DECISION

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

Paul Conicella

v

MSS Strategic Medical and Rescue Pty Ltd T/A MSS

(U2024/10687)

DEPUTY PRESIDENT DOBSON BRISBANE, 17 JANUARY 2025

Application for relief from unfair dismissal – speeding on a mine site in emergency – whether an emergency existed – breaching standard operating procedures – whether breach of policy permitted in emergent conditions – where site access removed by third party client – attempts made to reinstate site access – serious misconduct

[1] Mr Paul Conicella (**Mr Conicella**) has made an application for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (Cth) (**Act**). Mr Conicella was employed by MSS Strategic Medical and Rescue Pty Ltd T/A MSS (**MSS**). MSS provide Medical, Rescue and Security services in various industries including the mining industry in Australia. MSS terminated Mr Conicella's employment on 20 August 2024 on the grounds of frustration of contract because its client BMA, withdrew Mr Conicella's access from the site upon which he was placed, and in the alternative, on the basis of serious misconduct as a consequence of Mr Conicella speeding on a haul road at the Saraji Mine Site on 24 April 2024 whilst responding to an emergency call, initially driving at 113km per hour in a 60km limited area, and later at 90km per hour in a 60km limited area. Mr Conicella denies that his actions constituted misconduct at all and seeks reinstatement or in the alternative, compensation.

The hearing

[2] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing. After considering the views of the parties, the matter proceeded by hearing.

[3] At the hearing Mr Conicella was represented by Mr Chris Newman of the Mining and Energy Union (**MEU**) and MSS was self-represented by Ms Sarah Coker, People and Culture Manager, of MSS.

[4] Mr Conicella gave evidence on his own behalf.

[5] The following witnesses gave evidence on behalf of MSS:

- Mr Tony Ganzer, Operations Manager, East Coast MSS.
- Mr Casey Johnson, SEM Superintendent for BMA BHP Mitsubishi Alliance, (**BMA** or **Client**).

[6] Both parties filed submissions and also made oral closing submissions following the witness evidence and cross examination of all of the witnesses.

Has the Applicant been dismissed?

[7] A threshold issue to determine is whether the Applicant has been dismissed from their employment. There was no dispute, and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[8] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[9] There is no dispute and I am satisfied that the application was filed within the required 21 days.[1]

[10] There is no dispute and I am satisfied that Mr Conicella is protected from unfair dismissal.[2]

[11] There is no dispute and I am satisfied that MSS is not a small business[3] and that the dismissal was not a case of genuine redundancy.[4]

[12] The Commission must now proceed to consider the merits of the application and decide whether the dismissal was harsh, unjust or unreasonable, taking account of the matters in s.387 of the Act.[5]

[13] I acknowledge the submissions and evidence made by both parties in writing, pursuant to my directions which are set out in the Digital Court Book. This evidence and other relevant matters were further tested and explored at hearing. I don't intend to detail them all here, however they have all been considered and these are my findings.

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

[14] MSS submit there was a valid reason for dismissal related to capacity in that its client had withdrawn Mr Conicella's site access and therefore he was unable to fulfil the inherent requirements of the job and he had declined to take up a different role that they offered him. In the alternative, MSS submit there was a valid reason for dismissal based on Mr Conicella's conduct, being that he engaged in serious misconduct[6] when he drove on a mine site at great speed as set out in paragraph [1], which was inherently unsafe and was a serious breach of policy/procedure.

[15] Mr Conicella was employed as an emergency response supervisor/team leader at the Saraji mine site. Mr Conicella supervises 4 emergency response officers who are located on

different parts of the mine site in addition to 1 paramedic emergency officer (PEO). On 24 April 2024, Mr Conicella responded to an emergency call at a site at the mine.

[16] At hearing, Mr Conicella conceded, and I accept that he was in the office prior to proceeding to the emergency call and was unaware of the site conditions, although he was aware of the protocols for other traffic in an emergency situation.

[17] At the hearing Mr Conicella gave evidence that the PEO was getting dressed and rather than wait for her to finish, Mr Conicella elected to drive while she continued to do so. When questioned, Mr Conicella conceded that he did not know if his passenger was wearing a seatbelt while she was getting dressed. He also gave evidence that while he was driving, he used the handheld radio whilst driving, and that he held that radio with one hand and had his other hand on the steering wheel. He also gave evidence that he had not been trained to drive an emergency vehicle in emergency conditions for some 20 years and it was normally the PEO's job to drive in such situations at this site. The training he received over 20 years ago was unclear and not substantiated by any supporting evidence, and I am not at all satisfied that Mr Conicella was trained to drive in emergency situations that include speeding on a high risk worksite. Mr Conicella's evidence was that he agreed he was driving at 113 km per hour in the 60 km speed limited area due to there being an emergency which was a fire. He also gave evidence that he was advised on the radio that there was no threat to life and the fire had been extinguished. His evidence at hearing was that he then dropped his speed to 80-90 km per hour from then for the rest of the trip. (I note in Mr Conicella's written statement he stated that he slowed to 90 km per hour and I find that it was 90km per hour not 80-90). When asked why he did not drop to the 60 km speed limit, he said that he was concerned about a "risk of reignition". He claimed not to be able to remember how much longer he drove at the lower speed or how long it was from when he was told that there was no risk to life and no fire, until he arrived at the site still exceeding the speed limit by a significant amount. I find it hard to believe he didn't have at least some understanding as to how long it was but I believe it was for a period of time where there was at least some ongoing risk to having a vehicle continue to drive at speed, in excess of the speed limit by some 30 km per hour above the speed limit. Further, I am also satisfied that there was no policy or direction to Mr Conicella that gave him authority to break the usual site policy not to exceed the speed limit. I accept the evidence of Mr Johnson (the BMA Superintendent on the site, that there was no grey area in breaching speed limits even in circumstances of emergencies."[7] I find that it should have been clear to Mr Conicella that to do so was not only unacceptable, it was very dangerous.

[18] When all of the circumstances of my findings are considered, where I am satisfied that Mr Conicella had a passenger in the vehicle who was getting dressed at the time, whom he was unaware as to whether she was wearing a seat belt, where he had one hand on a handheld radio and one on the steering wheel, was untrained for driving in emergency conditions, on a site for which I find that he was unclear on the conditions that evening, and despite being told there was no threat to life and no fire and he continued to drive above the speed limit, I consider this was conduct that was unacceptable for someone in his position. It was a situation where it should have been obvious to a reasonable person that in all those circumstances, it was highly dangerous. Even moreso in circumstances where, on the evidence given which I accept, there had been a recent fatality on that site due to a vehicle driving over the site speed limit.

[19] It was submitted by MSS, which I accept, that MSS met with Mr Conicella on 8 August 2024 and advised him that BMA had withdrawn Mr Conicella's access to site and that they had made attempts to try and change that decision without success.[8] I am satisfied that at that

meeting, MSS offered Mr Conicella another role as a Security Guard for a different client, which was also put in writing.[9] Following that meeting, at Mr Conicella's request, MSS again contacted the client and challenged their revocation of Mr Conicella's site access without success.[10] On 11 August 2024, Mr Conicella wrote back to MSS and declined the alternative job offer.[11]

[20] I accept that it was BMAs decision to revoke Mr Conicella's access to the site.[12] I also accept the evidence of Mr Ganzer that attempts were made not to have Mr Conicella's site access removed[13] and an offer of an alternate job was made and not accepted.[14]

[21] I conclude that there was a valid reason for Mr Conicella's dismissal. It was that the employment could not continue in circumstances where the client had revoked Mr Conicella's site access, despite MSS making attempts to change this situation, and further that Mr Conicella's conduct was so egregious in all the circumstances previously set out, that serious misconduct arising from his actions in responding to the emergency on the evening of 24 April 2024, was substantiated.

[22] I note the Applicant's referral to the decision of *Kim Star v WorkPac Pty Ltd*[15] (**Star**). I believe this matter is materially distinguishable from Star in that MSS made attempts to have Mr Conicella's site access reinstated and importantly, I have made findings that the conduct of Mr Conicella was serious misconduct that warranted dismissal in and of itself.

Was the Applicant notified of the valid reason?

[23] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[16]

[24] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[17] and in explicit[18] and plain and clear terms.[19]

[25] It was the evidence of Mr Ganzer, which I accept, that Mr Conicella was stood down on the 26th of April 2024 and advised of the allegations against him.[20] Mr Conicella was subsequently issued a letter from MSS which again detailed the allegations and provided an opportunity to respond to those allegations[21] which he did on 30 April 2024.[22] Further, MSS then wrote again to Mr Conicella on 22 May 2024 advising the preliminary findings and provided an opportunity for Mr Conicella to respond as to why his employment should not be terminated.[23] Mr Conicella responded on 28 May 2024.[24] Following attempts to challenge the revocation of site access[25] and find an alternate job placement for Mr Conicella, MSS issued Mr Conicella with a termination letter that took immediate effect.[26]

[26] I find that the Applicant was notified of the reason for his dismissal prior to the decision to dismiss being made, and in explicit, plain and clear terms. In all the circumstances, I find that Mr Conicella was notified of the reason for his dismissal.[27]

[27] In further consideration of those circumstances, I find that Mr Conicella was given an opportunity to respond to the reasons for his dismissal prior to the decision to dismiss being made.[28]

[28] It was not in dispute and noting the presence of Mr Jeff Pearce of the MEU in at least one meeting,[29] I find that there was no unreasonable refusal of the Applicant to have a support person present to assist at all relevant dismissal discussions.[30]

[29] MSS submitted and I accept that Mr Conicella had been the subject of previous disciplinary action in the form of a record of counselling discussion held on 24 March 2024 for an earlier incident regarding a failure to follow standard operating procedures.[31] Whilst I accept that this was not related to unsatisfactory performance, it was related to Mr Conicella's conduct and therefore, a matter I consider relevant to the dismissal.[32]

[30] There was no dispute and I find that MSS's size did not impact the procedure followed in effecting the dismissal.[33]

[31] Further, there was no dispute and I find that MSS employs dedicated human resources staff and therefore, no impacts to procedures followed need be considered.[34]

What other matters are relevant?

[32] Mr Conicella submits that in circumstances where a valid reason for the termination is found to exist, that the termination is still unfair as the decisions where harsh, unjust and unreasonable.[35] I reject this submission. The actions of Mr Conicella were very serious for the reasons already outlined.

[33] Further, Mr Conicella also submits other factors that the Commission should consider in favour of finding the dismissal was unfair include: his length of service of approximately 20 months, the reason Mr Conicella provided for speeding on the mine site was to reduce the time it took to attend the scene of an emergency and the failure of MSS and BMA to provide clear direction and a clear policy directing how emergency response employees drive when responding to an emergency situation. I note that Mr Conicella was engaged as a casual for a period of 7 months and engaged permanently for a period of 13 months.[36] I do not consider 20 months of service to be a lengthy period of service, particularly in circumstances where he had already been provided with a record of counselling for a previous breach of policy in the preceding month. Further, for the reasons already outlined, I do not consider it reasonable to drive at the speed Mr Conicella drove at, especially in circumstances where he had another employee in the vehicle who was getting dressed as he drove, he was distracted with a hand held radio on one hand and only had one hand on the steering wheel, he was advised there was no threat to life and no fire and whilst he slowed down, he continued to speed at an unreasonably excessive level. I am also satisfied that there was no policy that raised any possibility that it was appropriate for Mr Conicella to ignore policies in an emergency situation. Further, and importantly, I don't accept that the situation continued to be an emergency situation once Mr Conicella was advised that there was no threat to life and no fire. I do not accept that a possibility of reignition amounted to an emergency situation (arguably, there is always such a possibility) and therefore, even if there was a policy saying it was okay to speed in an emergency, it would not have applied from that point onwards.

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

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

[35] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[37]

[36] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable for all the reasons set out.

Remedy

[37] I note that even if I had found that the dismissal was unfair, when it comes to remedy, I would have found that given MSS attempts to have Mr Conicella's site access reinstated,[38] and the serious nature of Mr Conicella's actions giving rise to a serious loss in confidence in him to perform his role, I would have considered reinstatement inappropriate in all the circumstances.

[38] In respect of a financial remedy, I would have considered the following circumstances: Mr Conicella held a second job which was in breach of his employment contract.[39] At hearing, Mr Conicella conceded he did not have written permission to engage in this second job at Fenner Dunlop Pty Ltd (**Fenner**),[40] as is set out in his employment contract,[41] which he signed on 24 August 2024.[42] I am satisfied on the evidence before me that Mr Conicella continued to work full time at Fenner Dunlop including during the period where he was stood down on full pay by MSS. While Mr Conicella states in his evidence that he worked at Fenner for a period of some 6-8 weeks post his employment with MSS ending,[43] I am satisfied based on a review of his payslips[44] on which he was cross examined at hearing, that he actually worked for a period of 10 weeks at Fenner from the time he was stood down on full pay. I note that Mr Conicella obtained alternative employment from 9 November 2024, and therefore note that there was a period of 2 weeks from the last payslip provided by Mr Conicella from Fenner until he commenced his new position. I find it is probable that the employment with Fenner continued until he commenced his new role and therefore even if I had found the dismissal was unfair, I would not have made any order for financial remedy.

Conclusion

[39] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that Mr Conicella was unfairly dismissed within the meaning of section 385 of the FW Act. Mr Conicella's application is therefore dismissed.

DEPUTY PRESIDENT

Appearances:
Mr Chris Newman, Mining Energy Union for the Applicant.
Ms Sarah Coker, People and Culture Manager for the Respondent.

Hearing details:
Brisbane
In Person
23rd December 2024

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[1] Fair Work Act 2009 (Cth) s.394(2).

[2] Ibid s.382.

[3] Ibid s.396(c).

[4] Ibid s.396(d).

[5] 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.

[6] *Fair Work Regulations 2009* (Cth) r.1.07(2)(a), (b) and (e).

[7] DCB p.502 at [8] and [9].

[8] DCB pp.118-119 at [19]-[20].

[9] DCB p 119 at [21].

[10] Ibid at [22].

[11] Ibid at [23].

[12] DCB p.503 at [11]. See also DCB pp.118-119 and pp.500-501.

[13] DCB pp.500-501

[14] DCB p.119.

[15] *Kim Star v WorkPac Pty Ltd* [2018] FWC 4991 (**Star**).

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

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

[18] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[19] Ibid.

[20] DCB pp.118.

[21] Ibid; See also DCB pp.178-179.

[22] Ibid; See also DCB pp. 180-182.

[23] Ibid; See also DCB pp. 183-184.

[24] Ibid; See also DCB pp. 185-186.

[25] Ibid p.119 at [22].

[26] Ibid p.119 at [24]-[25]; See also DCB pp. 196-197.

[27] *Fair Work Act 2009* (Cth) s.387(b).

[28] Ibid s.387(c).

[29] DCB p.118 at [19]

[30] *Fair Work Act 2009* (Cth) s.387(d).

[31] DCB p.119 at [26]; See also DCB pp. 198-199.

[32] *Fair Work Act 2009* (Cth) s.387(h).

[33] Ibid s.387(f).

[34] Ibid s.387(g).

[35] DCB p.26; See also *Makin v Glaxosmith Kline Australia Pty Ltd* [2010] FWA 2211.

[36] DCB p.113.

[37] *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].

[38] DCB p.118-119 at [22].

[39] DCB p.136 at [15.1].

[40] DCB pp.87-89.

[41] DCB p.136 at [15.1].

[42] DCB p.139.

[43] DCB p.32 at [35].

[44] DCB pp.87-89.