FAIR WORK AUSTRALIA

REASONS FOR DECISION

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

Ms Carol Conlon

v

Anthony Dickinson T/A Raylook Pty Ltd
(U2012/6526)

COMMISSIONER LEWIN MELBOURNE, 14 SEPTEMBER 2012

Obligation to consult - genuine redundancy - Small Business Fair Dismissal Code - loss of a chance -

[1] On 27 March 2012 Ms Carol Conlon made an application under s.394 of the *Fair Work Act 2009* (the Act) for relief in relation to the termination of her employment with Anthony Dickinson, trading as Raylook Pty Ltd (Raylook) (the respondent). Ms Conlon was employed by the respondent from 16 August 2010 until 16 March 2012.

[2] As the matter did not settle at a conciliation conference it was allocated to me to be heard on 15 August 2012. Ms Conlon represented herself and Mr Pauline of Counsel was granted permission to appear on behalf of the respondent. The following persons gave evidence:

- Ms Carol Conlon applicant
- Ms Kate Capozzi former employee of the respondent for Ms Conlon
- Dr Anthony Dickinson for the respondent

[3] At the conclusion of the hearing I delivered an ex tempore decision in relation to the application. In the course of that decision I stated that reasons for the decision would be provided.

[4] Consequent, upon my decision of 15 August 2012 I used an order on 15 August 2012 that Raylook pay Ms Conlon $3,450 and make a contribution to Ms Conlon's superannuation fund of 9% of that amount within 21 days of the order. That order was subsequently amended to provide that Raylook pay to Ms Conlon the amount of $3,450, less appropriate taxation, and that the compensation should be deposited in the nominated bank account of Ms Conlon. The order for payment of an amount of 9% of the gross compensation for Ms Conlon's superannuation fund was not amended.

[5] What follows below are the reasons for the decision.

[6] Before considering the merits of Ms Conlon's application it is necessary to consider:

a) whether the application made within the period required in s.394(2) of the Act;
b) whether Ms Conlon 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.[1]

It is not necessary to consider these matters in the above order.

[7] It is convenient to dispose of the considerations in (a) and (b) above instantly. There is no dispute that Ms Conlon was dismissed at the initiative of the respondent or that the application was made within the period required by s.394(2) of the Act.

[8] The respondent conceded that the dismissal of Ms Conlon was not a case of genuine redundancy, as defined by s.389 of the Act, because of non-compliance by the respondent with the consultation provisions of the modern award which applied to the employment of Ms Conlon, under s.389(1)(b) of the Act.

[9] As Ms Conlon has completed the relevant qualifying period,[2] was dismissed by the respondent and as the dismissal was not a case of genuine redundancy within the meaning of the relevant statutory provisions, I find that Ms Conlon was protected from unfair dismissal at the time of the termination of her employment.

[10] It is not disputed by Ms Conlon that the respondent is a small business. Accordingly the Small Business Fair Dismissal Code (the Code) applies.

[11] The Code is set out below:

> 'Small Business Fair Dismissal Code
>
> Commencement
>
> The Small Business Fair Dismissal Code comes into operation on 1 July 2009.
>
> Summary Dismissal
>
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
>
> Other Dismissal
>
> In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

---

[1] *Fair Work Act 2009*, s.396

[2] Ibid, s.383(b)

> The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.
>
> Procedural Matters
>
> In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.
>
> A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.'

[12] The reason for the termination of Ms Conlon's employment given by the respondent was redundancy of the position in which Ms Conlon was employed, due to restructuring of the duties of that position, which led to her retrenchment.

[13] The respondent submits that there was a valid reason for the termination of Ms Conlon's employment related to her capacity to fulfil the requirements of the position of practice manager of the employer's business, which she had occupied but which was restructured to include new duties, of a clinical nature, which required qualifications and experience Ms Conlon did not possess.

[14] In my view, on a proper construction of the Code, the termination of Ms Conlon's employment was not consistent with the Code.

[15] The dismissal of Ms Conlon was not a summary dismissal related to Ms Conlon's conduct.

[16] The dismissal did not relate to Ms Conlon's capacity to perform the duties of the position in which she was employed and from which she dismissed. Finally, no doubt for the reasons stated, Ms Conlon had not been warned verbally or in writing that she had been in anyway incapable of performing the duties of her position to the satisfaction of the respondent. Indeed, the evidence of Dr Dickinson is that Ms Conlon's conduct and her capacities to perform her position were at all times satisfactory. Consequently, for the purposes of the Code there was no valid reason of the kind provided for under the heading 'Other Dismissal'.

[17] In these circumstances the application must be considered taking into account the matters prescribed by s.387 of the Act which are set out below:

> '387 Criteria for considering harshness etc.

> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA 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 FWA considers relevant.'

Valid Reason

[18] The applicant submitted that the restructuring of the duties of her position, insofar as it was said to include the clinical duties relied upon by the respondent, should be considered a sham. It is submitted by Ms Conlon that her position was to be restructured in consultation with her to remove some duties in the lower range of her responsibilities, in order to engage a receptionist and enable her to pay more attention, unhindered by receptionist duties, to higher-level clerical and administrative duties. Ms Conlon's evidence is that she and Dr Dickinson were working together in discussion on this basis and for this purpose. Ms Conlon's submission is that the facts show that the inclusion of clinical duties in a job description relied upon by the respondent occurred after the termination of her employment.

[19] Dr Dickinson gave an explanation of the sequence of events which led to the construction of a duty statement for the person who was engaged and replaced Ms Conlon which included clinical responsibilities. It was not disputed that this occurred after Dr Dickinson informed Ms Conlon that they would 'have to part company'.[3] The evidence is that the person engaged to fill the restructured position previously held by Ms Conlon is the former wife of another Dentist with dental nurse qualifications and experience as a practice manager.[4]

---

[3] Exhibit A1, Para 9.

[4] Transcript, PN371.

[20] In relation to this controversy, the sequence of events whereby the applicant's position was restructured is somewhat problematic, sufficient to give me pause about the findings I should make in relation to the matter of whether or not the restructure should be considered a sham.

[21] However, while those facts are problematic, I have reached the conclusion that the respondent decided to move from a situation where the practice manager was a person with exclusively clerical and administrative skills to one where someone with clinical qualifications and experience and administrative capacities would fill the position.

[22] In order to come to the conclusion that this was not the case I would have to reject Dr Dickinson's evidence as entirely dishonest and untruthful. To do so would require more, in my view, than the evidence looked at as a whole can justify.

[23] I have therefore reached the conclusion that there was a valid reason for the termination of Ms Conlon's employment based upon her capacity to perform the duties of the restructured position of practice manager. Ms Conlon lacked clinical qualifications and experience.

Notification

[24] On the evidence before me Ms Conlon was not notified of the reason for the termination of her employment before the decision to do so was taken. Rather, suddenly, while discussing changes to the duties of her position which were in no way predicated on a duty statement which required clinical functions or qualifications, Dr Dickinson simply announced that they would have to 'part company'.[5] This took Ms Conlon completely by surprise. Ms Conlon had been working with Dr Dickinson to restructure the duties of her position on the basis that he wished her to shed reception and other low level administrative tasks to better focus on the higher order of practice management responsibilities, commensurate with her abilities, experience and remuneration.

Opportunity to respond

[25] The failure of the respondent to notify Ms Conlon of the decision to terminate her employment removed any meaningful opportunity for Ms Conlon to respond to considerations which might lead to the termination of her employment. The duty statement of the restructured position was drawn up by Dr Dickinson after he told Ms Conlon of the termination of her employment.

Support Person

[26] There was no refusal of the relevant kind.

Warning

[5] Exhibit A1, Para 9.

[27] The reason for the termination of Ms Conlon's employment did not relate to unsatisfactory performance and no such warnings are relevant or had been given prior to the termination of Ms Conlon's employment.

Size of employer

[28] The respondent is a small business employer. The business of the respondent is executed and managed by Dr Dickinson who is a Prosthodondist. I consider these circumstances likely impacted upon the procedures followed in effecting the termination of Ms Conlon's employment to a substantial degree.

Human resource management expertise

The business of the respondent lacked a human resource management specialist and any such expertise due to its size and the nature of the business. Consequently, the lack of such specialists and expertise likely impacted upon the procedures followed in effecting the termination of Ms Conlon's employment to a substantial degree.

Other relevant matters

[29] The respondent did not dispute that relevant consultation procedures provided for in the applicable modern award, the *Clerks Private Sector Award 2010* (the Award), were not complied with. Indeed, it was for this reason that the respondent conceded that the termination of Ms Conlon's employment was not a case of genuine redundancy within the meaning of s.389(1)(a) of the Act.

[30] The Award contains terms dealing with consultation regarding major workplace change and redundancy.

[31] The provisions are set out below:

> '8. Consultation regarding major workplace change
>
> 8.1 Employer to notify
>
> (a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
>
> (b) Significant effects include termination of employment, major changes in composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

8.2 Employer to discuss change

(a) The employer must discuss with the employees affected and their representative, if any, the introduction of the changes referred to in clause 8.1, effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.

(c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.'

'14. Redundancy

14.1 Redundancy pay is provided for in the NES.

14.2 Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing.

14.3 Employee leaving during notice period

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under this clause had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

14.4 Job search entitlement

(a) An employee given notice of termination in circumstances of redundancy must be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee must, at the request of the employer, produce proof of attendance at an interview or they will not be entitled to payment for the time absent. For this purpose a statutory declaration is sufficient.

(c) This entitlement applies instead of clause 13.3.'

[32] There can be no doubt that in the context of the small workplace of the respondent and the changes in the requirements of the position of practice manager relied upon as the basis of for the termination of Ms Conlon's employment that the relevant change can be properly characterised as a major workplace change, likely to have significant effects on Ms Conlon.

[33] Clearly Ms Conlon was not notified of the proposed change, which was likely to have the effect that her employment would be terminated as a consequence.

[34] Moreover, the respondent did not comply with the requirement to discuss the proposed change. I accept Ms Conlon's evidence that up until the point at which Dr Dickinson announced 'that means we will have to part company; the matters under discussion in relation to her duties were confined to steps to relieve her of the duties of receptionist in order to allow her to concentrate more fully on higher level administrative responsibilities commensurate with her capacities, for the purpose of greater managerial efficiency of the business.

[35] Ms Conlon had been absent on annual leave for several weeks not long before the events which led to the termination of her employment. The evidence is clear that during that time the administration of the respondent's practice became dysfunctional.

[36] Moreover, I accept that at least by overwhelming inference, the nature of the change discussed by Dr Dickinson with Ms Conlon prior to informing her of the termination of her employment was predicated on the assumption of continuity of her employment.

[37] Accordingly there was no opportunity for Ms Conlon to discuss the likely effect of the significant change, measures to avert or mitigate the adverse effect of such a change upon her or to raise matters in relation to the change.

[38] The proposed change was not provided in writing prior to the decision to terminate Ms Conlon's employment nor was any of the information to be provided in writing in accordance with Clause 8 of the Award so provided.

Harsh unjust or unreasonable

[39] The termination of Ms Conlon's employment was effected with notice. When Ms Conlon asked Dr Dickinson if the termination of her employment was by reason of redundancy Dr Dickinson said 'we can call it a redundancy'. I accept this evidence.

[40] The effect of non-compliance with the consultation provisions of the Award denied Ms Conlon the opportunity to respond to the proposed changes and to put forward alternatives to meet the exigencies of the circumstances which gave rise to the termination of her employment.

[41] I judge Ms Conlon to be a competent administrator, a judgement which accords with that of Dr Dickinson. Ms Conlon presented as a highly intelligent and articulate person. She conducted her case with an impressive grasp and understanding of the statutory framework and the factual issues to be determined. As already noted the respondent was represented by counsel. Ms Conlon held her own in relation to matters of some complexity for a lay person unfamiliar with legal proceedings.

[42] In my view, Ms Conlon would not have been without the ability to propose and shape potential alternatives to the dimensions of the restructure considered and unilaterally determined by Dr Dickinson. Clearly, up until the point of termination Dr Dickinson was giving consideration to the option of a restructure which did not involve the termination of Ms Conlon's employment and discussed this with her. Ms Conlon lost a significant opportunity to avoid or substantially mitigate the circumstances of the restructure Dr Dickinson decided to adopt and its effects upon her because of the non compliance of the respondent with the Award provisions.

[43] Non compliance with the provisions of an award is not a trivial matter. In the case of *UES (International) Pty Ltd v Leevan Harvey* the Full Bench of Fair Work Australia said the following about the particular factual circumstances of a case where an employer had failed to consult with an employee as required by the consultation provisions of a modern award where the Full Bench found that there was a valid reason for the termination of the employee's employment.[6]

> **'[48]** UES, however, failed to consult with Mr Harvey as required by the "consultation regarding major workplace change" clause in the modern award that applied to his employment. In the circumstances the failure to so consult was unreasonable. We regard such a failure to consult as also a matter relevant to our consideration as to whether Mr Harvey's dismissal was harsh, unjust or unreasonable. Further, it is a matter telling for a conclusion that Mr Harvey's dismissal was harsh, unjust or unreasonable.
>
> **Conclusion regarding harsh, unjust or unreasonable**
>
> **[49]** Taking into account the matters referred to above, we are satisfied Mr Harvey's dismissal by UES was harsh, unjust or unreasonable. A failure to consult does not necessarily mean a dismissal was harsh, unjust or unreasonable. However, in this case we consider the failure to consult was unreasonable and is sufficient to lead us to conclude Mr Harvey's dismissal was harsh, unjust or unreasonable, notwithstanding the valid reasons for his dismissal and the due weight we have given to those valid reasons.'

[44] At the very least and notwithstanding the period of notice provided, I consider Ms Conlon would have had some possibility of mitigating the effects upon her of Dr Dickinson's consideration of the restructuring of the position had these possibilities not been so abruptly and unilaterally foreclosed by Dr Dickinson. In my judgement it was difficult to do so after Dr Dickinson told Ms Conlon they would have to part ways. The Doctor had 'crossed the Rubicon' so to speak.

[45] It would also seem observable that in light of Ms Capozzi's evidence, the restructure has not brought complete satisfaction to Dr Dickinson in relation to the administration of his practice.

[46] In *UES v Leevan Harvey* the employer had terminated the employment of Mr Harvey because it no longer required the job performed by Mr Harvey to be performed by anyone.

---

[6] [2012] FWAFB 5241, Paras 48-49.

Those are very different factual circumstances to those before me. Here Dr Dickinson required competent administration of his practice to be performed by a practice manager. Dr Dickinson was unequivocal in his view that Ms Conlon was an efficient and competent administrator. The issue was not one of a position being abolished completely or a 'job' not being performed by anyone. The question was of the best configuration of duties of a practice manager which at the time of the termination of Ms Conlon's employment was a work in progress. Consultation in such circumstances would present different prospects for Ms Conlon than if the decision had simply been to abolish the position she was employed in rather than engage another person to substantially perform her duties with some variation.

[47] I consider that in the circumstances of this case the termination of Ms Conlon's employment was harsh, unjust or unreasonable. I have taken into account the size of the employer and the absence of human resource management specialists and expertise. Nevertheless, in my view, the award provisions and the straight forward possibility of Dr Dickinson sharing his thoughts on the restructure fully with Ms Conlon in accordance with the requirements of the Award leads me to conclude that the termination of Ms Conlon's employment was harsh, unjust or unreasonable.

Remedy

[48] I therefore turn to consider remedy. I am satisfied that reinstatement is inappropriate. I have taken into account Ms Capozzi's evidence that since the termination of Ms Conlon's employment Dr Dickinson has approached her to take the place of the person who was employed to replace Ms Conlon.

[49] However, regardless of any finding which might be available that Dr Dickinson is dissatisfied with that person and may be considering replacing that person with another Ms Conlon does not seek reinstatement. Since the termination of her employment Ms Conlon has found other employment in a dental practice.

[50] I therefore should consider an appropriate amount of compensation.

[51] When considering an amount of compensation the Tribunal must take into account the following:

> 'Criteria for deciding amounts
>
> (2) In determining an amount for the purposes of an order under subsection (1), FWA must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
>
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

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

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that FWA considers relevant.'

Viability

[52] In my view, any order should have regard to the particular nature of the business of the respondent which is a small business and unlikely to have major capital reserves. However, no evidence was put on behalf of the respondent as to the likelihood that an order of compensation within the limits of the jurisdiction would cause a threat to the viability of the respondent.

Service

[53] Ms Conlon's service is not lengthy and the judgement of an amount of compensation should reflect this in all the relevant circumstances.

Section 392(2)(c) - Remuneration which Ms Conlon is likely to receive

[54] I consider there was a real chance that Ms Conlon would have been able to address Dr Dickinson's concerns in relation to the duties of the restructured position in a manner which may not have lead to the termination of her employment or at least a trial of arrangements which she may have been able to present to Dr Dickinson in relation to the administration of all aspects of the practice's business activities.

[55] The relevant circumstances are conceptually referred to within the common law as a loss of chance to address a threat to the employment of an employee due to non-compliance with appropriate procedural requirements binding upon an employer. For the sake of clarity however, I observe that the framework within which this decision is made is quite different, notwithstanding conceptual similarities of this kind.

[56] In this case the relevant procedural requirements arise under a statutory instrument as a minimum term and condition of Ms Conlon's employment binding upon the respondent, rather than contractual obligations.

[57] I judge that Ms Conlon would have been, at least, able to produce a plausible plan for consideration or implementation which would have caused her employment to continue if Dr Dickinson had followed the consultation procedures prescribed by the modern award. I cannot, however, be certain that this would have caused her employment to have continued indefinitely or in fact for how long. I must therefore apply prudent and cautious judgement.

[58] I have therefore decided that it is appropriate to estimate the employment horizon at no more than three weeks beyond the date at which the employment came to an end.

Mitigation

[59] Ms Conlon has acted reasonably and effectively to substantially mitigate her loss as a result of the termination of her employment.

Remuneration Earned

[60] The period I consider relevant is a period in which Ms Conlon received no remuneration.

Remuneration likely to be earned

[61] There is no relevant remuneration to be taken into account.

Other Matters

[62] There are no other matters I consider relevant.

[63] Taking all of these matters into account I decided to award a gross amount of compensation of $3,450 which I reckoned to be closely equal to an amount of three weeks pay.

COMMISSIONER

Appearances:

Ms C Conlon on her own behalf

Mr G Pauline of Counsel for Anthony Dickinson T/A Raylook Pty Ltd

Hearing details:

2012.
Melbourne:
August 15.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR529206>