the *Workers Compensation Act 1951* (ACT), which for relevant purposes deemed casual workers as workers for the purpose of that Act if their "engagement, under the contract or similar contracts, has been on a regular and systematic basis" taking into account a range of matters including the contractual terms, the working relationship and all associated circumstances, the period or periods of engagement, the frequency of work, the number of hours worked, the type of work, and the normal arrangements for someone engaged to perform that type of work. Crispin P and Gray J observed that the concept of employment on a regular and systematic basis was drawn from the *Workplace Relations Act 1996*,[8] and went on to say (emphasis added):

> *"[65] It should be noted that it is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement. Furthermore, the section applies to successive contracts and non-continuous periods of engagement. It is true that subs (3) provides that, in working out whether an engagement has been on a regular and systematic basis, a court must consider, inter alia, the frequency of work, the number of hours worked under the contract or similar contracts and the type of work. However, these statutory criteria relate to the decisive issue of whether the relevant engagement has been on a regular and systematic basis. The section contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent.*
>
> *...*
>
> *[67] Connolly J was right to conclude that the absence of any contractual requirements for the respondent to work at set times or of any assumption that he be present on a daily weekly or monthly basis unless told otherwise did not preclude a finding that his engagements had been regular and systematic.*
>
> *[68] The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant". Considered in the light of the criteria in s11 (3)(a)-(g), we are satisfied that the pattern of engagement over the years from 1995 to 2002 satisfied this description.*
>
> *[69] Mr Rares argued that the course of engagement over these years had not been shown to have been systematic because it had not been predictable that the respondent would be engaged to work at particular times, on particular jobs or at particular sites. Again, that is not the test. The concept of engagement on a systematic basis does not require*

the worker to be able to foresee or predict when his or her services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged."

[18] Similarly, Madgwick J found (emphasis added):

"[89] ... a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all.

[90] The respondent's work for the appellant was certainly frequent enough to be termed 'regular' within an acceptable understanding of that term, which may, even in ordinary speech, be used to denote 'frequent.'

[91] Engagement under contracts on a 'systematic basis' implies something more than regularity in the sense just mentioned, that is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan (cf the definition of 'systematic' in the Macquarie Dictionary, revised 3rd edn, 2001)."

[19] In *Chandler v Bed Bath N' Table Pty Ltd*,[9] the Full Bench of the Fair Work Commission observed that the reasoning in Yaraka Holdings has been applied to the concept of casual employment on a regular and systematic basis in the Act. In *WorkPac Pty Ltd v Skene*,[10] the Federal Court Full Court favoured (without needing to finally adopt) the view that the construction in *Yaraka Holdings* should be applied to the definition of "*long term casual employee*" in s.12 of the Act (which includes a requirement that the employee has been employed "*on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months).*"[11] The Commission, in its own decisions, has consistently applied *Yaraka Holdings* to s.284(2)(a), including in the Full Bench decisions of *Pang Enterprises Pty Ltd ATF Pang Family Trust v Sawtell*,[12] and Br*onze Hospitality Pty Ltd v Janell Hansson*,[13] as well as in numerous first instance decisions.

[20] The meaning of "casual employee" is set out at s.15A of the FW Act as follows:

"Meaning of casual employee

(1) A person is a ***casual employee*** *of an employer if:*

(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment;

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

(4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

(5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a ***casual employee*** *of the employer until:*

(a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or

(b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis."

[21] The meaning of *"regular casual employee"* is defined in s.12 of the FW Act as follows:

> ***"regular casual employee"*** *: a national system employee of a national system employer is a regular casual employee at a particular time if, at that time:*
>
> > *(a) the employee is a casual employee; and*
> >
> > *(b) the employee has been employed by the employer on a regular and systematic* basis.

[22] That the employment was *"regular"* in the sense of being frequent is amply demonstrated by the data in the Employment Payment Summary referred to in paragraph [6] above. It shows the Applicant, in the last 6 months of her employment at least, was employed in almost every week.

[23] The employment can also be characterised as *"systematic"* as it was seemingly arranged pursuant to an identifiable system. The Contract provided "*The Employer will notify you when you are required to work from time to time*." While the work was clearly stated to be of a casual nature, with hours changing from week to week, and with no obligation to offer a minimum number of hours, the regular and systematic nature of the employment identified above, including the contractual obligations, and the sheer regularity of engagement, leads me to the conclusion that the Applicant had a reasonable expectation of continuing employment by the Respondent on a regular and systematic basis (s.384(2)(a)(ii)).

[24] Accordingly, I find that, the Respondents jurisdictional objection is dismissed, and the Application may proceed to be dealt with on its merits.

(b) Unfair Dismissal

[25] The only outstanding issue is whether the Applicant's dismissal was 'harsh, unjust or unreasonable,' and therefore an unfair dismissal. To this end, I must direct attention to s.387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair. It is trite to observe that each of the matters must be considered and a finding made on each of them, including whether they are relevant or not.

[26] Section 387 of the Act identifies the matters that the Commission must take into account in deciding whether a dismissal was "harsh, unjust or unreasonable:"

> *(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);*
>
> *(b) Whether the person was notified of that reason;*
>
> *(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;*

(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;

(e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal;

(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;

(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.

[27] In *Rode v Burwood Mitsubishi,*[14] a Full Bench of the then Australian Industrial Relations Commission discussed the meaning of valid reason in the context of the relevant provisions of the *Workplace Relations Act 1996* and referring to *Selvachandran v Peteron Plastics Pty Ltd* [15](*Selvachandran*). The Full Bench found:

[18] While Selvachandran was decided under the former statutory scheme the above observations remain relevant in the context of s.170CG(3)(a). A valid reason is one which is sound, defensible or well founded. A reason for termination which is capricious, fanciful, spiteful or prejudiced is not a valid reason for the purpose of s.170CG(3)(a).

[19] We agree with the appellant's submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.

[28] The termination letter outlined a general reason regarding "*persistent concerns regarding your behaviour and attitude, particularly in relation to your role as a Bar Supervisor",* and a more specific concern *"regarding involvement in a group chat that has fostered negative comments about the management team, thereby creating a divisive atmosphere between the Front of House and the Management team".* I consider that both the general and specific reasons are made out.

[29] Indeed, in addressing the general reason, the Applicant conceded taking a break during peak service,[16] inappropriately turning lights and music off,[17] and overall behavioural inconsistency.[18] Regarding the specific reason, the Applicant's evidence was:[19]

MS ROCHE: I also didn't realise that a private group chat, outside of work, had to be monitored. It has never been a group chat that has management in it. This is the second - - -

THE DEPUTY PRESIDENT: Well, why did you remove two managers?

MS ROCHE: Because they had been recently promoted. There was no other managers in the group chat, and I was being told - - -

THE DEPUTY PRESIDENT: By whom?

MS ROCHE: Sorry?

THE DEPUTY PRESIDENT: You were being told by whom?

MS ROCHE: By other staff members that they weren't comfortable having one of the managers in the group chat, as they didn't trust her, because of her relationship with one of the other managers who they don't trust. So, yes.

THE DEPUTY PRESIDENT: So without talking to anyone, you just removed them from the group chat.

MS ROCHE: Yes.

THE DEPUTY PRESIDENT: Okay.

MS ROCHE: As – as I said, I didn't think it would be an issue. It's not a work chat, it's a – it's a social chat with friends. Some people who don't even work at the Dolphin are in the group chat, so.

[30] The Chat Group clearly related to working at the Dolphin Hotel. There is no sensible basis for describing the group as a private group chat. As a person working in a supervisory capacity, and who had been instructed in the Supervisor's meeting on 31 October 2023, to work together and not question management decisions, the actions of the Applicant are all the more unacceptable.

Procedural fairness- s.387(b)-(e)

[31] Sub-sections (b) - (e) of s 387 of the Act may be broadly characterised as issues relevant to whether a dismissed employee was afforded procedural fairness. It is correct to observe that, even if there was a valid reason for an employee's dismissal, the dismissal may still be held to be unfair if the employee was not afforded procedural fairness.

[32] I consider the Applicant was afforded procedural fairness. On 22 August 2023, a meeting occurred that addressed what was described as a change in the Applicant's behaviour, involving ignoring management decisions or requests, and complaints from customers occurred. Indeed, the Applicant stated that she was not enjoying work as much as previously but still wanted to work for the Respondent and would put effort into improving her customer interactions.

[33] Then at the Supervisors meeting on 31 October 2023, the Applicant seemed to accept that she was forewarned in that meeting about the conduct that subsequently resulted in her dismissal. Her evidence was:[20]

> *THE DEPUTY PRESIDENT: The respondent might say that there were two times, at least, where they explained to you what they required from you in the performance of your role, being the first was the meeting of 22 August 2023, and in the more general sense, the supervisor's meeting on 31 October 2023.*
>
> *MS ROCHE: Mm-hm.*
>
> *THE DEPUTY PRESIDENT: Now whether you appreciated what was being put to you, am I correct in understanding, you knew what the respondent was wanting you to do.*
>
> *MS ROCHE: In the supervisor meeting, absolutely.*

And:[21]

> *THE DEPUTY PRESIDENT: Attending to my question, now my question is dealing with, when the new general manager was in place, you were receiving instructions in a meeting, particularly with you, and you were receiving instructions in a meeting generally with supervisors.*
>
> *MS ROCHE: Mm-hm.*
>
> *THE DEPUTY PRESIDENT: And then we look at the screenshot, that seems to have been relied on by the respondent, as possibly the straw that broke the camel's back.*
>
> *MS ROCHE: Yes.*
>
> *THE DEPUTY PRESIDENT: But weren't you forewarned in relation to dealings with management?*
>
> *MS ROCHE: Well, like, as I said, I was not trying to, like – I just don't think I did anything wrong. I suppose, I'm not sure. Maybe we have different stances on that, but like, I just don't see an issue with it. No other managers are in this group chat. Why would these managers be in the group chat now.*

[34] Regarding the specific reason, the Applicant attended the meeting on 10 November 2023, and was able to provide her responses.

[35] The Applicant received notification of the valid reasons for dismissal and had an opportunity to respond to the reasons for dismissal. There is no evidence of a request being made for the presence of a support person.

Size/Human Resource Specialists ss 387(f), (g)

[36] Neither party submitted that the size of the Respondent's enterprise or its access to human resource management specialists or expertise was likely to have impacted the procedures followed in effecting the dismissal.

Conclusion

[37] I have made findings in relation to all matters specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal.

[38] I have found the Respondent had valid reasons for the dismissal of the Applicant. The Respondent provided the Applicant with an opportunity to respond to the reason for dismissal before sending the termination letter. Further, no other factors were accorded weight.

[39] I therefore do not find that the dismissal of the Applicant was harsh, unjust or unreasonable. The Application is dismissed.

DEPUTY PRESIDENT

Appearances:

Ms B Roche the Applicant.

Ms R Reed on behalf of the Respondent.

Hearing details:

7 March 2024.

Sydney.

In Person.

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[1] Transcript PN 57.

[2] Transcript PN 200 and 339.

[3] Transcript PN 332.

[4] Transcript PN 88 and 255.

[5] *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 399 (***Yaraka***) at [65]; cited in *Ponce v DJT Staff Management Services Pty Ltd t/a Daly's Traffic* [2010] FWA 2078 (***Ponce***).

[6] Ibid.

[7] [2006] ACTCA 6; 149 IR 339.

[8] Ibid at [64].

[9] [2020] FWCFB 306.

[10] [2018] FCAFC 131.

[11] Ibid at [150] to [152].

[12] [2006] FWCFB 4438, at [15] to [17].

[13] [2019] FWCFB 1099 at [24].

[14] Print R4471, at [18] and [19].

[15] (1995) 62 IR 371

[16] Transcript PN 214.

[17] Transcript PN 236.

[18] Transcript PN 339.

[19] Transcript PN 343 to 346.

[20] Transcript PN 343 to 346.

[21] Transcript PN 325 to 335.