



Unfair dismissal win strengthened by “other factors”; not just valid reasons or procedural fairness

Date: Monday February 24, 2020

When determining an unfair dismissal claim, the Fair Work Commission (“FWC”) will consider if the termination of employment was harsh, unjust or unreasonable. When assessing the application, [section 387 of the Fair Work Act 2009 \(Cth\)](#) (“the Act”) prescribes that the FWC must consider the following:

Whether there was a valid reason for the dismissal

(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)

Whether procedural fairness was afforded to the employee

(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

Any “other matters” that the FWC considers relevant

Whether a valid reason for dismissal existed and procedural fairness was afforded to the dismissed employee, are factors that employment lawyers immediately turn to when preparing an unfair dismissal application. Case law demonstrates that these factors are pivotal in determining whether a dismissal was unfair.

But s387 makes it clear that “other matters” that the FWC may consider relevant must not be overlooked.

In the recent case (January 2020) of [*Zelman v Billboard Media \[2020\] FWC 5*](#), “other matters” that were considered by the FWC significantly strengthened the unfair dismissal case, in favour of the worker.

Background of the case

- The Applicant was employed as a full-time account's receivables officer at Billboard Media (“the Respondent”).
- She was employed from 3 July 2018 until 13 August 2019.
- In the week leading up to 13 August 2019, the Applicant reported to her HR Manager, that she was unwell.
- On 13 August 2019, the Applicant attended work but told the HR Manager that she was still unwell and could only expect to work a half-day.
- At lunchtime on 13 August 2019, the Applicant left work.
- At approximately 2.30 pm on the same day, she received an email from her HR Manager which stated as follows:

"Thank you for your resignation. We accept your notice of today's date. We will be arranging the payment of your entitlements in the next pay run. Should you wish to discuss the matter further, please contact me on the number below."

The Applicant subsequently lodged an unfair dismissal application to the FWC.

In her unfair dismissal application, and during the FWC hearing, the Applicant was adamant that she had not resigned. The FWC accepted her evidence, finding in her favour. The FWC took the following matters into consideration.

Section 387(a) – Valid Reason

The FWC found that Billboard Media did not produce any evidence about any capacity or conduct issues that would have justified the dismissal of the Applicant despite having the opportunity to do so. Therefore, there was no “valid reason” for the dismissal.

Section 387(b) to (g) – Procedural Fairness

Sections 387(b) to (e) address procedural fairness. The FWC found these factors to be irrelevant or neutral considerations given that:

- there was no valid reason for the Applicant to be notified of the reason for her dismissal;
- The Applicant's dismissal did not relate to her capacity or conduct;
- The Applicant did not appear to have an opportunity to discuss her dismissal; and
- The Applicant had not been counselled or warned in relation to her performance and the dismissal did not relate to unsatisfactory performance.

The FWC also found that Billboard Media's size (approximately 70 employees) was no excuse for the procedure it followed. Further, they did not lack dedicated human resource management specialists and expertise and therefore there can be no excuse.

Section 387(h) – Other Matters

As we've already indicated, the FWC is required to take into account any "other matters" it considers relevant when assessing whether a dismissal was unfair.

The Applicant gave evidence that during her employment with Billboard Media:

- she had been subject to sexual harassment innuendo and inappropriate comments;
- she made verbal complaints and a written complaint to the HR Manager, on at least two occasions, about this; and
- no investigation was undertaken, despite the conduct which the Applicant had reported.

The FWC found this to be a relevant matter in relation to assessing the fairness of the Applicant's dismissal. They stated that the inappropriate conduct that the Applicant was exposed to:

"reflects poorly on the management of the Respondent [Billboard Media] and is an **aggravating factor** in the matter of the termination of the Applicant's employment. I find that those circumstances **further weigh in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.**"

After concluding that the Applicant was unfairly dismissed, the FWC stated that it would seek submissions in relation to the appropriate remedy that should be ordered in the Applicant's favour. At the writing of this article, the remedy is yet to be determined.

Lessons for employees

Whether a valid reason for dismissal arose and procedural fairness was afforded to a terminated employee is essential to determining whether the dismissal was fair.

However, importantly these are not the only relevant factors that the dismissed employee should turn their mind to.

As this case demonstrates, the FWC will also take into account “other matters” it considers relevant. The Applicant's evidence of being exposed to inappropriate conduct ‘*further weigh[ed] in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.*’

However, even if the Applicant had not made those other submissions, it is still likely that her dismissal would have been found to be unfair. This is because the FWC ultimately found that there was not a valid reason for her dismissal and she was not properly afforded procedural fairness.

This decision serves as a reminder that employees should not confine their unfair dismissal applications to only considering whether a valid reason for dismissal arose and procedural fairness was afforded to them. They should consider any other matters that could give weight to their argument.

Get help from an employment lawyer

If you've been [dismissed and you think it's unfair, unjust or unreasonable, it's important to note that strict time limits apply to lodging a claim for unfair dismissal](#). Seeking immediate advice and assistance from an [employment lawyer experienced in unfair dismissal claims](#) is crucial to securing any rights and entitlements you may have.

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