FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Viktor Sulemanovski

v

Aperio Group (Australia) Pty Ltd T/A Aperio Finewrap
(U2010/1432)

COMMISSIONER RYAN MELBOURNE, 30 DECEMBER 2010

Termination of employment - no valid reason for termination - reinstatement ordered.

[1] This decision concerns an application under s.394 of the *Fair Work Act 2009* (the Act) by Mr Viktor Sulemanovski (the applicant) alleging that the termination of his employment by Aperio Group (Australia) Pty Ltd T/A Aperio Finewrap (the employer) was harsh, unjust or unreasonable.

[2] The application was lodged on 6 September 2010.

[3] The applicant was terminated by letter on 26 August 2010. The letter of termination identified the reasons for termination in the following terms:

> "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."

[4] The employer's response to the application for unfair dismissal remedy provided the following response to the applicant's contentions:

> "The Applicant has been given more opportunities to retain his employment than would have been provided to most other employees in similar circumstances.
>
> The Applicant had the opportunity to provide an undertaking that would have enabled his employment to continue.

> Termination was the last resort in the face of a pattern of conduct that the Applicant refused to address."

[5] The undertaking referred to in the letter of termination was contained in a letter to Mr Sulemanovski from Mr Allsop dated 24 August 2010. The terms of the letter are as follows:

[6] It is clear that had the applicant signed the letter of undertaking provided to him on 24 August 2010 that his employment would have continued. This was confirmed by Mr Allsop in his evidence. Therefore 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.

[7] It appears from the evidence in this matter that the letter of undertaking issued to Mr Sulemanovski on 24 August 2010 was in the form of an absolute ultimatum. He was required to sign the letter by a specific time on a specific date and his failure to sign the letter lead immediately to the termination of his employment.

[8] In giving evidence in this matter Mr Sulemanovski made clear that whilst he was prepared generally to give an undertaking to his employer, there was one specific set of words in the undertaking which he had significant concerns about and had those words been changed he would have signed the undertaking. Mr Allsop gave evidence that no discussion was had between himself and either Mr Sulemanovski or the union over the wording of the undertaking. When questioned on this matter Mr Allsop gave evidence that he was never made aware of any concerns that Mr Sulemanovski may have had over the wording of the undertaking and that if such concerns had been raised with him Mr Allsop would have sought advice from the employers HR personnel.

[9] Whilst the letter of the 24 August 2010 acknowledged that Mr Sulemanovski may wish to consult with his representatives this only had relevance to the timing of the reply expected from Mr Sulemanovski. There was nothing in the letter which offered Mr Sulemanovski any opportunity to discuss the terms of the undertaking with Mr Allsop or anyone else at Aperio. As I have described it above, the letter was an ultimatum.

[10] Whilst the specific reason of termination of employment was the failure by the applicant to sign the letter of undertaking as demanded by the employer, 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.

[11] Very little of the evidence in this matter went to the issue of the termination itself, and in particular to issues surrounding the issuing of a letter of ultimatum to Mr Sulemanovski that he sign an undertaking to the employer. Rather a large bulk of the evidence in this matter went to the issues relating to Mr Sulemanovski's conduct during his employment over the last couple of years.

The Applicant

[12] Mr Sulemanovski was employed by Aperio Group at its Oakleigh site in the capacity as a slitter operator. Mr Sulemanovski is 23 years old and has been working at the Oakleigh site since about July 2005. In Mr Sulemanovski's own evidence he has put in a considerable effort to ensure that he learnt as much as he could so that he could operate as many machines as possible and to be a good, flexible worker.

[13] Mr Trimble, Engineering Manager at the Oakleigh site, gave evidence that Mr Sulemanovski was considered to be a likeable person, described as "one of the boys" and that Mr Sulemanovski was rated quite highly as being a flexible worker with the ability to run a significant number of machines. Mr Trimble considered the applicant to be generally a good worker, although there were many incidences where Mr Sulemanovski's performance was questionable, especially in relation to issues of time keeping and attendance.

[14] In about 2008 or 2009 Mr Sulemanovski became the shop steward for his union, the Australian Manufacturing Workers' Union, and also the health and safety representative for the slitting department. As a health and safety representative, Mr Sulemanovski appears to have been extremely active in identifying issues for consideration of management. Mr Trimble's evidence supported generally the effectiveness of Mr Sulemanovski in raising genuine health and safety issues in the workplace.

[15] I found Mr Sulemanovski to be an articulate young man who had a very clear capacity to express his views quite strongly. It was apparent from his demeanour in the witness box that he was genuinely passionate about health and safety issues in the workplace. However, it is also very clear that Mr Sulemanovski is an arrogant person who gives the very clear impression that he can do no wrong and that he is not to be blamed for anything. For every alleged issue of misconduct he had an excuse. Not once in giving evidence, nor in his written statement, did Mr Sulemanovski offer to accept responsibility for his own actions. Under cross examination Mr Sulemanovski was forced to admit that on occasions he had been properly warned not to do things and then had subsequently done what he was warned not to do. In his concluding submissions Mr Terzic sought to portray Mr Sulemanovski as a troubled person crying out for help. I reject this characterization of Mr Sulemanovski. I would characterize Mr Sulemanovski as full of the arrogance of youth but with a genuine desire to be a productive worker and with a zealotry for workplace health and safety.

[16] Whilst nothing adverse has been said about Mr Sulemanovski's activities as a shop steward, considerable criticism can and should be made about Mr Sulemanovski's attitude and performance as a health and safety representative.

[17] It is important in my view for employees to be encouraged to take on the role of health and safety representatives in any workplace. These positions are recognised under various state occupational health and safety Acts and the status of health and safety representatives is clearly recognised within the general protections provisions of the *Fair Work Act 2009*. Given that state and federal legislation is designed both to ensure health and safe work practices in any workplace and also to provide proper mechanisms for health and safety representatives to carry out an effective role in the provision of a healthy and safe workplace, it is important that health and safety representatives both be encouraged by the system, legislative as well as practical, and that once encouraged that health and safety representatives accept the very real responsibilities that fall on their shoulders when they take on the position as health and safety representative.

[18] It is clear from the evidence from Mr Sulemanovski that he was a very active health and safety representative with a very strong desire to identify every possible health and safety breach that may exist in the workplace. As Mr Sulemanovski has made clear he hasn't resorted to issuing PIN notices at the drop of a hat but has rather raised issues on a constant basis with management.

[19] Mr Trimble's evidence supported this by acknowledging that the applicant has raised most of the health and safety issues through his leading hand, supervisors and through the committee structure.

[20] What is very clear from the evidence in this matter is that whilst Mr Sulemanovski has been very quick to point the finger at non-compliance by his employer and other employees with health and safety requirements of the workplace, he has been prepared to ignore health and safety requirements when they apply to him.

[21] The issue concerning the wearing of a safety glove and arm sheath to prevent cuts while using a knife when cutting product, exemplifies his approach to health and safety. His evidence was that he had been trained in the proper use of the knife and, if the knife was used with a two-handed grip, there would be no requirement to wear the safety glove or sheath. Whilst this may very well accord with accepted health and safety practice, the fact was that his employer had mandated that every employee in the slitting department would wear a glove and sheath at all times. Only one glove and sheath had to be worn and had to be worn on the opposing hand which gripped the knife. As knives are constantly used in the slitting department, the mandatory use of at all times of a glove and sheath was a reasonable direction. Mr Trimble gave evidence that even while wearing the glove and sheath a slitting department employee would be able to set up a machine a use a tape measure to check machine settings and the correct dimensions of the customer rolls.

[22] The applicant's own evidence made clear that whilst he had been properly trained in the safe use of a knife so that he had the skill, knowledge and capacity to use the knife without requiring a glove or sheath, he acknowledged that the training material which he had used had been misplaced or lost, and that other employees had not had the benefit of his training on the safe use of knives. In such circumstances where it was very clear that other employees would be required at all times to wear the glove and sheath to protect themselves from accidental knife cuts, it was irresponsible for Mr Sulemanovski as the health and safety representative to flagrantly disregard the requirement to wear a glove and arm sheath even in circumstances where he knew how to use a knife in a two-handed grip so as to avoid the possibility of cuts and to avoid the necessity to wear a glove and sheath. His level of personal skill is not matched by the level personal skill of other employees. As the health and safety representative he had a responsibility not only to enforce health and safety practices in the workplace, but to set an example for other employees. He singularly failed to do that.

[23] Mr Sulemanovski had also taken it upon himself to alter a safety vest to convert it into effectively a safety singlet, without any arms attached to the vest. The safety requirements necessitated high visibility work wear and to that extent Mr Sulemanovski was complying with the requirements to wear a high visibility top. Mr Sulemanovski's justification for removing the arms from a high visibility top was that the heat within the workplace during summer was such that he needed to minimise the amount of clothing that he was wearing. From a health and safety perspective his actions may have had some merit in creating an environment where he, as an employee, would suffer less from the heat within the workplace by wearing a sleeveless top than by wearing a top with short sleeves. However, balancing the issue of health and safety requirements was the need of the employer to maintain a very clean work environment. Workers were required to wear hair nets and beard nets in order to prevent any possibility of human hair being present on the finished product.

[24] As Mr Trimble made clear in his evidence, the concern of the employer with the activities of Mr Sulemanovski in removing the arms of this high visibility safety vest was the possibility of arm-pit hair contamination on the product. There was no evidence that Mr Sulemanovski was made aware of the need to prevent armpit hair contamination of product when he was counselled or warned about not wearing correct uniform. If Mr Sulemanovski had a genuine health and safety concern about wearing sleeved shirts in a very hot workplace the proper course of conduct would have been to raise this issue through a safety committee or alternatively to have sought external expert advice through WorkSafe. The unilateral approach adopted by Mr Sulemanovski was not consistent with good occupational health and safety practice, nor with good industrial relations outcomes.

[25] As a general comment in relation to the applicant, I would say that the evidence discloses a person with zealotry for health and safety but who lacks a real sense of maturity so that he can properly and meaningfully contribute to the creation of a health and safe work environment in the place in which he finds himself.

The several issues of misconduct

[26] Mr Sulemanovski has been accused of engaging in misconduct over a period of time. The misconduct includes poor performance in carrying out his role as a slitter so that product has been irretrievably lost, poor time keeping in attending work and poor attendance at work in the sense of taking unauthorised breaks.

[27] A key incident alleged against Mr Sulemanovski was poor performance whilst carrying out his duties as a slitter which resulted in the loss of a significant amount of product to the value of $14,700. All blame for the loss of this product was placed on the Mr Sulemanovski.

[28] The evidence given by Mr Vay was that he formed the view that the loss of product was as a direct result of Mr Sulemanovski failing to carry out a critical function of checking the set-up on his machine. I do not place any reliance upon the evidence of Mr Vay.

[29] The production orders which were used by the operators to perform their functions determined the parameters for the setting up of their machines. The operator was required to manually set the machine in accordance with the instructions on the production order. Having done that the operator then had the settings checked by either a leading hand supervisor or another operator in the same department. Each production order required both the operator and the buddy, ie the person who checked the operator's settings, to initial the production order. Mr Vay when giving evidence ignored the fact that a buddy had counter checked the settings made by Mr Sulemanovski when setting up the machine. I do not doubt that a significant amount of product was ruined by some factor relating to the set-up of the machine. However, to place all of the blame on the applicant appears to remove any blame from the buddy who had a responsibility of cross-checking the settings made by Mr Sulemanovski as the prime operator of the machine.

[30] Evidence given by Mr Trimble was that it was uncommon for product to have such extremely tight tolerances as occurred in relation to the product which was ultimately discarded. Additionally Mr Trimble's evidence was that at the time of the incident with Mr Sulemanovski the system of work permitted the check to be done only by another operator and that once the machine was set up and commenced running the operator only had to check

the first customer roll that was produced. There was no requirement on product which had to be produced to extremely tight tolerances for any more senior person to be the checker of the operator's set-up of the machine. Mr Trimble gave evidence that since that time the production orders have been revised so that there is greater control over product and in particular product with extremely tight tolerances. The admission by Mr Trimble in many respects identifies that there were clear inherent problems with the system of work at the time that Mr Sulemanovski was blamed for having ruined a significant amount of product.

[31] It would appear from the evidence given in this matter that had the buddy checked the settings of the machine as set up by Mr Sulemanovski and counter-signed that they were correct, then if an error occurred it occurred after the machine had been set up. Alternatively if the settings themselves were wrong, and if they had been wrongly set by Mr Sulemanovksi, then the buddy was more culpable in signing off on clearly incorrect settings. The role of the buddy was simply not addressed by any of the employer witnesses in this matter.

[32] Other issues of misconduct alleged against Mr Sulemanovski included being absent from his machine on several occasions. On at least one of these occasions Mr Sulemanovski's defence was that he had been specifically permitted by Mr Vay to be absent from his machine but in subsequent interviews and in giving evidence in this matter Mr Vay expressly denied having giving permission to Mr Sulemanovski. I do not find Mr Vay to be a reliable witness on this matter.

[33] The issue of misconduct which directly led to an ultimatum being issued to Mr Sulemanovski concerned his use of a mobile camera to photograph an employee carrying a 35kg customer roll of product. The use of mobile phones within the work area was specifically prohibited by the employer. Mr Sulemanovski acknowledged that he was aware of this prohibition. The employer also relied upon a company policy that prohibited the use of cameras within the workplace. However in giving evidence Mr Allsop conceded that the policy on the prohibition of cameras may not have been brought to Mr Sulemanovski's attention. The lifting and carrying of a 35 kg customer roll was acknowledged by Mr Vay as being an unsafe work practice. The evidence as to the reasons for Mr Sulemanovski taking the photos discloses that he was clearly and deliberately getting proof of unsafe lifting occurring in the workplace. The purpose of this evidence was to strengthen his own WorkCover claim in relation to a back injury in circumstances where the employer had opposed the claim.

[34] Mr Vay became aware of Mr Sulemanovski having taken photos when that fact was reported to him by his Leading Hand Mr Tacey. Mr Tacey observed Mr Sulemanovski taking the photos. Mr Vay reported Mr Sulemanovski for taking photos. Mr Allsop interviewed Mr Sulemanovski over the taking of photographs in the workplace. Mr Allsop's concern was in relation to Mr Sulemanovski's blatant breach of policy in having a mobile phone in the workplace and in taking photos in the workplace. The written evidence of Mr Allsop was that if Mr Sulemanovski had sought permission to use a camera as part of his Health and Safety role, permission would probably have been granted.

[35] What was absolutely clear throughout the evidence given by Mr Vay and Mr Allsop in relation to this matter was that neither was concerned with the health and safety breach which Mr Sulemanovski had photographed.

[36] Mr Allsop acknowledged in his evidence that he viewed each of the photos on Mr Sulemanovski's mobile phone and then watched as Mr Sulemanovski deleted the photos.

Given that the photos depicted an unsafe work practice and one which had a real and imminent capacity to injure a worker, it says a lot about the company's attitude to health and safety that no attempt was made to copy the photos onto a company controlled medium before their deletion from Mr Sulemanovski's mobile phone.

[37] I note that at the request of the Tribunal the company produced a set of photographs which showed the workstation of Mr Sulemanovski referred to in the incident concerning the production of defective product. The company had full control over the workplace at the time these photographs were taken and had the ability to set up the photographs to its best advantage. In what I consider to be the real attitude of the company to health and safety the photographs produced by the company disclose one significant unsafe work practice which could lead to significant injury to employees and a second workplace practice which Mr Sulemanovski identified as a significant unsafe work practice.

[38] The significant unsafe work practice involved employees having to lift customer rolls weighing around 30kgs each from a weighing table, carrying them about a metre and then packing them in boxes. Mr Vay, who is the former health and safety representative for the slitting department and who is now the Team Leader, acknowledged that this was unsafe.

[39] The second work practice involved a heavy roll of product being placed on the floor a couple of metres from the machine on which it was to be loaded. The roll weighed several hundred kilograms. Safe work practice was for the roll to be lifted into place. However, as the photograph was explained, this roll would be manually rolled into place. Mr Vay acknowledged that this practice was inconsistent with the proper movement of large rolls of product although he stated that he did not consider it an unsafe work practice for an employee to roll the roll into place.

[40] I also note that the evidence of both Mr Vay and Mr Rudd show that the mandatory wearing of a glove and sheath by employees in the slitting department is not complied with. Mr Vay gave evidence that on an occasion when a client was to do a walkthrough of the production area that he instructed his leading hand Mr Tacy to ensure that each employee was wearing a glove and sheath. Mr Sulemanovski was subsequently caught not wearing his glove and sheath by Mr Cramsie, the OHS officer for the company, when he also did a walkthrough of the production area contemporaneous with the client walkthrough.

[41] That Mr Vay needed to instruct his leading hand to ensure that employees were wearing the glove and sheath prior to a client walkthrough strongly suggests that Mr Vay accepted that in the absence of his leading hand specifically ensuring that employees were wearing a glove and sheath then a client doing a walkthrough would find employees not wearing a glove and sheath. This suggests a degree of laxity in the wearing of the glove and sheath with Mr Vay enforcing the rule only for the purpose of giving the appearance that the rule was ordinarily complied with.

The system of counselling and warnings

[42] Aperio Group as the employer in this matter, has a comprehensive approach to issuing counselling and warnings to employees who engage in issues of misconduct. I have real concerns that the structure used by the employer can lead to a situation where employees are not given sufficient certainty as to the seriousness of the misconduct and the seriousness of consequences which may flow from future breaches of the obligations on an employee in the

workplace. Mr Allsop conceded in his oral evidence the weakness inherent in giving multiple absolutely final warnings.

[43] In the present matter, Mr Sulemanovski received at least two warnings which were described as being absolutely final. The very fact that two warnings can be described as absolutely final means only one thing, neither was absolutely final. The use of highly explicit language in a warning which is meant to convey the impression that any misconduct of any sort after the issue of a warning would lead to termination of employment, should only be issued when the employer intends that outcome. Where employers as in this case issue strongly worded warnings where more than one warning in succession can be identified as the absolutely final warning, this would lead employees to believe that if they can get two absolutely final warnings then they might get a third, fourth, fifth or sixth absolutely final warning because the term absolutely final becomes meaningless.

[44] Whilst the issuing of multiple warnings which are described as absolutely final may lead to a sense amongst employees that nothing is final, it is important to recognise that what the employer has done on this occasion is to show genuine leniency to an employee who had engaged in misconduct which warranted a quite significant and substantial warning. I would be concerned that any comments I make in this matter are seen as a criticism of the employer's leniency in dealing with misconduct. I do not intend any criticism of the employer or of Mr Allsop for showing leniency towards Mr Sulemanovski.

[45] I accept the evidence of Mr Trimble that, as a new manager who commenced at the Oakleigh site not long after the Aperio Group acquired the site, he saw the need to significantly change the culture in the workplace so that there would be greater compliance with workplace practices, procedures and rules, and, that the approach adopted by the company in using counselling and warnings has not been heavy handed but has been directed at trying to achieve cultural change through the appropriate use of counselling and warnings.

[46] Where this may fail is only through the processes used in terms of identifying warnings as being final and having more than one final warning being issued to an employee. I'd make the very strong suggestion to the employer that it review the approach it uses on both

[47] counselling and warnings.

[48] The evidence in this matter shows that there is a single form being used to record the interviews for counselling and warnings. The company's disciplinary policy is predicated upon an ascending level of actions from counselling to first warning to final warning to termination. I would strongly recommend to the company that it completely separate the concept of the counselling from the concept of warnings.

[49] The approach adopted by the company in counselling employees and in having records of interview of counselling sessions is commendable. Counselling which does not lead to disciplinary actions such as the issue of formal warnings is to be encouraged. Counselling sessions in this sense can be an extremely valuable tool in changing workplace culture, especially where employees can be counselled without fear that they will be subject to an immediate formal warning. Separating the counselling process from warnings and to make such separation clear to employees may enhance the effectiveness of counselling and to minimise the fear amongst employees that a counselling session will inevitably lead to a warning. If cultural change is genuinely being sought, as I believe it is, then employees, the

union and the employer can effectively maximise the benefits that flow from a proper counselling procedure.

[50] I'd also caution the employer against having an approach where warnings are titled "First Warning" or "Final Warning". Warnings of any sort should be issued only where the conduct is serious enough to require a formal reprimand to an employee for engaging in a form of misconduct. In many respects there is simply no difference between a warning which is the first, second or subsequent warning issued. Every warning may carry with it the possibility that a future incident of misconduct could lead to termination. Equally, warnings can be expressed in reference to the level of severity of the warning without having to categorise it as a first, second, third or final warning. There is no reason why more than one very severe warning could not be issued to an employee during the course of their employment and even in reasonable close proximity to each other. Mr Amandola in his closing submission characterized the three final warnings given to Mr Sulemanovski as being a final warning for a specific issue and as there were three specific issues then each led to a final warning. The intent of each of the final warnings was to create a situation where repetition of the specific conduct could lead to immediate termination of employment, but where an incident of misconduct of a different type wouldn't necessarily lead to termination. Whilst this may have been the intent the actual language of the warning letters states that any form of subsequent misconduct could lead to termination of employment.

[51] The employer needs to have flexibility in the issuing of warnings to employees for misconduct. Employees need the certainty of understanding what may be the consequences but equally the employer needs and should retain the flexibility to be able to issue subsequent very severe warnings to an employee without employees being able to downplay the severity of the warning or to ignore it. In the present circumstances the multiple use of final warnings has the tendency to undermine the effectiveness of the warnings. If a warning is final in the proper sense of that term it means no future warning can or will be issued but that termination would follow. The terminology in the disciplinary process which is used within this employer's business should be amended. Warnings can be rated more effectively than by typing them 'first', 'second' or 'final'. Terminology in a warning system that relates to the severity of the warning might be a more appropriate means of getting the message across to those employees being warned.

Conclusions

[52] It was agreed by both the applicant and the respondent that the requirements of s.396(a) and (b) had been met and that neither of s.396(c) or (d) applied in the current matter.

[53] The matter before me has proceeded on the basis that both the applicant and respondent accept that Mr Sulemanovski has been dismissed within the meaning of s.386.

[54] The issue for determination is whether the dismissal is harsh, unjust or unreasonable within the meaning of s.387.

Was there a valid reason? - s.387(a)

[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[1] sense.

[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.

[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.

Notification of the reason for termination - s.387(b)

[58] Mr Sulemanovski was notified of the reasons for his termination and this is not in dispute in this matter.

Opportunity to respond - s.387(c)

[59] As discussed above Mr Sulemanovski was not given the opportunity to respond to the reason for the termination before the termination took effect. I note that the matters addressed by s.387(c) are limited to being given an opportunity to respond "to any reason related to the capacity or conduct of the person". In this matter the capacity of Mr Sulemanovski was not in issue. The conduct of Mr Sulemanovski that is comprehended by s.387(c) is his refusal to sign the undertaking. As I have already identified, Mr Sulemanovski was not given an opportunity by Mr Allsop to respond as to why he did not sign the undertaking by the ultimatum time.

Support person - s.387(d)

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

Warning as to unsatisfactory performance - s.387(e)

[61] Whilst the dismissal was not for the reason of unsatisfactory performance the dismissal clearly related to unsatisfactory performance. Mr Sulemanovski was warned about his unsatisfactory performance before the dismissal.

[1] *Selvachandran v Peteron Plastics Pty Ltd*,(1995) 62 IR 371 at 373, 7 July 1995, Northrop J

Size of the employers business - s.387(f)

[62] The size of the employers business directly impacted upon the procedures followed in effecting the termination. However the impact was not of an adverse nature in relation to Mr Sulemanovski. As the evidence in this matter made clear Aperio had well defined policies and practices in relation to handling disciplinary matters involving employees.

HR expertise - s.387(g)

[63] The size of Aperio's HR department was not identified but Mr Allsop made clear in his evidence that he both had access to HR expertise when considering a termination and that he sought advice from those HR experts when necessary.

Other relevant matters- s.387(h)

[64] I have taken into account the fact that Mr Sulemanovski was a health and safety representative and that he was zealous in his pursuit of health and safety breaches by the company and other employees. I note in passing that being a zealot means that the person can be so single-minded as to lack a sense of perspective or an ability to be objective. From the evidence presented in this matter it appears that notwithstanding specific policies on health and safety it is clear that health and safety is not practiced at the level suggested by the very particular OHS policies in place. This provides an important contextual setting in which the last incident of misconduct occurred.

Remedy for Unfair Dismissal - s.390

[65] The primary remedy provided for by s.390 is reinstatement. Compensation must not be ordered unless FWA is satisfied both that reinstatement is inappropriate and that payment of compensation is appropriate in all the circumstances of the case. It is clear from the way in which the company approached the last incident of misconduct by Mr Sulemanovski that they had considerable concerns as to Mr Sulemanovski's commitment to abide by the terms of employment. The requirement by the company that Mr Sulemanovski sign an undertaking makes clear that the company had not lost confidence or trust in Mr Sulemanovski. What tipped the company over the edge in the sense of losing trust and confidence in Mr Sulemanovski was his refusal to sign the undertaking. The sense of loss of trust and confidence in Mr Sulemanovski is not irreversible. As discussed earlier had Mr Allsop engaged with Mr Sulemanovski over the latter's concern about the wording of the undertaking it is likely given Mr Sulemanovski's evidence that he would have signed an undertaking. In opposing the reinstatement of Mr Sulemanovski the company put it no higher than that there was a possibility that the reinstatement would have adverse impacts on other workers and the workplace culture. Mere possibility of an adverse impact flowing from the reinstatement is insufficient to satisfy me that reinstatement is inappropriate. I determine that the appropriate remedy in this matter is reinstatement.

Reinstatement - s.391

[66] Nothing was put in these proceedings to suggest that if reinstatement was the appropriate remedy that I should do anything other than order reinstatement to the position which Mr Sulemanovski held immediately before the dismissal. Mr Sulemanovski was employed as an operator in the slitting department and it is appropriate that he be reinstated

into that position. I note that an order for reinstatement relates only to the position Mr Sulemanovski was employed in prior to his dismissal. Thus the order for reinstatement has no effect in relation to Mr Sulemanovski's capacity to be a health and safety representative or union shop steward. Given my earlier comments about Mr Sulemanovski I think it singularly inappropriate for him to continue to be a health and safety representative given that his priority should be to make the reinstatement work. In any event I expect the union to take note of my comments and it is they who control the position of shop steward and who can influence the selection or election of health and safety representatives.

[67] S.391(2) permits the Tribunal to make an order to maintain the continuity of employment of an employee who is reinstated. I consider it appropriate to make an order under s.391(2) to maintain the continuity of Mr Sulemanovski's employment. Such an order will have 2 specific benefits. Firstly, by maintaining continuity of his employment Mr Sulemanovski has more to lose should he engage in further acts of misconduct which may lead to termination of employment. Secondly, the continuity of Mr Sulemanovski's employment carries with it the continued operation of the several warnings given to him. Mr Sulemanovski must understand that an order for reinstatement and an order for continuity of service do not act as creating a clean sheet for him. In fact the exact opposite will occur. The written warnings given to Mr Sulemanovski stand and continue to apply to him. **Any** misconduct (and I stress the word **Any)** by Mr Sulemanovski when he returns to his employment can be used by the company to consider further disciplinary action against him including termination of employment. If Mr Sulemanovski is subsequently terminated for misconduct he retains his rights under the Fair Work Act.

[68] S.391(3) permits FWA to make an order requiring the company to pay Mr Sulemanovski his lost remuneration since he was dismissed. In this matter I consider it quite inappropriate to make any order the effect of which would have the company pay Mr Sulemanovski for the period between his dismissal and his reinstatement. The conduct of Mr Sulemanovski was deserving of criticism and there are sufficient instances of unequivocal misconduct by Mr Sulemanovski leading ultimately to the decision to terminate him, that even though the termination was not for a valid reason, the history of misconduct means that Mr Sulemanovski must suffer a significant penalty and that is best achieved by not making an order under s.391(3).

[69] An order to give effect to this decision will be issued separately and such order will operate from 10 January 2011.

COMMISSIONER

Appearances:

Mr B Terzic, Australian Manufacturing Workers' Union, for the applicant

Mr J D'Abaco, of Counsel, for the respondent

Hearing details:

2010
Melbourne:
14, 21, 22 December

Decision Summary

TERMINATION OF EMPLOYMENT – misconduct – s394 Fair Work Act 2009 – applicant terminated for alleged misconduct – no valid reason for termination (even though there were some instances of misconduct) – reinstatement ordered but no order for remuneration lost.

Sulemanovski v Aperio Group (Australia) P/L t/as Aperio Finewrap

U2010/1432 [2010] FWA 9958
Ryan C Melbourne 30 December 2010
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