

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00240

CORAM : COMMISSIONER D J MATTHEWS

HEARD : MONDAY, 1 APRIL 2019, WEDNESDAY, 3 APRIL 2019

DELIVERED : THURSDAY, 23 MAY 2019

FILE NO. : U 119 OF 2018

BETWEEN : JESSICA AUFDEM KAMPE
Applicant

AND

THAKKAR FAMILY TRUST
Respondent

CatchWords : Unfair dismissal claim - Applicant given two weeks' notice of dismissal - Respondent dismissed applicant to save money - Found dismissal lawful but not fair in all the circumstances - Applicant not seeking reinstatement - Compensation awarded

Legislation : *Minimum Conditions of Employment Act 1993* sections 40 and section 41

Result : Application granted

Representation:

Counsel:

Applicant : Mr M Harriss (as agent)

Respondent : Mr M Thakkar

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by
Commissioner Matthews)

- 1 The applicant worked at the respondent's Subway franchise store in Aveley as a “sandwich artist”, commencing employment in February 2017. She was good at her job, so good in fact that she entered a Subway competition for “sandwich artistry” and won the West Australian leg of that competition and in fact the Australian leg of the competition qualifying her to compete in the world championships in Washington DC where unfortunately, she told us in evidence, she was unplaced.
- 2 The applicant’s employer, Mr Thakkar, gave evidence that she was a good employee and her performance is in no way in question in these proceedings. Nonetheless, in late August 2018 the applicant was given two weeks' notice by Mr Thakkar that her employment was to end and her employment ended on 9 September 2018.
- 3 The applicant prosecutes a case that she was dismissed by Mr Thakkar because she had disappointed Mr Thakkar in his plans to have her become the supervisor or manager of the store. The applicant says that once she made it clear that that was not a path which she wished to go down that Mr Thakkar decided that there was no future for her in the business at all and took steps to end her employment with the business.
- 4 The case prosecuted was that initially Mr Thakkar gave the applicant a new contract which would have made her a casual employee, allowing Mr Thakkar to reduce her hours, and that when the applicant refused to sign that contract Mr Thakkar simply decided to bring her employment to an end.
- 5 So the applicant prosecutes a case that the real reason why her employment was ended was that she would not agree to take on greater responsibility and, in that event, the respondent sacked her because he could get others to do the job she was willing to do for less money.
- 6 The applicant further prosecutes a case that the process by which the employment was ended did not have regard for certain sections of the *Minimum Conditions of Employment Act 1993*, in particular sections 40 and 41 of the *Minimum Conditions of Employment Act 1993*, which refer to major changes in the operation of a business and the need, where that is to occur, for an employer to bring those to the notice of an employee who is to be affected.
- 7 The respondent's case in turn is quite a simple one and probably does not differ much from that put by the applicant, although it emphasises different aspects.
- 8 Mr Thakkar says that he terminated the applicant to save money. I note that in the notice of termination, which was exhibit 6 in these proceedings, Mr Thakkar wrote to the applicant in these terms and I quote:

However, as per current business requirement, rising employment and food cost and financial affordability, we reviewed our business and staffing structure, your position is no longer needed. This decision is not a reflection on your performance.
- 9 So the letter of termination says that because of rising costs there was a restructure of the business and the position that the applicant held had been abolished or that her position - to use the language of the letter - was no longer needed. That, of course, is what led Mr Harriss on behalf of the applicant into the territory covered by section 40 *Minimum Conditions of Employment Act 1993* which talks about restructuring of the business and so on.

- 10 I do not think this was a genuine redundancy situation. I think what we got to at the hearing, and to his credit Mr Thakkar was quite open about this, was that he let the applicant go so he could maximise profit from the business. He explained that letting the applicant go, with him having more junior people make the sandwiches, and with him providing managerial or supervisory input, saved him about \$500 a week.
- 11 So the two cases are not so different. The applicant says she was sacked so that Mr Thakkar could get others to do her job for less money. Mr Thakkar does not really dispute that.
- 12 Unfortunately, despite repeated questioning from me and the opportunity to do so, the respondent was unable to put the money saved into some sort of context for me. By this I mean he was unable to explain to me exactly what kind of difference \$500 made to him and to the business he operated. I am certainly not able to conclude that it was the difference between being in business and going out of business.
- 13 So I am left with this situation. The respondent runs a small business and is entitled to maximise his profit in that business and may seek to maximise that profit with the reorganisation of staff. He may let staff go to achieve this.
- 14 But we also have the *Industrial Relations Act 1979* in this State which says that, whilst you may establish that you have lawfully dismissed someone, that is not the end of the inquiry for this body. This body must look into whether you have fairly dismissed someone.
- 15 In all likelihood the dismissal of the applicant was lawful in that she was given two weeks' notice and that is probably all that is required for it to be lawful. But the inquiry for this jurisdiction is a different one. Mr Thakkar had the right to dismiss the applicant but the question is whether he has exercised that right so harshly or oppressively or unfairly against the applicant as to amount to an abuse of that right.
- 16 I find that he did abuse that right for the following reasons.
- 17 The applicant had been a good employee for the respondent since he had taken over the business in December 2017.
- 18 Given that he took over the business in December of 2017, and the applicant had been employed in the business longer than that, throughout the entirety of his ownership of the business, the applicant had been a good employee for him, a good and faithful employee who had brought credit to the business and the respondent by the winning of competitions.
- 19 I accept what Mr Thakkar says, and I do not think he meant offence by it, that the work involved was not 'rocket science'. But doing it well is to the credit of the applicant and I think it is only proper that this body gives her that credit by finding that she was a very good employee over a long period of time.
- 20 Mr Thakkar, by August 2018, was entitled, however, to come to a decision that he wanted to let the applicant go because he wanted to maximise profit from the business and because dismissing the applicant may help with this. If the applicant would not move into a supervisory role the respondent was entitled to decide that he would provide the supervision and would find others who could do the applicant's work at a cheaper rate.
- 21 But the respondent had to handle that change fairly. In my view, he should have sat down with the applicant and said "look, I know I'm only paying you \$21.18 an hour, but I can get the work done for cheaper, and I wish to go down that path, and for that reason I'm going to end your employment." He should have had a discussion with the applicant about how to manage the

period of time over which this change might be effected and how there may be a soft landing for the applicant, especially in circumstances where Mr Thakkar knew that she was going to be pursuing work with a bank.

- 22 So, I am saying and finding, that Mr Thakkar was entitled to make the decision he did and was entitled to take the action that he did, but that he had to do it in a certain way and he had to do it in a way that was a lot fairer than the way in which he pursued it. He couldn't simply give the applicant, at the end of a shift, a letter which, on her evidence, she then read in the car, sacking her. The applicant deserved much better from her employer given her work performance.
- 23 It may have been a difficult situation for Mr Thakkar. I think sacking someone is an exquisitely difficult situation for a person. It is no fun. But it must be done properly. Mr Thakkar should have sat down with the applicant and explained the situation to her, being that he wished to save some money, and he should have discussed with her how that might be achieved with dignity and fairness for all concerned. Mr Thakkar should not have simply given the applicant a letter giving her two weeks' notice for her to read in the car at the end of a shift.
- 24 Now, on that basis, that is the way Mr Thakkar handled the applicant, and in all the circumstances, I find the dismissal was an unfair one. It was lawful, but it was still unfair and that is the key question for me.
- 25 We then turn to what does the applicant get by way of a remedy. She doesn't seek reinstatement. In fact, her life moved on very quickly, and for the better, in that she achieved work with the Commonwealth Bank on 22 October 2018 at a higher rate of pay in what I understand was a permanent, fulltime position in which she works 76 hours per fortnight.
- 26 That is better work than working as a sandwich artist at Subway, with respect to all concerned. And it is the kind of progression you would expect from someone of the applicant's obvious abilities.
- 27 And that is relevant to the overall situation and my finding that what Mr Thakkar did was lawful, just badly handled. You do not expect people of the applicant's abilities to go on working at Subway long-term. They work until they are the 21 or 22 years of age that the applicant achieved and then you expect that the owner of Subway might be bringing through younger people at cheaper rates.
- 28 So, I do not as a concept say that Mr Thakkar did the wrong thing, although I find that he did it in the wrong way. There was a period of six weeks where the applicant was out of work. The question for me is how long would it have taken Mr Thakkar to fairly bring the applicant's employment to an end? I think that if on the date when Mr Thakkar gave the applicant notice he had sat down with her and said, "you know this is what the future looks like as far as I'm concerned. This is what I want to achieve", and if he had given her four weeks work on top of the two weeks he gave her that would have been more than sufficient.
- 29 So, I'm going to give compensation for four weeks because the respondent has already paid for two weeks of notice. So, four weeks of pay. That is, I am saying that if Mr Thakkar had said on the date that he did, "your employment is going to end in six weeks", rather than two, I would have found that not only was the dismissal lawful, but it was also fair.
- 30 I am going to say that the applicant was working 34 hours a week on average. Now, I know that she only worked 10 hours in the last week of her employment and 30 hours the week before, but I think over the course of the period of her employment, Mr Thakkar said she worked between 30 and 37 hours. I am picking 34 hours. So, 34 times \$21.18 times four is the amount of

compensation that will be ordered, that is an amount of \$2,880.48 which I will round down to \$2,880.

- 31 The emotional upset of these kinds of things is also compensable in this jurisdiction. I did not hear a great deal from the applicant about the emotional impact it had on her, but I heard enough to award a nominal sum of \$500 for that. So we end up with a figure of \$3,380.
- 32 So, the order is that the respondent pay the applicant the sum of \$3,380 within 14 days.