DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Parmalat Food Products Pty Ltd
v
Christopher Tran
(C2015/6098)

VICE PRESIDENT WATSON
DEPUTY PRESIDENT HAMILTON
COMMISSIONER JOHNS

MELBOURNE, 29 MARCH 2016

Appeal against decision [2015] FWC 5535 of Deputy President Lawrence at Sydney on 27 August 2015 in matter number U2015/4581 – Nature of factor regarding valid reason – Requirement to give weight and make findings about each of the factors – Fair Work Act, ss. 387, 394, 400, 604 and 607.

Introduction

[1] On 6 November 2015 we issued a decision[1] in which we granted permission to appeal. We issued directions for further submissions on whether or not the appeal should be granted and if so what remedy if any should be granted by the Full Bench pursuant to s.607 of the Act. Written submissions were filed in accordance with the directions and the matter was heard on 23 February 2016.

Consideration

[2] The task of the Commission in this matter is to determine whether the termination is harsh, unjust or unreasonable. The Commission is required to apply the terms of s.387 of the Act in considering that question. Section 387 states that:

> "**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
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> (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
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> (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."

[3] Subsection 387(a) refers to whether or not there is a valid reason related to the dismissed employee's capacity or conduct. This, on its face, could be a relatively unimportant valid reason, or one which is of much greater importance. The subsection does not require the Commission to find that the valid reason is serious, or sufficiently serious to justify a warning or dismissal. This interpretation is consistent with the discussion of the term 'valid reason' by Northrop J in *Selvachandran v Petron Plastics Pty Ltd*[2], in relation to the then s.170DE of the *Industrial Relations Act 1988*. He said:

> "Section 170DE(1) refers to a 'valid reason, or valid reasons', but the Act does not give a meaning to those phrases or the adjective 'valid'. A reference to dictionaries shows that the word 'valid' has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is '2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.' In the Macquarie Dictionary the relevant meaning is 'sound, just or well founded; a valid reason.'
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> In its context in s. 170DE(1), the adjective 'valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, commonsense way to ensure that' the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd (1995) 60 IR 1, when considering the construction and application of a s170DC."

[4] The decision in *Selvachandran* has been widely accepted as applying both to the current Act and its predecessors, and was quoted with approval by both parties before us.

[5] It is clear that the Commission is required to make findings about each of the matters in s.387, including s.387(a), and also is required to give each of those factors weight in making an assessment as to whether or not the termination of employment is harsh, unjust or unreasonable. In *Chubb Security Australia Pty Ltd v John Thomas*[3] a Full Bench said of the equivalent provision of the *Workplace Relations Act*:

> "**[35]** The first matter we consider is Chubb's contention that his Honour erred in not making a finding with respect to the relevant matter specified in s.170CG(3)(a); that is, whether there was a valid reason for Mr Thomas's termination related to his conduct. Section 170CG(3) required his Honour to have regard to the matters set out in paragraphs (a) to (e) of it. We have set out in our paragraphs [6] to [10] what his Honour said with respect to each of these matters. As appears from this, his Honour did not make a finding as to whether there was a valid reason for Mr Thomas's termination related to his conduct.
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> **[36]** Section 170CG(3) says that, in determining whether a termination was harsh, unjust or unreasonable, *"the Commission must have regard to"* the matters specified in paragraphs (a) to (e).
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> **[37]** The words *"have regard to"* were considered by the High Court in *Re Hunt; Ex parte Sean Investments Pty Ltd* (1979) 53 ALJR 552. Mason J, with whom Gibbs J agreed, said (of a section of an Act which said that the Permanent Head shall have regard to certain costs) that when the section *"directs the Permanent Head to 'have regard to' the costs, it directs him to take those costs into account and to give weight to them as a fundamental element in making his determination"* (p.554). Murphy J said that the section *"tends in itself to show that his* [the Permanent Head's] *duty in respect of those costs is limited to having regard to them. He must take them into account and consider them and give due weight to them, but he has an ultimate discretion"* (p.556).
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> **[38]** Each of paragraphs (a) to (d) of s.170CG(3) requires the Commission to have regard to *"whether"* a circumstance existed. Whether it existed must then (*Re Hunt; Ex parte Sean Investments Pty Ltd*) be taken into account, considered and given due weight as a fundamental element in determining whether the termination is harsh, unjust or unreasonable.
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> **[39]** In this situation, and subject to the qualifications we express in the next paragraph, the Commission, in our view, is not able to have regard to the circumstances specified in ss.170CG(3)(a) to (d) without making a finding with respect to each of them.
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> **[40]** We qualify what we have said in the previous paragraph in two respects:
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> (1) The circumstance in s.170CG(3)(a) contains three considerations:
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> ·the capacity of the employee, or
> ·the conduct of the employee, or
> ·the operational requirements of the employer's undertaking, establishment or service.

The need to make a finding under s.170CG(3)(a) will only be in respect of such of these three considerations as is relevant. (In the present case, for instance, the relevant consideration is whether there was a valid reason for the termination of Mr Thomas related to his conduct.)

(2) The circumstance in s.170CG(3)(d) is only relevant *"if the termination related to unsatisfactory performance of the employee"* (opening words of s.170CG(3)(d)).

[41] Further, it is not, we think, possible to have regard to s.170CG(3)(b) until a finding has been made with regard to s.170CG(3)(a). Section 170CG(3)(b) refers to *"that reason"*; that is *"a valid reason"*, being the term used in s.170CG(3)(a). If there is no valid reason, s.170CG(3)(b) has no application. Neither, we think, has s.170CG(3)(c).

[42] We are therefore of the opinion that his Honour's failure to make a finding with respect to the relevant matter specified in s.170CG(3)(a) amounted to a failure, contrary to s.170CG(3), to take that matter into account and, accordingly, an error of the type referred to in s.170JF(2). This view is, we think, supported by Moore J's remarks, quoted in our paragraph [33], in *Edwards v Giudice* that a failure to comply with s.170CG(3)(a) amounts to an error of this type."[4]

[6] In *Edwards v Giudice*[5], Moore J of the Federal Court said:

"6 Paragraph (a) speaks of "whether there was a valid reason ... related to the ... conduct of the employee". The paragraph requires consideration of the validity of the reason when the reason is, relevantly, based on conduct of the employee. It is, in my opinion, difficult to avoid the conclusion that the Commission is obliged in such circumstances to investigate in the inquiry process contemplated by s 170CG(3) whether the conduct relied on occurred as a necessary step in the process of determining whether a valid reason existed.

7 The reason would be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur or it did occur but did not justify termination. An employee may concede in an arbitration that the conduct took place because, for example, it involved a trivial misdemeanour. In those circumstances the employee might elect to contest the termination in the arbitration on the basis that the conduct took place but the conduct did not provide a valid reason and perhaps also by relying on the other grounds in paras (b) to (e). However an employee may not concede or admit, for the purposes of the arbitration, that the conduct occurred or may not be prepared to accept that the Commission could assume the conduct occurred. In either situation the employee would be putting in issue whether the conduct occurred. In my opinion the Commission must, in these circumstances, determine whether the conduct occurred as a step in resolving whether there was a valid reason. I do not see how the Commission can move straight to a consideration of whether termination was justified by assuming the conduct did occur. First the Commission would have failed to resolve an issue raised by and relied on by the employee, namely whether the conduct occurred at all. Second the Commission would have failed to make findings by reference to which a Full Bench might have to

determine an appeal where the Commission had concluded the termination was harsh unjust or unreasonable on assumed facts and not facts found.

…

11. … In my opinion the subject matter of the power to arbitrate under s 170CG, when taken together with the conditional right of appeal conferred by s 45 and the grounds of appeal in s 170JF, point to the conclusion that the Commission is, when determining an application under s 170CE by arbitration, obliged to give reasons for its decision which deal with the material legal and factual issues presented for determination and which deal with the matters the Commission must consider because of s 170CG(3) and the relevant provisions of s 170CH. The power conferred by s 45(6)(b) is, in my opinion, not directed to the provision of reasons by the primary decision maker against whose decision or order an appeal is brought. That provision is intended to facilitate the hearing of an appeal where the Full Bench seeks to investigate itself issues that were not investigated or investigated fully at the original hearing."

[7] Marshall J said:

"44 In a seriously contested case before a tribunal which is required to afford procedural fairness and act judicially, an arbitrator is obliged to disclose the steps involved in the reasoning which leads to a particular result. There does not appear to be any obligation expressed in the Act to require a member of the Commission to give adequate reasons for a decision. It does not thereby follow however that in some cases such as strongly contested ones where a final order of significant consequence may be made that full reasons should not be given.

45 As Deane J said in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 366:

> *"A duty to act judicially (or to accord procedural fairness or natural justice) extends to the actual decision-making procedure or process, that is to say, to the manner in which and the steps by which the decision is made."*

46 The obligation to give adequate reasons may more readily arise when a right of appeal lies from the order which gives effect to the decision at first instance, as is the case in the instant circumstances. Indeed a statutory right of appeal was considered by the New South Wales Court of Appeal as being a relevant *"special circumstance"* in the context of the portion of the judgment of Gibbs CJ in *Osmond* cited above. See *Attorney-General of New South Wales v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729, per Priestly JA with whom Powell JA agreed, (at 734-735) and per Handley JA, (at 739).

47 It should be noted that Full Benches of the Commission have thoroughly reviewed the obligation of Commission members to provide adequate reasons for decision on previous occasions and that their decisions accord with the views expressed above. See, for example, *Re Astec Pty Ltd* (1992) 45 IR 261 and *Confectionery Workers Union of Australia v Australian Chamber of Manufactures* (1991) 38 IR 49, (at 52). See also *Dornan v Riordan* (1990) 24 FCR 564, in the context of the obligation of the

> Pharmaceutical Benefits Remuneration Tribunal's duty to disclose its reasoning process (at 568).
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> 48 Commissioner Tolley's reasons for decision did not disclose with any certainty an understanding of the reasoning process he applied. The Full Bench, in those circumstances, was entitled to reach the conclusion that the Commissioner was in error in deciding to make the order which flowed from his decision. Accordingly it is my opinion that the Full Bench made no error of law in granting leave to appeal and upholding the appeal. I agree with Moore J that the Full Bench was empowered to remit the matter to a Commissioner other than Commissioner Tolley pursuant to s.45(7)(c) of the Act."

[8] We were referred to a number of other decisions including *Schliebs v Ricegrowers Co-operative Limited*[6] and *Walsh v Australian Tax Office*[7], in which a Full Bench of the Commission said:

> "We are aware that Full Benches have also held that 'proportionality' can be considered under either s.170CG(3)(a) or (e): *Ricegrowers Co-operative Ltd v Schliebs* ... and *Woodman v. Hoyts Corp Pty Ltd* .... This does not render invalid the approach adopted by Eames C." [citations omitted]

[9] In *Schliebs* and other decisions the Commission accepted that a finding must be made about each of the factors in s.387, and also discussed the manner in which the separate function of finding whether or not the termination was harsh, unjust or unreasonable must be performed. Properly interpreted these decisions are not inconsistent with *Chubb* and related authorities. If the Commission makes an assessment in its findings in relation to s.387(a) that a valid reason does not warrant dismissal, or that a valid reason does not exist and employee conduct does not justify dismissal because of extenuating factors such as length of service or other matters which mean that dismissal would be harsh, then it is difficult to see how the Commission has given weight to each of the other factors in s.387 as it is required to do. Those other factors must also be given proper weight in the overall assessment as to whether or not the termination of employment is harsh, unjust or unreasonable

Decision

[10] In this case the Commission found that the applicant breached its safety policy. The Commission then found that this did not constitute a valid reason for dismissal for reasons including that the applicant had not received a written warning, there were rational reasons for breach of policy, the applicant was honest and contrite, the applicant's good service, the need to avoid differential treatment of employees, and 'there were lesser punishments open to the Respondent which would have been appropriate'. The Deputy President said:

> **"[54]** The Respondent has established that the Applicant breached its safety policy and practices on 5 March. However, I am not satisfied that this constitutes a valid reason for his dismissal. I have come to this view because:
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> - There is, to say the least, uncertainty about the status of the Respondent's response to the 19 February incident. At the highest level, the Applicant had received a verbal counselling and had been stood down from forklift duties for a week while the investigation took place. He had not received a written warning. When the 5 March incident occurred he was driving forklifts.

> ● Even though the Applicant breached policy, there were rational explanations for his actions.
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> ● The Applicant was honest and contrite in co-operating in the investigation.
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> **[55]** The Applicant's service with the Respondent, taking account casual employment, was over ten years. He had a good work and performance record. Dismissal, in the circumstances, was not a proportionate response to the breach.
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> **[56]** I accept that a comparison of differential approaches to employees needs to be undertaken with caution (see: *Wayne Darvell v Australian Postal Corporation* [2010] FWAFB 4082, *Sexton v Pacific National (ACT) Pty Ltd* (PR931440), *Daly v Bendigo Health Care Group* (PR973305). However, both the Applicant and Mr Tiqui had long and good service. Given that Mr Tiqui was the Leading Hand and therefore should be expected to accept greater responsibility, it is hard to see that the Applicant should receive a harsher punishment. The evidence is the Applicant was co-operative at all times.
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> **[57]** I find therefore that although there was a breach of the Respondent's health and safety policies and practices, it did not represent a valid reason for dismissal. In all the circumstances, there were lesser punishments open to the Respondent which would have been appropriate.
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> **…**
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> **[71]** Having found that there was no valid reason for the dismissal, the factors I have taken into account pursuant to s.387(h) support the finding that the dismissal was harsh, unjust or unreasonable. The Applicant was not accorded "a fair go" in the sanctions imposed by the Respondent in response to his actions. Accordingly, I find that the dismissal was unfair within the terms of s.385."

[11] The Commission conflated the requirement to make a finding as to whether or not there was a valid reason with the requirement under s.387 to make a finding as to whether or not the termination was harsh, unjust or unreasonable. The Commission made a finding that there was no valid reason for termination of employment for various extenuating reasons which were relevant to whether or not the dismissal was overall harsh, unjust or unreasonable, but which were not relevant to whether or not there was a valid reason for termination of employment. This is an error of law which raises issues of public interest.

[12] In addition, the evidence before the Commission, and the Commission's own findings about the evidence, in our view compelled the Commission to find that there was a valid reason for dismissal, namely breach of the safety policies of the company. In applying s.387 of the Act the Commission must give consideration to the need to enforce safety standards to ensure safe work practices are applied generally at the workplace. This is both for the protection of employees and others, and to comply with legal obligations imposed on employers, which require them to take various actions, including establishing and enforcing safety policies.

[13] This is an error of the type described in *House v King* because it applied an erroneous principle, misapplied the provisions of the Act, and allowed irrelevant considerations to

influence the decision on the existence of a valid reason. Further, it distorted the assessment of whether the termination was harsh, unjust or unreasonable.

[14] We allow the appeal and quash the decision and order.

Future Proceedings

[15] The appellant submitted that in the event that the appeal was allowed the matter should not be determined by the Bench because of the potential need to make factual findings that are reliant on credit, and gave examples. The respondent did not ask the Bench to determine the matter but submitted that it should be remitted to the Deputy President. In the circumstances we will not ourselves determine the matter but will remit the matter to be heard and determined by Commissioner Johns.

VICE PRESIDENT

Appearances:

Mr I. Latham, of counsel, for Parmalat Food Products Pty Ltd.
Mr M. Gibian, of counsel, for Mr C. Tran.

Hearing details:

2016.
Sydney.
23 February.

Final written submissions:

Parmalat Food Products Pty Ltd on 10 December 2015.
Mr C. Tran on 24 December 2015.

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[1] [2015] FWCFB 7475.

[2] (1995) 62 IR 371.

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[3] Print S2679.

[4] See also *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [19]; *Tenix Defence Systems Pty Ltd v Fearnley* (unreported, AIRCFB, Ross VP, Polites SDP, Smith C, 22 May 2000) Print S6238 [71]; *Annetta v Ansett Australia Ltd* (2000) 98 IR 233 [15].

[5] [1999] 94 FCR 561.

[6] PR908351, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001 at paragraphs 14-17.

[7] [2005] 141 IR 226 at 17.