FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Aperio Group (Australia) Pty Ltd T/a Aperio Finewrap
v
V Sulemanovski
(C2011/10)

SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT MCCARTHY
COMMISSIONER DEEGAN MELBOURNE, 4 MARCH 2011

Appeal against decision [[2010] FWA 9958] and Order [PR505584] of Commissioner Ryan at Melbourne on 30 December 2010 in matter number U2010/1432 - Permission to appeal granted - Order [PR505584] of Commissioner Ryan quashed - Appeal proceeded to re-hearing - application in matter number U2010/1432 dismissed.

[1] This is an appeal by Aperio Group (Australia) Pty Ltd T/a Aperio Finewrap (Aperio) against a decision of Commissioner Ryan dated 30 December 2010[1] and an associated order[2] under s.604 of the *Fair Work Act 2009* (the Act). The decision and order arose from an application by Mr V Sulemanovski under s.394 of the Act seeking relief in respect of the termination of his employment by Aperio.

Background

[2] Mr Sulemanovski was first employed by a labour hire agency at the Finewrap Division of Aperio at its Oakleigh site. In July 2006 Aperio bought the Finewrap business. Mr Sulemanovski became a direct employee of Aperio on 14 August 2006, working in the Slitting Department as a Slitter Operator, other than for a four month period in the middle of 2009 when he was on light duties due to a back injury, a brief period in 2010 when he performed some elements of the health and safety coordinator's job and a further reassignment to general duties in 2010 when on light duties.

[3] When he commenced direct employment with Aperio, Mr Sulemanovski undertook induction and acknowledged[3] that he had received and understood the induction booklet.[4]

[4] In 2008, Aperio altered shift arrangements and, through a new Operations Manager, Mr S Rebecchi, introduced changes to operational requirements in relation to the taking of breaks. Around that time, Mr Sulemanovski took over the roles of shop steward and the Slitting Department's Occupational Health and Safety Officer.

[5] Mr Sulemanovski was absent from work, due to illness, for six months[5] following an incident in June 2008 in which Mr Rebecchi grabbed him forcefully by both arms, holding him tightly for about 10 seconds, during a discussion about an absence by Mr Sulemanovski from his work station. Mr Rebecchi left Aperio before Mr Sulemanovski returned to work.

[6] A number of issues concerning the conduct and/or performance of Mr Sulemanovski whilst working for Aperio were raised in the evidence before Commissioner Ryan, resulting in the following meetings between Aperio management and Mr Sulemanovski:

1. 4 May 2007

   The meeting concerned quality issues, poor attitude to jobs and not following procedures for absences and resulted in first written counselling.[6]

2. 16 July 2007

   The meeting concerned late attendance and resulted in second written counselling.[7]

3. 31 August 2007

   The meeting concerned late attendance and resulted in "first written warning".[8]

4. 15 January 2009

   The meeting concerned late attendance and non-attendance respectively on two separate days, without advice to supervisors, and resulted in third written counselling.[9]

5. 23 January 2009

   The meeting concerned late attendance on two occasions and resulted in informal counselling.[10]

6. 6 February 2009

   The meeting concerned failure to check production orders, not running machines at proper speed, absence from machine during working hours without reason and not wearing a uniform and resulted in a second "first written warning".[11]

7. 13 February 2009

   The meeting concerned faulty production leading to loss of product with sales value of $3,500 and not wearing a proper uniform. It resulted in a third "first written warning".[12]

8. 20 February 2009

   The meeting concerned absences from his machine to go outside the factory without permission on two occasions and resulted in informal counselling.[13]

9. 25 February 2009

   The meeting concerned absences from his machine to go outside the factory without permission and resulted in a fourth written counselling.[14]

10. 18 August 2009

    The meeting concerned an unauthorised invitation to a potential new employee for induction on site and an absence from his machine without permission. No formal counselling or warning resulted.[15]

11. 16 September 2009

    The meeting concerned absences from his machine to go outside the factory on two occasions, without permission, and resulted in a fifth written counselling.[16]

12. 23 September 2009

    The meeting concerned not wearing Personal Protection Equipment (glove and arm sheath) and refusal to wear it when requested to do so and resulted in a fourth "first written warning".[17]

13. 12 October 2009

    The meeting concerned faulty production (sales value of $14,700) and resulted in a first final written warning.[18]

14. 13 May 2010

    The meeting concerned an absence from his machine without permission and resulted in a second final written warning.[19]

15. 26 May 2010

    The meeting concerned failure to wear Personal Protection Equipment (glove and arm sheath) and refusal to wear it when requested to do so and resulted in a third final written warning.[20]

16. 19, 20, 23 and 24 August 2010

    The meetings concerned the use of his mobile telephone in the factory to take photographs inside the factory and resulted in the termination of Mr Sulemanovski's employment. [21]

[7] In the meeting of 23 August 2010, Mr A Allsop, Operations Manager of the Oakleigh site, advised Mr Sulemanovski that he believed he had no choice but to terminate his employment and asked if there was any reason why he should not do so.[22] Upon Mr Sulemanovski explaining difficulties he had with his Supervisor (Mr Vay), Mr Allsop told Mr Sulemanovski that the only way he would not be dismissed was if he signed a declaration agreeing to follow Aperio's policies in relation to performance, behaviour and occupational health and safety, within 24 hours of its receipt.[23] He advised Mr Sulemanovski that he may wish to obtain some advice.[24]

[8] In the meeting of 24 August 2010, an undertaking was provided by Mr Allsop to Mr Sulemanovski in the following terms:[25]

> "We refer to your previous conduct in the workplace which has been the subject of disciplinary proceedings last addressed by letter dated 28 May 2010. We refer also to our discussion yesterday about your recent mobile telephone conduct which seriously breached site guidelines and rules.
>
> In light of the final warning which currently applies to your employment, your conduct in using a mobile telephone in the factory and in particular using its camera function is unacceptable. You now acknowledge that your conduct was in breach of the terms and conditions of your employment.
>
> Given this is the case Aperio requires your signature where indicated below as your undertaking that you will comply with the following:
>
> - all Company rules and guidelines in relation to
> - safety;
> - food safety and hygiene;
> - quality;
> - productivity;
> - general behavioural standards;
> - the terms and conditions of your employment.
>
> Breach of the above undertaking will result in the termination of your employment.
>
> This undertaking will be removed from your file after 12 months.
>
> We acknowledge that you may wish to consult with your representatives. Accordingly you have until 5.00 pm, 25 August 2010 to sign and return this letter.
>
> Yours faithfully,
>
> Andrew Allsop
> Operations Manager – Oakleigh
> Finewrap Division, Aperio Group
> ---
>
> I, Viktor Sulemanovski acknowledge that my conduct has been unacceptable and undertake to comply with the rules, guidelines, terms and conditions of employment referred to above. I have had the opportunity to consult with my representatives and accept that any breach of this undertaking will result in the termination of my employment.
>
> …… ……
> Viktor Sulemanovski Date"

[9] Mr Sulemanovski did not sign or return the undertaking. Mr Allsop terminated the employment of Mr Sulemanovski on 26 August 2010 after advice from Ms N Machlouch[26] an organiser for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) (AMWU) that Mr Sulemanovski would not sign the undertaking.

[10] A letter of termination, dated 26 August 2010, was in the following terms:[27]

> "We refer to the final warning issued to you on 28 May 2010. The warning stated that any further example of unacceptable conduct without reasonable excuse would result in the termination of your employment. This was on the basis that given the final warning and the several previous warnings issued to you, you would have demonstrated that you did not intend to be bound by the terms and conditions of your employment.
>
> You subsequently brought a mobile telephone into the work environment and used the camera function, which constituted a significant breach of company rules and guidelines and the terms and conditions of your employment. This conduct was discussed with you on 23 August 2010 and you did not provide a reasonable excuse for your actions.
>
> Due to the company's concern about your pattern of conduct indicating an intention not to be bound by your terms and conditions of employment, the company offered you by letter dated 24 August 2010, the opportunity to provide an undertaking. The undertaking stated that you would comply with company rules and regulations and the terms and conditions of employment. You have refused to provide such an undertaking.
>
> The company has concluded that by your conduct you have demonstrated that you do not intend to be bound by the terms and conditions of your employment and accordingly the company has decided to terminate your employment effective immediately . . ."

The Commissioner's Decision

[11] In his decision, the Commissioner proceeded on the basis that the issue before him was whether the termination was harsh, unjust or unreasonable, within the meaning of s.387 of the Act,[28] a proposition not challenged on appeal. Section 387 of the Act provides:

> "**CRITERIA FOR CONSIDERING HARSHNESS ETC**.
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> **387**. In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA 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 *t*he 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."

[12] Commissioner Ryan found that Aperio terminated the employment because Mr Sulemanovski refused to sign an undertaking to comply with company rules and regulations and be bound by the terms and conditions of his employment. He found that that reason did not constitute a valid reason for termination and made findings in relation to the other matters within s.387 of the Act. He also found that reinstatement was the appropriate remedy.

The Appeal Grounds

[13] Aperio raised 4 appeal grounds:

1. The Commissioner erred in finding that there was no valid reason for termination:

    a. In failing to have regard, or alternatively sufficient regard, to the evidence concerning Mr Sulemanovski's history of poor work performance and misconduct over the 20 months preceding the termination;

    b. In finding that Mr Sulemanovski's employment was terminated because he refused to sign the undertaking, the Commissioner failed to have regard, or alternatively sufficient regard, to the evidence of Aperio that it terminated the employment on the basis of Mr Sulemanovski's work history and his most recent conduct in using a mobile telephone in an area where its use is prohibited;

    c. In failing to have regard, or alternatively sufficient regard, to the evidence concerning an incident in which Mr Sulemanovski's negligence led to a significant loss of product; and

d. In finding that Aperio's conclusion that Mr Sulemanovski did not sign an undertaking to be bound by the terms and conditions of his employment did not constitute a valid reason for termination.

2. The Commissioner erred in taking into account irrelevant considerations, in particular, Aperio's alleged lack of diligence in observing and enforcing sound occupational health and safety policies.

3. The Commissioner erred in finding that Mr Sulemanovski was not given an opportunity to respond to the reasons for his termination in that:

   a. He failed to have regard, or alternatively sufficient regard, to the evidence as to the reason for termination;

   b. He failed to have regard, or alternatively sufficient regard, to the evidence about meetings of 19, 20, 23 and 24 August 2010;

   c. He failed to have regard, or alternatively sufficient regard, to the evidence that Aperio, having told Mr Sulemanovski that it would terminate his employment, gave him the undertaking to consider and a time to consult his representatives and either get back to Aperio or sign the undertaking; and

   d. He failed to have regard, or alternatively sufficient regard, to the evidence that at no time prior to the termination did Mr Sulemanovski raise any issues or concerns about the terms of the undertaking.

4. The Commissioner erred in ordering reinstatement in the circumstances that:

   a. His conclusions as to valid reason were in error;

   b. He took into account irrelevant considerations; and

   c. His findings regarding the lack of opportunity to respond were in error.

The nature of the appeal

[14] In matters of this nature the right to appeal a decision, with the permission of Fair Work Australia, under s.604 of the Act, is modified by s.400 which provides:

"**APPEAL RIGHTS**

400 (1) Despite subsection 604(2), FWA must not grant permission to appeal from a decision made by FWA under this Part unless FWA considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by FWA in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact."

[15] Permission to appeal will only be granted in relation to Part 3-2 - Unfair Dismissal Matters of the Act - if Fair Work Australia considers that it is in the public interest to grant permission and appeals concerning a question of fact can only be made on the ground that the decision involved a significant error of fact.

[16] The significance of s.400 of the Act was considered by a Full Bench in *GlaxoSmithKline Australia Pty Ltd v Colin Makin* (*GlaxoSmithKline*).[29] The Full Bench said:

> "**[3]** Prior to the introduction of the Act the manner in which an appeal against an unfair dismissal decision proceeded was the same as with appeals from other decisions, but only on the grounds that the Australian Industrial Relations Commission was in error in deciding to make the order. [*Workplace Relations Act 1996, s.685*] The conventional grounds for granting leave to appeal [*Wan v Australian Industrial Relation Commission (2001) 116 FCR 481 at [26]*] otherwise applied under the *Workplace Relations Act 1996*, being whether the decision was attended by sufficient doubt to warrant its reconsideration or whether substantial injustice would result if leave were refused. However, even absent the conventional grounds, if the Commission was of the opinion that the matter was of such importance that it was in the public interest that leave should be granted the Commission was required to grant leave. Alternatively, leave could be granted if error could be demonstrated. [*S.170JF(2) of the pre-WorkChoices Workplace Relations Act 1996*]
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> **[4]** It can be seen that a significant change to the granting of permission to appeal was wrought by the introduction of the Act."

[17] In *A Smith and others v Moore Paragon Australia Ltd*,[30] a Full Bench of the Australian Industrial Relations Commission summarised the relevant principles in relation to the determination of appeals in respect of an exercise of discretion as follows:

> "[28] The nature of an appeal under s.45 of the *WR Act* was the subject of consideration by the High Court of Australia most recently in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [[2000] HCA 47] (*Coal & Allied*). Gleeson CJ, Gaudron and Hayne JJ, in a joint judgment, said
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> > 'Because a Full Bench of the Commission has power under s 45(6) of the Act to receive further evidence on appeal, an appeal under that section is properly described as an appeal by way of rehearing. And because there is nothing to suggest otherwise, its powers under sub-s (7) are exercisable only if there is error on the part of the primary decision-maker. And that is so regardless of the different decisions that may be the subject of an appeal under s 45. [Ibid at paragraph 17]'
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> [29] The types of error that may constitute grounds for review of a discretionary decision of the kind here under consideration were re-stated in *Coal & Allied* in the following way:
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> > 'Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of a decision can only be challenged by showing error in the decision-making process [See Norbis v Norbis (1986) 161 CLR 513 at 518-519 per Mason and Deane JJ].

> And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in House v The King in these terms:
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> > "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. [(1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ]".'"

Consideration

A valid reason for the termination (s.387(a))

[18] In addressing whether there was a valid reason for the dismissal related to the person's capacity or conduct, Commissioner Ryan approached his task from the perspective that "the termination of employment has to be seen to be for the reason of refusing to sign an undertaking in the terms provided to him on 24 August 2010"[31] and that "the specific reason of termination of employment was the failure by the applicant to sign the letter of undertaking as demanded by the employer",[32] although he noted that the termination itself must be viewed and considered in the context of the applicant's behaviour in the workplace over a significant period of time.[33]

[19] Whilst the Commissioner addressed "several issues of misconduct" in his decision,[34] he made no findings as to whether they constituted, in themselves or collectively, a valid reason for termination.

[20] In his conclusions, under the heading "Was there a valid reason? - s.387(a)", the Commissioner found:

> "**[55]** Termination of employment was for the reason that Mr Sulemanovski refused to sign the undertaking presented to him. In the letter of termination the company drew the conclusion that the failure to sign the letter of undertaking together with Mr Sulemanovski's previous misconduct disclosed an intention on the part of Mr Sulemanovski that he would not be bound by the terms and conditions of his employment. To be a valid reason the reason should be 'sound, defensible and well founded' in the Selvachandran [*Selvachandran v. Peteron Plastics Pty Ltd*. (1995) 62 IR 371 at 373, 7 July 1995, Northrop J] sense.
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> **[56]** Mr Allsop drew the conclusion that by not signing the undertaking as presented to him, Mr Sulemanovski intended not to be bound by his terms and conditions of employment. Whilst this may, at face value, appear to be reasonable I find that the decision to terminate for this reason does not constitute a valid reason for termination.
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> **[57]** The evidence of Mr Sulemanovski was that he did not sign the specific undertaking presented to him as he had a concern about the language used in it and the consequences that might flow from the language used. The evidence of Mr Allsop was

that he was unaware of any concerns that Mr Sulemanovski had as to the wording of the undertaking, that no discussion took place with Mr Sulemanovski or his representatives over the wording of the undertaking and that had such concerns been brought to his attention he would have sought advice before making a decision. It is this evidence which means that the reason for termination was neither sound, defensible nor well founded. The requirement to sign the undertaking was given and accepted as an ultimatum. No opportunity was presented to Mr Sulemanovski to discuss the undertaking or clarify the meaning of the undertaking."[35]

[21] It is apparent that in applying s.387(a) of the Act, Commissioner Ryan limited his consideration to whether the reason that Mr Sulemanovski refused to sign the undertaking was a valid reason for the termination of the employment. The Commissioner was obliged to consider more broadly whether there was a valid reason for the dismissal related to Mr Sulemanovski's capacity or conduct,[36] as required by s.387(a) of the Act. In restricting his consideration to whether the refusal to sign the undertaking was a valid reason for the termination the Commissioner erred, acting upon a wrong principle and misapplying the statutory requirements.

[22] This conclusion is reached whether or not the Commissioner erred in finding that the employment was terminated for the reason that Mr Sulemanovski refused to sign the undertaking. That finding, itself, was challenged by Aperio before the Commissioner and on appeal, on the basis that the Commissioner failed to have regard, or alternatively sufficient regard, to the evidence of Aperio that it terminated the employment on the basis of Mr Sulemanovski's work history and his most recent conduct in using a mobile telephone in an area where its use is prohibited. In our view, Aperio has substantiated that ground of its appeal. Given the evidence as a whole, and in particular the evidence of Mr Allsop,[37] the Commissioner has mistaken the facts in finding that the termination occurred because Mr Sulemanovski refused to sign the undertaking. The correct finding, on the evidence, was that Mr Sulemanovski's employment was terminated because of a series of conduct and/or performance issues, in breach of Aperio's policy and procedures, over the preceding two years of his employment, the most recent being the use of the mobile telephone in a prohibited area. On the evidence, the undertaking is best characterised as a final opportunity afforded to Mr Sulemanovski by Aperio to avoid the termination which would otherwise be given effect on the basis of the series of conduct issues/performance issues over the period up to and including the final incident on 19 August 2010.

[23] It is unnecessary to deal with the additional grounds raised by Aperio in the appeal.

[24] The errors of Commissioner Ryan in misapplying the statutory test in s.387(a) of the Act and finding, against the weight of the evidence, that Mr Sulemanovski's employment was terminated because he refused to sign the undertaking are significant and productive of a plainly unjust result. The preservation of public confidence in the administration of justice is a matter of public interest and tends to be undermined by decisions that are manifestly unjust. Accordingly, we are satisfied that there is a public interest in the grant of permission to appeal, grant that permission and quash the order of Commissioner Ryan.[38]

[25] The appeal then proceeds as a rehearing.

Rehearing

[26] We have decided to rehear Mr Sulemanovski's application ourselves. Neither party in the appeal suggested any reason why we should not do so in the event that we granted permission to appeal.

[27] In deciding the application ourselves, we have had regard to the submissions and evidence of the parties before Commissioner Ryan. Extensive evidence was given by Mr Sulemanovski, Mr B Trimble (Engineering Manager of Aperio), Mr S Vay (Team Leader of Aperio's Slitting and Laminating Departments at the Oakleigh site) and Mr Allsop. Evidence of more limited scope was given by Mr Sulemanovski's work colleague Mr G Rudd.

[28] Our task in rehearing the matter is to determine whether Mr Sulemanovski has been unfairly dismissed (s.385). None of the matters in s.385 of the Act are in contention between the parties other than s.385(b) - whether the dismissal was harsh, unjust or unreasonable.

[29] In considering that question, s.387 of the Act requires us to take into account those matters set out therein and recorded above.

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) (s.387(a))

General

[30] On his evidence, the decision to terminate the employment of Mr Sulemanovski was taken by Mr Allsop on the basis of the 19 August 2010 incident in which Mr Sulemanovski took some photographs on his mobile telephone inside the factory without seeking permission. This was a breach of policy against the background of a series of previous performance and conduct issues involving late attendance or non-attendance without advising the nominated Aperio officers, leaving his work station without the permission of or notification to managers, not wearing his uniform, not wearing personal protective equipment and performance and quality deficiencies.

[31] There were three performance/conduct issues in relation to Mr Sulemanovski resulting in counselling and one written warning in 2007, involving late attendance in all cases and quality and attitudinal issues. There is little evidence about these incidents and we place no weight on those issues.

[32] There were 10 further issues resulting in counselling and written warnings, including three final written warnings between the middle of January 2009 until May 2010, prior to the final incident on 19 August 2010.

Late attendance and non-attendance

[33] Late attendance and non-attendance were the subject of disciplinary meetings on 15 January 2009 and 23 January 2009. In neither case were the allegations of lateness or non-attendance challenged, although Mr Sulemanovski gave evidence that he attempted to ring the relevant managers but their telephones rang out.[39] The evidence of the relevant managers, Mr Vay and Mr Trimble, was that they had no record of such a call.[40] Mr Sulemanovski, in

his witness statement, gave evidence that he offered to show the managers his telephone to demonstrate that the calls were made[41] but that evidence was in conflict with his vive voce evidence.[42] Mr Vay's evidence was that he did not make such an offer.[43] Given the confusion in Mr Sulemanovski's evidence, we prefer the evidence of Mr Trimble and Mr Vay on this point. We find that Mr Sulemanovski did breach the policy requirement to notify relevant managers of his absence and late attendance. It should be noted, however, that following written and informal counselling in the meetings, there was no evidence of further breaches of this requirement by Mr Sulemanovski.

Production/quality issues

[34] Mr Trimble gave uncontested evidence that he attended tool box meetings, attended by Mr Sulemanovski, over the period May 2008 to June 2010 at which he brought to the attention of employees guidelines for taking breaks, efficient machine running and quality requirements and the necessity to wear Personal Protection Equipment.[44] Mr Sulemanovski was made aware of the importance attached to the efficient machine running and quality requirements.

[35] Production/quality issues arose in meetings of 6 February 2009, 13 February 2009 and 13 October 2009. In the first case they involved issues of failure to check production orders and not running machines at proper speed. In the second case the issue was lost production. In the final case it concerned faulty production, leading to substantial product loss, through a failure to follow quality checking processes. It might also be noted that the issues concerning unauthorised absences by Mr Sulemanovski from his work station also raised quality issues, given that the company policy, that employees in the Slitting Department remain at their work stations unless absences are authorised or notified, is directed to ensuring that single operators on machines maintain vigilance over quality. The concerns expressed by Aperio in the first instance were accepted as reasonable by Mr Sulemanovski.[45] The concerns raised in the second case were not denied by Mr Sulemanovski, although he argued that the requirements expected of him would slow production.[46]

[36] The final matter resulting in a substantial product loss on 9 October 2009 is more difficult to assess, given much evidence arose in cross-examination, raising matters not put to earlier witnesses and the technical production issues concerned.

[37] As we understand it, the relevant process, briefly stated, involved setting up the machine in accordance with specifications on production orders and then producing customer rolls of product off a parent roll. The evidence of Mr Sulemanovski,[47] Mr Vay[48] and Mr Trimble[49] was that the standard practice required of machine operators was to then check a sample off the first customer roll produced against the production order[50] specifications. Mr Sulemanovski checked the first customer roll off the parent roll.[51]

[38] Mr Vay also gave evidence that Mr Sulemanovski was instructed, at the 6 February 2009 disciplinary meeting and to go beyond standard practice, to check every roll of product against specifications.[52] Such an instruction is not recorded in the warning letter of 13 October 2009.[53] It would be reasonable to expect that an instruction departing from normal practice would be recorded in warning letters. Accordingly, we proceed on the basis that Mr Sulemanovski was expected to apply the standard practice required of machine operators to check a sample off the first customer roll produced against the production order specifications.

[39] There is a dispute about who was responsible for "rolls 9" and above, as recorded on the production order documentation. Mr Sulemanovski's evidence is that the night shift was responsible and signed off on that product.[54] Mr Vay's evidence is that Mr Sulemanovski was responsible for that product on day shift, with the production order being signed off by a casual that Mr Sulemanovski was training on that slitter, with the casual incorrectly checking the specifications of the first sample off a new parent roll.[55] Mr Vay's evidence is that Mr Sulemanovski was responsible for product off three parent rolls on the day shift on 9 October 2009.[56] Mr Vay's evidence is that if the afternoon shift was responsible for the later product, they would have signed off with the addition of "AS" to identify the afternoon shift.[57] Mr Trimble's evidence is that Mr Sulemanovski checked the initial run but failed to do subsequent checks as rolls had come off the machine and admitted in the meeting in October 2009 that he had not done the necessary checks and undertook to do so in the future.[58] Mr Allsop's evidence was that Mr Sulemanovski explained to him that his tape measure had been broken, he had borrowed a tape measure from his leading hand at the time of set-up and at the conclusion of that set-up he had returned the tape measure to his leading hand and had failed to do any further tests.[59]

[40] We find that Mr Sulemanovski was responsible for product beyond "roll 9" in the production order documentation and the casual being trained at the time. Whilst the casual employee made the measurement errors which resulted in substantial product loss,[60] Mr Sulemanovski was responsible for his work and failed to check the first rolls produced off parent rolls against specification himself.

[41] We find that whilst Mr Sulemanovski was not solely responsible for the 9 October 2009 product loss, there were deficiencies in his application of operating procedures reflected in the incidents of February and October 2009, with the second and third incidents resulting in significant product loss which resulted from the failure by Mr Sulemanovski to apply quality control procedures, which he was aware of.

Failure to wear/altering the Aperio uniform

[42] In a meeting on 6 February 2009, issues arose concerning the failure of Mr Sulemanovski to wear his uniform. Mr Sulemanovski's redesign of the uniform by converting a polo shirt in to a tank top was raised in a meeting of 13 February 2009. In relation to the first issue, Mr Sulemanovski believed it was acceptable to wear alternate types of clothing.[61] He altered the polo shirt in the second instance because he found the polyester uniform uncomfortable.[62] It is evident that Mr Sulemanovski had little regard for company uniform requirements in altering the polo shirt a little more than a week after he had been warned in writing that he was required to wear the company uniform. Mr Sulemanovski clearly breached policy, although no subsequent issues have arisen in relation to the uniform issue.

Absences from the work station without authority of, or notification to, managers

[43] Two such absences were addressed in a meeting of 20 February 2009, with the absences occurring to allow Mr Sulemanovski to meet a friend on one occasion and to have a cigarette on the other.[63] Mr Sulemanovski clearly understood the policy of the company[64] that he could not leave his work station without permission.[65] Mr Sulemanovski sought to justify his actions by reference to other employees being outside but not disciplined.[66]

[44] A similar absence was raised in a meeting of 30 May 2010. In that case, Mr Sulemanovski concedes that he was found outside the factory having a cigarette without having sought permission from his supervisor or any team leaders, but again sought to justify his actions by reference to other employees being outside but not counselled.[67] An unauthorised absence was addressed in the meeting of 18 August 2009 and two further absences were addressed on 16 September 2009. In the final instance, Mr Sulemanovski claims the absences were authorised by Mr Vay.[68] That position is not reflected in the written warning issued and was denied by Mr Vay.[69] Mr Sulemanovski gave evidence that he did not think he raised that permission in the meeting, then altered his evidence to not remembering, altered it again thinking he did raise it and finally giving evidence that he did raise the permission of Mr Vay at the meeting.[70] The proposition that Mr Sulemanovski raised the permission of Mr Vay in the meeting is not reflected in the written warning issued[71] and given Mr Sulemanovski's unsatisfactory evidence on this point, we accept that record to be accurate on that point. A further absence was discussed on 13 May 2010, leading to a second final written warning.

[45] We find that Mr Sulemanovski persistently breached the requirement to not absent himself from his work station without permission. That requirement was well known to him and the breaches occurred notwithstanding the clearest possible identification of that requirement through counselling and warnings on multiple occasions. We find the rationalisation by Mr Sulemanovski of some of the breaches - that other employees were absent from their work stations, to be unconvincing given the scant detail provided, particularly so in circumstances where different break procedures applied in different areas of the factory.[72]

Failure to wear Personal Protection Equipment

[46] As noted above, during tool box meetings between May 2008 and June 2010, Mr Trimble advised employees, including Mr Sulemanovski, of the necessity to wear personal protection equipment.

[47] The failure of and refusal by Mr Sulemanovski to wear a protective glove and arm sheath was the subject of meetings on 23 September 2009 and 26 May 2010.

[48] Mr Sulemanovski understood that it was important to wear required personal protection equipment.[73] His explanation for his failure to wear the glove and sheath varied in his evidence. At one point his evidence was that he did not "mind wearing them as long as when you do put a rule in place it's spread across the factory and not just to individuals".[74] Later his explanation was he did not have the equipment, having disposed of it because it was old and did not think to replace it.[75]

[49] Whilst there is confusion in the evidence of Aperio managers whether the requirement is to wear the equipment at all times or only when using an open blade, there is no doubt that Mr Sulemanovski understood the need to wear the glove and arm sheath when using an open blade and failed to do so.

The use of a mobile telephone in the factory on 19 August 2010

[50] An incident occurred on 19 August 2010 where Mr Sulemanovski used his mobile telephone in the factory to take photographs in the workplace of what he believed to be health and safety risks. He admits that he used the mobile telephone in that way.[76] He concedes he was aware that the use of mobile telephones in the factory is strictly prohibited and anyone breaking this rule would be disciplined[77] and concedes that there is signage prohibiting the use of mobile telephones approximately three metres from his machine.[78] The policy which appears in the induction booklet given to employees[79] exists because of the risk of ignition of solvents within the factory.[80] The taking of photographs is also generally prohibited to protect Aperio's commercial obligations to its clients. Aperio's concern about the policy breach was heightened by initial advice by Mr Sulemanovski to management that he had taken the photographs with a digital camera from his bag[81] rather than a mobile telephone, which Mr Allsop believed was an attempt to deceive Aperio.

[51] We find that Mr Sulemanovski's action in taking photographs with the camera in his mobile telephone in the factory on 19 August 2010 was a clear breach of company policies known to him.

Conclusion as to valid reason

[52] We find that there was a valid reason for the termination of Mr Sulemanovski's employment: the breach of company policies which were known to him, in the context of a series of earlier deliberate and persistent breaches of company policies and procedures which were also known to him. The continued pattern of disregard by Mr Sulemanovski of company policies and procedures, despite numerous counselling and warnings over nearly two years is such that Aperio was entitled to lose trust and confidence in Mr Sulemanovski as an employee and his preparedness to adhere to company policies and procedures.

[53] We note that Mr Sulemanovski's case before Commissioner Ryan was based significantly on the proposition that he was treated differently and more harshly than other employees.[82] Mr Sulemanovski believed he was being set up by Mr Trimble, Mr Vay and Mr Allsop[83] and that there was no substance to those counselling sessions or the written warnings or the final warnings because the company was wrong and did not have cause to take him to task on the various issues.[84] It was submitted at the commencement of the hearing before Commissioner Ryan that Mr Sulemanovski was singled out for special treatment because he was forthright in making his views known as to safety concerns around the plant.[85]

[54] We do not doubt that Mr Sulemanovski believed he was being treated differently and harshly. This belief is evident in his raising a harassment complaint within Aperio against Mr Trimble and Mr Vay on that basis in June 2010.[86] He raised a similar complaint with AMWU organiser, Ms Machlouch.[87] However there is no support in the evidence for that proposition. In final submissions before Commissioner Ryan, it was not seriously asserted that Mr Sulemanovski's role as a safety representative and a union delegate coloured the view taken by Aperio of Mr Sulemanovski.[88] There is no evidentiary basis to support the proposition that Mr Sulemanovski was otherwise treated differently and harshly. Indeed there is no evidence at all to support that proposition, save for the belief of Mr Rudd that, on one occasion, Mr Sulemanovski was set up for a warning concerning safety equipment,[89] a perception denied by Mr Vay.[90] The evidence demonstrates that disciplinary actions against Mr Sulemanovski in relation to his conduct and performance were reasonably based and

legitimate. The implausibility of the conspiracy argument is demonstrated by the fact that Aperio did not rely on the conduct of Mr Sulemanovski set out above to terminate his employment at an earlier time. Whilst the inconsistent application of disciplinary actions can be a relevant consideration in dismissal applications, there is no evidentiary basis in this case to substantiate the proposition that Mr Sulemanovski was singled out or to diminish the gravity of his consistent performance and conduct deficiencies over a long period of time.

Whether the person was notified of that reason (s.387(b))

[55] Mr Sulemanovski was notified of the reason for his termination.

Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person (s.387(c))

[56] Mr Sulemanovski was afforded the opportunity to respond to the reason for his termination in meetings on 19, 20, 23 and 24 August 2010 in respect of the 19 August 2010 issue concerning the use of a mobile telephone in a prohibited area and the unauthorised taking of photographs. To the extent that the history of previous performance and/or conduct issues was relied upon, Mr Sulemanovski was afforded the opportunity to respond to the issues when they were raised with him at earlier meetings.

Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal (s.387(d))

[57] The company permitted Mr Sulemanovski to have a support person present whenever it met with him.[91]

If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal (s.387(e))

[58] Mr Sulemanovski was warned about his unsatisfactory performance before the dismissal. Mr Sulemanovski received written warnings in relation to the loss of product/faulty product, not wearing a proper uniform, failure to check production orders, not running machines at proper speed, absences from his work station during working hours without reason and failure to wear Personal Protection Equipment. Multiple written warnings were given in relation to some of those issues and the warnings often dealt with more than one issue. Attendance issues and absences from the factory, without authority, were subject to written and informal counselling on multiple occasions and one written warning in respect of absences from the factory. It may be noted that some instances of warnings related to conduct, rather than performance, but unsatisfactory performance was subject to warnings on numerous occasions.

The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal (s.387(f))

[59] There were no submissions or evidence on this matter.

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 (s.387(g))

[60] Mr Allsop had access to HR expertise when considering a termination and sought advice from those HR experts when necessary.

Any other matters that FWA considers relevant (s.387(h))

[61] Mr Sulemanovski was a young man, with a pregnant wife, at the time of the termination of his employment. We accept that the termination impacted significantly upon him at a personal level.

Conclusion about whether the dismissal was harsh, unjust or unreasonable

[62] In circumstances where there was a valid reason for the termination, Mr Sulemanovski was notified of the reason for his termination, Mr Sulemanovski was afforded the opportunity to respond to the reason for his termination, Mr Sulemanovski was permitted to have a support person present whenever he met with Aperio's managers and Mr Sulemanovski was warned about unsatisfactory performance before the dismissal, we are satisfied that the termination of Mr Sulemanovski's termination was not harsh, unjust or unreasonable, notwithstanding the significant adverse impact of the termination upon Mr Sulemanovski.

Was Mr Sulemanovski unfairly dismissed?

[63] Given we are not satisfied that the dismissal was harsh, unjust or unreasonable, we are not satisfied that Mr Sulemanovski has been unfairly dismissed, within the meaning of s.385 of the Act.

[64] We dismiss the application of Mr Sulemanovski.

SENIOR DEPUTY PRESIDENT

Appearances:

J D'Abace of Counsel for the Appellant.

B Terzic for the Respondent.

Hearing details:

2011.
Melbourne:
February 16.

Decision Summary

TERMINATION OF EMPLOYMENT – misconduct – breach of company policy – ss394, 604 Fair Work Act 2009 – appeal – Full Bench – applicant dismissed for failure to sign undertaking to comply with company policies and be bound by terms and conditions of employment – decision at first instance found no valid reason and ordered reinstatement – appeal – appeal by former employer – although several other misconduct issues addressed, no finding as to whether they contributed to valid reason for termination – Commissioner was obliged to consider more broadly whether valid reason based on capacity or conduct – facts mistaken at first instance – evidence indicates that true reason for termination was applicant's *breach* of policies and procedures over 2 year period – plainly unjust result at first instance – leave to appeal granted – appeal upheld – decision and order quashed – rehearing – applicant engaged in series of deliberate and persistent breaches of company policies and procedures – applicant aware of relevant policies – various counselling and disciplinary actions carried out – appellant entitled to lose trust and confidence in employee – differential treatment alleged – no evidentiary basis to conclude applicant singled out – valid reason for termination – applicant notified of reason – warnings given – support person permitted – not harsh, unjust or unreasonable – application dismissed.

Appeal by Aperio Group (Australasia) P/L t/as Aperio Finewrap against decision of Ryan C of 30 December 2010 [[2010] FWA 9958]] – Re: Sulemanovski

C2011/10 [2011] FWAFB 1436
Watson SDP Melbourne 4 March 2011
McCarthy SDP
Deegan C

Citation: *Appeal by Aperio Group (Australasia) P/L t/as Aperio Finewrap against decision of Ryan C of 30 December 2010 [[2010] FWA 9958]] – Re: Sulemanovski* [2011] FWAFB 1436 (4 March 2011)

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[1] [2010] FWA 9958.

[2] PR505584.

[3] Appeal Book, at p. 549 and Transcript of 8 December 2010 before Ryan C at para 428.

[4] Appeal Book, at pp. 525-548.

[5] Transcript of 8 December 2010 before Ryan C at paras 574-579. Half of which was paid as a result of a conciliated outcome in respect of a workers' compensation claim,.

[6] Appeal Book, at p. 499.

[7] Ibid, at p. 500.

[8] Ibid, at p. 501.

[9] Ibid, at p. 450.

[10] Ibid, at p. 451.

[11] Ibid, at p. 452.

[12] Ibid, at pp. 453 and 486.

[13] Ibid, at p. 505.

[14] Ibid, at p. 454.

[15] Ibid, at p. 507.

[16] Ibid, at p. 455.

[17] Ibid, at pp. 456-459.

[18] Ibid, at pp. 460-461 and 491.

[19] Ibid, at pp. 462-463.

[20] Ibid, at pp. 513-514 and 492-493.

[21] Ibid, at pp. 493-497.

[22] Ibid, at p. 496.

[23] Ibid.

[24] Ibid.

[25] Ibid, at p. 550.

[26] Ibid, at p. 497.

[27] Ibid, at p. 551.

[28] [2010] FWA 9958, at para 53.

[29] [2010] FWAFB 5343.

[30] PR915674.

[31] [2010] FWA 9958, at para 6.

[32] Ibid, at para 10.

[33] Ibid.

[34] Ibid, at paras 26-41.

[35] Ibid, at paras 55-57.

[36] *Victor Zammit and MM Cables - A Division of Metal Manufactures Ltd*, Print S8106, at para 42. See also *A. Ryder and Curtin University of Technology, Western Australia*, PR920047 at para 41 and endnote 35.

[37] Transcript of 22 December 2010 before Ryan C at paras 2414-2415, 2426, 2453 and 2501-2502.

[38] PR505584.

[39] Transcript of 8 December 2010 before Ryan C at para 637.

[40] Appeal Book at pp. 442 and 467.

[41] Appeal Book at p. 362.

[42] Appeal Book at p. 362 and Transcript of 8 December 2010 before Ryan C at paras 643-646.

[43] Appeal Book at p. 467 and Transcript of 22 December 2010 before Ryan C at paras 1622-1623.

[44] Appeal Book at p. 442.

[45] Transcript of 8 December 2010 before Ryan C at para 807.

[46] Appeal Book at p. 363 and Transcript of 8 December 2010 before Ryan C at para 807.

[47] Appeal Book at p. 368 and Transcript of 8 December 2010 before Ryan C at para 750.

[48] Transcript of 22 December 2010 before Ryan C at para 1749.

[49] Transcript of 21 December 2010 before Ryan C at paras 483-484.

[50] The relevant production order is found in Appeal Book at pp. 475-477.

[51] Transcript of 21 December 2010 before Ryan C at para 64.

[52] Transcript of 22 December 2010 before Ryan C at paras 1999-2002.

[53] Appeal Book at pp. 402-403.

[54] Transcript of 8 December 2010 before Ryan C at paras 267, 272-3 and 279.

[55] Transcript of 22 December 2010 before Ryan C at para 1828 and 1832.

[56] Transcript of 21 December 2010 before Ryan C at para 1203.

[57] Transcript of 21 December 2010 before Ryan C at paras 1225-1226.

[58] Appeal Book at p. 446.

[59] Transcript of 22 December 2010 before Ryan C at paras 2401-2402.

[60] The casual employee was asked to leave the business following the investigation of the 9 October 2009 product loss. See Transcript of 22 December 2010 before Ryan C at para 1839.

[61] Appeal Book at p. 363.

[62]Transcript of 8 December 2010 before Ryan C at paras 326-328 and Appeal Book at p. 363.

[63] Transcript of 8 December 2010 before Ryan C at paras 1033 and 1075.

[64] Transcript of 8 December 2010 before Ryan C at para 1059.

[65] Transcript of 8 December 2010 before Ryan C at paras 1078-80.

[66] Appeal Book at p. 364 and Transcript of 8 December 2010 before Ryan C at para 865.

[67] Transcript of 21 December 2010 before Ryan C at para 98.

[68] Appeal Book at p. 366.

[69] Appeal Book at p. 471.

[70] Transcript of 8 December 2010 before Ryan C at paras 1175-1186.

[71] Appeal Book at p. 480.

[72] Transcript of 8 December 2010 before Ryan C at para 1108 and 22 December 2010 at para 2437.

[73] Transcript of 8 December 2010 before Ryan C at paras 1216 and 1222.

[74] Transcript of 8 December 2010 before Ryan C at para 205.

[75] Transcript of 8 December 2010 before Ryan C at paras 1248-1256.

[76] Appeal Book at pp. 371-372.

[77] Appeal Book at p. 371.

[78] Transcript of 21 December 2010 before Ryan C at para 168.

[79] Appeal Book at p. 530.

[80] Transcript of 22 December 2010 before Ryan C at para 2474.

[81] Transcript of 21 December 2010 before Ryan C at para 189.

[82] Transcript of 8 December 2010 before Ryan C at para 592.

[83]Transcript of 8 December 2010 before Ryan C at para 1188-1193.

[84] Transcript of 8 December 2010 before Ryan C at para 591.

[85] Transcript of 8 December 2010 before Ryan C at para 57.

[86] Appeal Book at pp. 370 and 415. The complaint was reviewed and dismissed in Appeal Book at pp. 419-420.

[87] Transcript of 8 December 2010 before Ryan C at paras 1203-1204.

[88] Transcript of 22 December 2010 before Ryan C at para 2568.

[89] Appeal Book at p. 436 and Transcript of 21 December 2010 before Ryan C at paras 317-320.

[90] Transcript of 22 December 2010 before Ryan C at paras 2073-2081.

[91]Transcript of 21 December 2010 before Ryan C at paras 231-232 and 239.