
PERFORMANCE MANAGEMENT AND ENDING EMPLOYMENT: How much procedural fairness is enough?

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A. INTRODUCTION

What is this thing called “procedural fairness”?¹ Wilcox CJ explained it in these terms:

*“The relevant principle is that a person should not exercise legal power over another, to that person’s disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. . . . It represents part of what Australian call ‘a fair go’.”*²

It is important to provide employees with procedural fairness in deciding whether to terminate their employment because:

1. It’s the right thing to do, reflects management best practice and helps foster a positive workplace culture;
2. It is a key element in defending any statutory unfair dismissal claim that may be commenced by an ex employee;
3. It often plays a significant part in an employer being able to demonstrate that a termination of employment did not occur for a reason prohibited by the law such as unlawful discrimination or the exercise of a workplace right.

If the significance of procedural fairness is accepted, then the second question is *“How much is enough?”* As with many aspects of the law, the answer is that *“It depends”*. By referring to several recent statutory unfair dismissal cases, this paper seeks to highlight and illustrate the pitfalls to be avoided and practical lessons in applying the concept of procedural fairness in termination of employment situations based particularly on performance issues.

B. THE BEGINNING

Employment is usually ended for one of the following reasons:

1. resignation;
2. redundancy;
3. misconduct; or
4. failure to perform to the employer’s requirements.³

¹ Sometimes called “natural justice”.

² *Nicolson v heaven & Earth Gallery Pty Ltd* (1994) 126 ALR 233

³ For the purpose of this paper, fixed or short term casual employment relationships are not considered.



Most legal claims arising out of termination of employment still take the form of a statutory unfair dismissal claim under the *Fair Work Act 2009 (FW Act)*. This type of claim is commenced in the Fair Work Commission (“**FWC**”) and there is a 21 day time limit on commencing the claim after termination occurs.⁴ The FWC can order reinstatement and/or compensation of up to 6 months wages for loss of income. The FWC’s process involves an initial telephone conciliation conference between the parties and a FWC conciliator. If that is not successful in resolving the matter, a hearing will generally be scheduled before a Commissioner and directions will be made for the filing of written evidence by the parties. The unfair dismissal jurisdiction is generally an “*own costs*” jurisdiction.

A dismissal will be unfair under the FW Act if the dismissal:

- was harsh, unjust or unreasonable; and
- was not consistent with the Small Business Fair Dismissal Code (if the employer has less than 15 employees); and
- was not a case of genuine redundancy.⁵

There is a lot of case law about the meaning of the words “*harsh, unjust or unreasonable*” but essentially a common sense approach is adopted so that “*a fair go all round*” is accorded to both the employer and employee concerned.⁶ In considering whether a dismissal was harsh, unjust or unreasonable, the FWC 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 – 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 Commission considers relevant.⁷

The FWC will consider both whether the dismissal was procedurally fair and substantively fair. From a procedural point of view, it is relevant whether the employee has been given procedural fairness (sometimes called “*natural justice*”). The basics of procedural fairness involve:

- a. allegations or issues being put to an employee in sufficient detail;
- b. the employee being allowed to respond appropriately; and
- c. any response being taken into account before a decision is made about termination.

Apart from considering whether a dismissal was procedurally fair, the Commission will consider whether the dismissal was substantively fair, i.e. procedural fairness might have been given to the employee but the decision to terminate was itself unfair or not called for in the circumstances or some lesser penalty than termination would have been more appropriate.

⁴ There are also jurisdictional requirements in relation to remuneration and an arbitrary minimum employment period.

⁵ Section 385 FW Act

⁶ Section 381(2). Also see *In re Loty and Holloway v Australian Workers’ Union [1971] AR (NSW) 95*.

⁷ Section 387 FW Act

Whilst this paper does not consider the issue of whether a valid reason for termination exists in detail, it should be remembered that this is a pre requisite to any termination and no amount of procedural fairness can overcome the absence of a valid reason. On the other hand though, terminations have in many cases been found to be unfair on the basis that, despite the existence of a valid reason for termination, the employee has not been given procedural fairness.

C. RECENT CASES

1. *Fichera v Thomas Warburton Pty Ltd* [2012] FWA 4382 (24 May 2012)

a. *The facts*

Mr Fichera was employed as a Business Development Manager from 21 January 2008 and then as Branch Manager from April 2009 to 12 December 2011 when his employment was terminated and he was paid 5 weeks in lieu of notice. Thomas Warburton is a supplier of engineering and industrial lines to engineering, manufacturing and allied industries based in Victoria.

Mr Fichera initially worked from home to build up the business in central Victoria. A new branch was opened in Shepparton in April 2008, to which Mr Fichera was appointed as branch manager in 2009. A performance appraisal was carried out in June 2009 which was generally acceptable. No performance appraisal was conducted in 2010 and only partially in April 2011. Branch sales figures were good in 2009 and 2010 but declined in 2011. Mr Fichera was aware that the branch had not made a profit in 2011 and sales figures for the period August to October 2011 were substantially below budget. He disputed that this meant he was not performing his job and asserted that this type of financial performance was common in the early years. He also considered the sales targets to be unrealistic.

Mr Fichera accepted that he had received an email on 1 August 2011 from Mr Adlington, the National Sales Manager, which had been sent to five underperforming branches in which it was pointed out that sales and profitability were declining. In that email Mr Adlington advised the managers *“something has to give. Over the coming months the Management Team will meet to look at ways to reduce costs at your location if sales don’t dramatically increase..... Remember Sales is King and your Branch needs to show a profit to justify your current personnel numbers.”*

Subsequently, Mr Fichera received an email from Mr Sekker, his immediate supervisor, on 1 December 2011 after Mr Sekker had received Mr Fichera’s October report. In that email Mr Sekker told Mr Fichera that he was disappointed in the results, that the branch was below budget by \$100,000 and that this was a decrease of 24% on the previous year’s figures. Mr Sekker told Mr Fichera *“this [was] unacceptable from someone with [his] experience and status within the company. With Shepparton lagging well behind where it should be at the moment - sales \$143,000 down YTD on last year as well as running at a loss of \$218,196 YTD NOW is the time to act, increase communication, get active, remain positive and most importantly SELL & SERVICE!”* Mr Sekker invited the Applicant to forward his thoughts and plans for 2012.

Mr Sekker arranged to meet Mr Fichera on 12 December 2011 at the Branch to discuss the business plan for 2012. When he arrived, Mr Adlington was with him. Mr Fichera was asked to get his sales representatives to come into the office. He produced his business plan and it was his evidence that he was told by Mr Adlington that he was not there to discuss *“the*

garbage that was in [the business plan]". Mr Fichera was asked to leave the room and his sales representatives were called into the meeting to discuss their poor sales performance. He was then asked to come back into the room where Mr Adlington told him that *"there had to be a change moving forward in the business and that does not include you."* Mr Fichera was escorted off the premises. The evidence of Mr Sekker and Mr Adlington was that they had not gone to the branch intending to terminate Mr Fichera's employment but were very disappointed at the physical appearance of the branch and lack of staff motivation. They gave Mr Fichera 60 minutes to think about *"how he was going to prove to [them] that he was committed to turning Shepparton around to advise us how he was going to do it."* When Mr Fichera returned, Mr Sekker decided that he lacked *"drive, direction and any sign of enthusiasm"* and Mr Sekker decided to end his employment.

On 20 December 2011 Mr Fichera received his letter of termination which advised that he would be paid five weeks pay in lieu of notice. The Commission found as follows:

b. Section 387 factors - Valid reason

It was clear that the branch was not making a profit and that it was Mr Fichera's responsibility to manage the staff. It was accepted that the poor performance of the branch in 2011 was a valid reason for terminating employment.

Notification of reason/opportunity to respond

Mr Fichera was told of the reasons for termination on the day his employment was terminated. It was clear that Mr Fichera was not advised of the reasons for termination before the decision was made to terminate. The Commission accepted that the decision had been made and communicated on the same day. Mr Fichera was not given an opportunity to respond to the reason for his termination. The legislation requires the employee to be notified of the proposed reason for termination before a decision to terminate is made. The Commission referred to a decision of the Full Bench of the Australian Industrial Relations Commission:

"As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3) (b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted".⁸

Prior warning

The Commission accepted that Mr Fichera was a senior manager with extensive experience and should have recognised that continued poor performance of the branch could lead to his termination. However, he was never told that his employment was at risk. The employer had a performance appraisal system in place. However, no appraisal was conducted in 2010 and only a partial appraisal in 2011. No performance management process was undertaken. While there were discussions about poor performance of the branch, Mr Fichera was never told that his unsatisfactory performance could lead to termination of employment.

Size of employer's enterprise/hr management capacity

The respondent was not a small employer, its managers had received unfair dismissal law training and there was a performance management procedure in place.

⁸ *Crosier v Palazzo Corporation Pty Ltd Print S5897 at [73]*.

Other matters

Mr Fichera was required to leave the premises that day and not permitted to say goodbye to his staff. He felt belittled because his staff saw him being required to pack his belongings and leave the premises. The manner of the termination was a relevant consideration in determining if the termination was harsh, unjust or unreasonable. Mr Fichera was not allowed to work out his notice because the company was concerned about the damage he may have done to the business during this time. However, the evidence did not demonstrate any basis for this concern.

So, whilst there was a valid reason for termination, having regard to the failure of the employer to comply with its own performance management process and its failure to ever warn Mr Fichera that his employment was at risk, the Commission found that he was unfair dismissed. The Commission considered that a performance management process would have taken about 2 months and Mr Fichera's employment could have been ended at that point. It ordered the payment of 8 weeks wages as compensation.

LESSONS

- *Procedural fairness is generally just as important as having a valid reason for termination;*
- *Notification of the proposed reasons should take place before termination;*
- *An opportunity to respond should be given before the final decision to terminate is made;*
- *An incremental process is advisable including performance appraisals and warning;*
- *Employees should be allowed to leave gracefully;*
- *It is not necessarily expected that any incremental process be unduly drawn out.*

2. *Choi v Country Fire Authority* [2013] FWC 469 (23 January 2013)

a. The facts

Ms Choi was employed as a Business Analyst ICT Services for the CFA from 23 November 2006 until 20 September 2012 when she was dismissed and paid 4 weeks in lieu of notice. Her termination letter specified that she was dismissed for inappropriate workplace behaviour, breaches of the CFA Code of Conduct, failures to meet required standards of performance and behaviour as detailed in a performance management process, warning of 25 May 2012 and final warning of 13 June 2012.

No concerns had been raised with Ms Choi's performance before the 2009/2010 Performance Planning and Review process which occurred in November 2010. She disputed the concerns raised at that time and her performance was ultimately assessed as adequate on the basis that feedback had not been given in a timely way. The final PPR did identify areas for improvement including communication style with which Ms Choi did not agree.

In July 2011 a meeting was held with Ms Choi where concerns were expressed about her willingness to follow instructions for a particular project. In particular, it was put to Ms Choi that on one occasion she had used demeaning language and walked out of a meeting and that her preferred means of communication was by email. The Commission accepted that management's concerns were justified.

In August 2011, Ms Choi was assigned the development of a personal protective clothing business case. Her manager believed her work was not of an acceptable standard and he rewrote the case. Ms Choi disputed her manager's assessment. The Commission was

satisfied the matters raised by the manager were not serious but considered the real issue was that it was reasonable for the employer to require these matters to be addressed and despite a number of attempts, Ms Choi was not willing to do so. At a meeting on 16 September 2011, Ms Choi claimed that the raising of ongoing performance issues was bullying. She was given the choice of having her complaint dealt with internally or referred to the CFA's Diversity section. Ms Choi did not respond and the issue was not pursued.

Meetings were held in December 2011 and February 2012 concerning Ms Choi's PPR which Ms Choi refused to sign off as she did not agree her performance was not satisfactory. In January 2012, Ms Choi was asked to produce a document on the NSP project. Her manager told her the document was not satisfactory but Ms Choi refused a request to rewrite it. In February 2012, Ms Choi was assigned to the Data Relocation Project but refused to carry out this work saying that she did not feel she was the right person for the project. The Commission was satisfied that Ms Choi refused a reasonable direction.

In April 2012, Ms Choi was told that her CRM Marketing Proposal was unsatisfactory. Ms Choi refused to make changes to the document. She raised further allegations of bullying and the employer appointed an independent investigator who found Ms Choi's claims to be unsubstantiated. The Commission was not satisfied that Ms Choi had been treated in a discriminatory manner or that the raising of performance concerns constituted bullying or harassment (whilst conceding that some criticisms of her performance may have been poorly based).

A draft performance management plan was provided to Ms Choi with specific examples of performance and behaviour concerns. Meetings to discuss the draft occurred on 4 and 19 April at which Ms Choi denied any performance issues and she was advised that the plan would be put in place for 3 months. A formal plan was signed on 8 May 2012 to address perceived unsatisfactory performance and behaviour. The Commission said it was not necessary to find that every instance of poor performance was proven and adequately explained to Ms Choi. The Commission considered that the PMP was clear and reasonable and linked to matters which had been raised directly with Ms Choi on earlier occasions and focussed on the need to communicate more respectfully and appropriately and to respond more positively to direction and feedback.

After a counselling session on 22/23 May 2012, a formal warning was given to Ms Choi on 25 May 2012 that:

"CFA makes it very clear to you that your behaviour to date has not been to an acceptable standard. There are certain conditions/expectations that CFA have in relation to your future performance. They are as follows:

- *That you take immediate steps to ensure that both your written and verbal communication as well as your conduct is in a professional manner at all times, representing CFA in a professional and positive way to both internal and external stakeholders*
- *That you behave in a courteous and respectful way towards co-workers and line managers at all times*
- *That you raise issues respectfully and appropriately*
- *That you ask for, provide input to and accept feedback provided on behaviours and performance."*

A further performance counselling session was held on 13 June 2012 as a result of 2 further incidents where Ms Choi had spoken over the top of others, refused to participate and walked

out of a meeting. She was given an opportunity to respond and a final warning was issued advising that dismissal could result should the behaviour continue.

A further incident occurred on 25 June 2012 where Ms Choi shouted at a colleague and slammed an office door. An investigation was conducted into this incident which found that Ms Choi's conduct constituted a breach of the CFA Code of Conduct and that termination was proposed. Ms Choi was given the opportunity to respond as well as to have a support person present. The decision was then taken to terminate her employment. The Commission was satisfied that:

- Ms Choi had refused reasonable directions from her managers;
- Her behaviour justified a warning and was unacceptable and unreasonable conduct;
- Ms Choi received and understood the contents of the final warning letter of 15 June 2012 and was on notice that her behaviour could result in termination;
- Ms Choi's performance was unsatisfactory and that there was a valid reason for termination based on conduct and performance;
- the validity of reasons for termination were strong and the process was fair;
- whilst Ms Choi found the performance management distressing and stressful which was compounded by her failure to constructively engage, "*just because performance management is stressful does not make it inappropriate or unfair*";
- whilst Ms Choi had been employed for six years and had a substantial mortgage, the mitigating factors were not sufficient to render the termination a disproportionate response.

Accordingly, the Commission held the termination was not unfair and the application was dismissed.

LESSONS

- *Refusal to accept feedback or direction from managers is a valid reason for termination of employment;*
- *Document, document, document;*
- *Employers should not allow themselves to be provoked into rash action by provocative employees;*
- *The fact the process is stressful does not make it unfair;*
- *Adopt an incremental process.*

3. *Schade v Transend Networks Pty Ltd* [2013] FWC 873 (8 February 2013)

a. The facts

Mr Schade was employed from 11 August 2008 to 31 July 2012 as a Senior Technical Officer. He had worked in the electrical industry since 1979. Transend is the owner and operator of the electricity transmission system in Tasmania. He was dismissed for poor performance and paid 5 weeks in lieu of notice.

Performance issues had been raised in performance reviews in 2010 and 2011 and Mr Schade had been provided with a mentor in that time. A document was given to Mr Schade on 20 January 2012 raising 5 areas of issue with his performance and giving examples of each area:

- misrepresenting the truth and failure to be open in his communications;
- inappropriate behaviour in the workplace;

- failure to properly undertake duties in respect of SCADA audit;
- failing to seek clarification when issues arose to enable them to be quickly resolved;
- failure to take up training opportunities and a lack of positive attitude to learning where challenges are embraced and not avoided.

Mr Schade responded in writing to these issues and a meeting was held on 25 January 2012 to discuss the matters. Mr Schade accused his manager of constant harassment and goading. In early February 2012, Mr Schade was given a choice of a formal warning and performance management or an independent review to report on the complaints and his performance. He chose the independent review option. On 28 March 2012 Mr Schade was advised that an independent review had found his performance and conduct did not meet the required standard and he was provided with a first warning and a summary of the independent review.⁹ A formal twelve week performance management process was then put in place.

On 22 May 2012 a further meeting was held and Mr Schade was advised that his performance had not improved to the level required and he was given a final warning on 7 June 2012. On 13 July 2012 he was given a further final warning. Mr Schade responded to that letter saying that there had been an orchestrated campaign of bullying and harassment against him. On 18 July, Mr Schade was advised that he had not performed to the required standard, reference was made to previous minutes, conversations and correspondence and he was told this may lead to his termination. On 31 July 2012, he was provided with a letter of termination which advised that his employment was to be terminated that day because his performance was still unsatisfactory. The reasons for the termination were said to be:

- “(a) inability to demonstrate being able to work autonomously to deliver the standard of work required by a Senior Technical Officer - Protection and Control;*
(b) not accepting personal accountability to deliver work in a timely manner and being accountable for the work outputs;
(c) tasks completed contain inaccuracies or errors which necessitate additional rework and effort (often from others);
(d) not demonstrating work practices and understanding of the power system to the standard of a Senior Technical Officer - Protection and Control.”

For his part, Mr Schade submitted the employer's expectations were unreasonable and its actions constituted bullying and harassment. The Commission found as follows:

b. Section 387 factors - Valid reason

Problems were identified with Mr Schade's performance in his 2010 and 2011 reviews. This was not a case of an employee who had been performing the role satisfactorily and was only assessed as unsatisfactory when a new manager was appointed. While there were some errors in the assessment of Mr Schade's work, there was a reasonable overall assessment of Mr Schade's skills. Neither the times for the tasks in the work plan nor the employer's expectations were unreasonable. Mr Schade was unable to perform the role of Senior Technical Officer and a valid reason existed for termination of his employment.

Notification of reason/Opportunity to respond

At a meeting on 18 July 2012, Mr Schade was advised that he had not performed to the required standard and this may lead to termination of his employment. Reference was made

⁹ Interestingly, the independent investigator was a person recommended by Mr Schade's ETU organiser.

to previous minutes, conversations and correspondence. Meeting minutes disclosed that specific criticisms were made of Mr Schade's performance. He responded to the various issues raised about his performance in the meetings.

Unreasonable refusal to allow a support person

Mr Schade argued that due to the scheduling of meetings and because, for the first meeting, he did not know what to expect, he did not have a support person with him. The Commission held that this misconstrued the criterion. He was not refused the opportunity to have a support person present and in fact did have representation at some of the meetings.

Prior warning

This was not a case of a mere exhortation for the employee to improve their performance. The employer had identified issues in the performance reviews and provided Mr Schade with training and assistance. There was an independent review of Mr Schade's claim that he was the victim of an unfounded negative assessment by his team leader. That report acknowledged that Mr Schade had not been provided with accurate feedback about his performance by his team leader. However, the employer put in place a detailed work plan with set out its expectations. Throughout the work plan, the employer provided feedback about Mr Schade's performance. He received formal advice that his work was not up to standard. While those letters were general in nature, the meetings addressed the deficiencies in performance in greater detail.

The Commission accepted that there was a valid reason for termination, that an assessment of Mr Schade's performance had been made after a detailed review and having put Mr Schade on notice that he was not performing to the required standard and that he had been afforded procedural fairness. Given the absence of any other relevant factors, the application was dismissed.

LESSONS

- *Performance management should be more than "mere exhortations";*
- *Whilst notification of proposed reasons for termination and an opportunity to respond should be given immediately before termination, failure to do so will not always be fatal where this has occurred within a reasonable time before termination;*
- *Regular and honest performance reviews are important to procedural fairness;*
- *It is important for employers to have up to date position descriptions and, where appropriate, performance measures;*
- *Adopt an incremental process;*
- *Payment of notice is important in terminations based only on performance.*

4. *Bowley v Trimatic Management Services Pty Ltd [2013] FWC 2533 (24 April 2013)*

a. *The facts*

Mr Bowley was employed from 20 November 2007 to 27 November 2012 as a "Floor Manager" or "Customer Experience Sales Manager". It appears the company engages in direct marketing and sales. Mr Bowley was dismissed for:

- a. unsatisfactory performance against key targets despite a performance management improvement plan being in place since September 2012;
- b. lack of regular completion of trigger sessions with staff; and
- c. a continued and evidenced unacceptable lack of professionalism and poor attitude.

On about 19 or 20 March 2012, Mr Bowley was put on an “informal” performance plan for not meeting his KPIs. Revised targets were set for him and he agreed to those. The centre manager, Mr Chaudhury, was to meet with Mr Bowley weekly to provide feedback and direction. Mr Bowley subsequently made a formal complaint of bullying against Mr Chaudhury. This was investigated by an external contractor who did not find any justification for the complaint and Mr Chaudhury continued to manage Mr Bowley. SafeWork also did not pursue a complaint made to them.

The evidence was that:

- on 30 March 2012 Mr Chaudhury had a one on one to review Mr Bowley’s daily performance, confirmed by email on 31 March 2012;
- there was a further one-on-one session and confirming email on 3 April 2012;
- on 19 April Mr Bowley was given an email showing his KPIs were well below the targets agreed;
- on 8 May 2012 he was counselled about not following routines regarding agents and focus sessions;
- on 28 May 2012, 2 and 19 June 2012 Mr Bowley received specific feedback and instruction from Mr Chaudhury as to the performance plan;
- he had a one-on-one session on 30 June 2012;
- on 2, 7 and 25 July 2012 Mr Bowley received further information on his KPIs and follow up actions required;
- on 24 August 2012 Mr Bowley had a further one-on-one session and on 27 August 2012 he received his KPI results for July. This document illustrated that Mr Bowley was being instructed directly as to what to do in his role, eg *“to do regular focus groups, to follow up on 5 contact trackers and micromanage during the day”* and *“enter all coaching includes SBS, trigger sessions and focus sessions”*.
- Mr Bowley received his August KPI results on 24 September 2012 and on 27 October 2012 he received his KPI results for September;
- on 18 October 2012 he was advised of various requirements in regard to stakeholder meetings and preparing for morning agent meetings;
- Mr Bowley was assisted with action plans, directly in meetings and provided with shared information sessions with other team leaders to assist him in September and October;
- on 26 September 2012, a formal performance plan was commenced. This document included a formal warning that Mr Bowley’s performance was still considered unsatisfactory against the employer’s parameters and provided a formal warning setting out the areas in which he must improve. It also stated that if his behaviour, communication and overall performance remained unsatisfactory by 26 October 2012 that further disciplinary action would be considered including termination;
- further performance review meetings occurred with feedback during October;
- at the next review on 2 November, Mr Bowley’s performance was assessed as having deteriorated and a proposal was made to extend his review for a further 4 weeks;
- Mr Bowley’s manager went on leave during November and a decision was made in her absence to terminate Mr Bowley’s employment;
- Prior to her departure, Mr Bowley’s manager had identified that he was texting during training, was displaying rudeness in management meetings, providing unacceptable remarks or humour, displaying lateness and had not prepared for meetings. His operational statistics and metrics had improved during October but his sales had not.

The employer’s evidence was that Mr Bowley, when compared with other like employees and allowing for absences and structural changes in the workplace, was the worst performing

manager. They considered his attitude reflected a habit of lateness, an indifference to requirements and lack of concern for his work. For his part, Mr Bowley rejected the assertion that his performance was less than acceptable in comparison with like employees. He said that his performance had been adversely affected by disruptions and structural changes at the workplace. The Commission found as follows:

b. Section 387 factors - Valid reason

The Commission accepted that Mr Bowley did not perform to the employer's legitimate requirements. It noted that there were some matters of conduct relied on by the employer which seemed excessive such as the concern that Mr Bowley attended work at one minute past starting time.

Notification of reason/opportunity to respond

Mr Bowley was provided with a termination of employment letter which was read out to him in the final meeting on 27 November 2012. That letter contained substantive conclusions. Mr Bowley was asked if he had any questions; he made comment about his disappointment and then left.

The Commission considered this process deficient in that the decision to dismiss Mr Bowley was taken some time before the actual meeting. The employer then planned the meeting, gave him the letter and orally confirmed its contents. The employer did not give Mr Bowley an opportunity to respond to the proposed reason for termination and he was deprived of an opportunity to respond to an impending termination and thus potentially offer further information for the consideration of the employer.

Unreasonable refusal to allow support person to be present

Mr Bowley was given the opportunity to have a support person present at his dismissal meeting and did not take that opportunity.

Prior warning

The Commission was satisfied that there was ample evidence of the communication of the employer's views of Mr Bowley's unsatisfactory performance and there were documents as to warnings of disciplinary action including a consideration of dismissal.

Impact of the size of the respondent's enterprise on procedures followed

The employer had more than 500 employees and a small human resource team.

The Commission said that the progression of the performance management plan both informal and formal seemed comprehensive. However, the employer then became somewhat frustrated and hastily brought the matter to an end, probably confident that Mr Bowley's conduct and issues were self evident and warranted dismissal. But in their haste, the employer gave insufficient consideration to the need for procedural fairness and the impact on Mr Bowley of their decision. The Commission accepted that the employer had a geographically separated workforce and management in a dynamic industry which brings its challenges and may have resulted in the current situation.

The Commission concluded that the dismissal was lacking in procedural fairness and because of its personal and economic consequences on Mr Bowley, was harsh. The Commission was satisfied that reinstatement was not appropriate and compensation of 4 weeks pay based on an annualised salary of \$63,000 was ordered.

LESSONS

- *Direct and detailed instruction is desirable in performance management;*
- *Practical efforts should be made to help the employee improve their performance;*
- *A warning that failure to improve may result in termination of employment is important;*
- *Pre judgment of the final decision to terminate should not be made, even where a reasonable process has occurred previously;*
- *Employees are required to respond appropriately to feedback and directions from managers;*
- *Don't rush the final decision to terminate.*

5. **Raymond Bosworth v JBS Australia Pty Limited [2013] FWC 6455 (3 September 2013)**

a. The facts

Mr Bosworth had been employed as a boning room foreman/supervisor at an abattoir/meat processing plant in Longford, Tasmania for 18 years. He had commenced as a floor boy at age 16 and had held no other employment. He was 34 years old when his employment was terminated.

Mr Bosworth had been promoted to the position of boning room foreman on 12 October 2009 with little additional training. There were subsequently significant changes in the plant and there were long periods when Mr Bosworth had no immediate supervisor and no assistant. In this role Mr Bosworth was responsible for up to 95 employees on the boning room floor at any one time.

In April 2012, Mr Jenkins took up the role of boning room manager. On 26 October 2012, Mr Bosworth was put on a performance plan by Mr Jenkins and the HR manager for the plant. The employer required a 72.5% red meat "yield" which Mr Bosworth considered unrealistic, particularly in view of the lack of training for employees and the age of the facility.

There was a review meeting on 13 November and Mr Bosworth had a positive discussion with the HR Manager and the plant manager on 12 December. There were some improvements in the required yield. He was then on leave between 18 January and 11 February 2013. On 28 February 2013, the Southern Area manager visited the plant and identified a problem with the manner in which some tenderloin had been trimmed and directed that an investigation take place.

On Friday 1 March 2013, Mr Bosworth was requested to make a statement. On Monday 4 March he was given a letter, told he was stood down and requested to respond to the issues raised in the letter. Mr Bosworth gave a response on 6 March. He was subsequently asked to attend a meeting at the plant and on 14 March, he was handed a letter and informed his employment was terminated. The termination letter was in the following terms:

'The purpose of this correspondence is to confirm our discussions on the 13 March 2013 regarding matters related to our continuing concerns with aspects of your performance/ work behaviour.

In recent times you have been issued with a number of Performance Improvement Plans regarding your performance/work behaviour. These Performance Improvement Plans very clearly indicated that a failure on your behalf to address the concerns we had raised may lead to your termination of employment.

Despite the measures that have been taken, you have failed to satisfactorily address the matters that have been repeatedly raised with you. Similarly, when you were given an opportunity to respond to the allegations that were being made, you were unable to provide any satisfactory reasons to explain or mitigate your conduct. Given these facts, it has been decided that your employment is to be terminated.'

The Commission found as follows:

b. Section 387 factors - Valid reason

The reasons given in the termination letter could not be said to be “*sound, defensible or well founded*”. The Commissioner was satisfied that the performance management plan for Mr Bosworth did not extend past December 2012. Mr Bosworth had only 1 formal review of his PMP almost 3 weeks after it commenced. That review on 13 November was positive with recognition given to improvements that had been made. The employer’s explanations for the failure to conduct performance review meetings were unconvincing for the Commissioner.

It was clear that Mr Bosworth was not being performance managed in the manner that was the accepted process for the employer at the time. Meetings were not occurring weekly or fortnightly as would have been the case if the applicant was on such a plan and failing to improve. The evidence supported that the performance of the boning room was generally improving.

Whilst the termination letter stated that Mr Bosworth’s reasons for failure to meet standards were not satisfactory, the Commissioner considered that the issues he raised were not mere excuses but genuinely matters over which he had little or no control and with which he was given little assistance. The Commission failed to see why a high level of absenteeism would be Mr Bosworth’s rather than a human resources responsibility. He also had little actual control over the chain speed and his request to train staff during quiet periods had been refused on cost grounds. The Commission accepted that poor workmanship in the boning room was a result of lack of training and staff, and high chain speeds rather than the fault of Mr Bosworth. There was also no evidence to show that a 72.5% yield target was achievable or had been achieved since Mr Bosworth’s termination

Opportunity to respond

Mr Bosworth was notified of his termination and the reason by letter of 14 March 2013. Whilst he had been given the opportunity to respond to matters raised in the letter of 4 March, very little of that response was taken into account and he was not given the opportunity to respond to the reasons proposed in the termination letter.

Prior warnings

The Commission accepted that Mr Bosworth had received prior warnings but said those warnings were unwarranted and, in any event, he had responded to those warnings with improvements, which had been noted by the employer.

Size of the employer’s enterprise/absence of dedicated hr management specialist or expertise

The Commission noted that the respondent was a large employer with human resource managers involved in the process adopted in terminating Mr Bosworth’s employment.

The Commission found that the dismissal was harsh, unjust and unreasonable:

- *“Harsh, as the applicant had worked for one employer for 18 years, and had given ‘120% every day’ whilst employed as the boning room foreman;*
- *Unjust, as the applicant was terminated for perceived failures over which he had little control but had, in any case made efforts to address with little, if any, effective practical management support; and*

- *Unreasonable as the reason given for his dismissal was that he had failed to make any improvement while being performance managed when in reality improvements were made and the performance management lasted only two months and did not continue past December 2012.”*

In deciding remedy, the Commission accepted that:

- reinstatement was not appropriate;
- Mr Bosworth would have stayed in employment indefinitely if his employment had not been terminated;
- he had made reasonable efforts to mitigate his loss;
- he had worked for the employer for 18 years since leaving school at 16;
- there were few other opportunities where he resided;
- since termination, he had earned \$100 per week cutting and selling wood.

The Commission ordered that Mr Bosworth be paid the maximum compensation available under the legislation less \$2000 for money earned.

LESSONS

- *Don't gild the lily in the letter of termination;*
- *If the employer has a formal performance management process, it should be followed;*
- *Employee responses should reasonably be taken into account;*
- *It will not be sufficient to rely on prior warnings which have been addressed by improved conduct;*
- *Larger employers have a greater onus to show procedural fairness has occurred.*

D. SUMMARY OF LESSONS FROM CASES

A number of points can be drawn from the cases:

- Procedural fairness is just as important as having a valid reason for termination;
- Notification of the proposed reasons should take place before termination;
- An opportunity to respond should be given before the final decision to terminate is made;
- Employee responses should reasonably be taken into account;
- A warning that failure to improve may result in termination of employment is important;
- An incremental process is advisable including performance appraisals and warning/s;
- It is not necessarily expected that any incremental process be unduly drawn out;
- Performance management should be more than “mere exhortations”;
- Direct and detailed instruction is desirable in performance management;
- Practical efforts should be made to help the employee improve their performance;
- Employers should not allow themselves to be provoked into rash action by provocative employees;

- l. Regular and honest performance reviews are important to procedural fairness;
 - m. It is important for employers to have up to date position descriptions and, where appropriate, performance measures;
 - n. If the employer has a formal performance management process, it should be followed;
 - o. It will not be sufficient to rely on prior warnings which have been addressed by improved conduct;
 - p. Don't rush the final decision to terminate;
 - q. Don't gild the lily in the letter of termination;
 - r. Larger employers have a greater onus to show procedural fairness has occurred;
 - s. Paper trail is all important;
 - t. Pay appropriate notice on termination.
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