

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00815

CORAM : COMMISSIONER D J MATTHEWS

HEARD : WEDNESDAY, 30 OCTOBER 2019

DELIVERED : THURSDAY, 14 NOVEMBER 2019

FILE NO. : B 26 OF 2019

BETWEEN : JASON ANDREW KOVAL
Applicant

AND

CHD PTY LTD
Respondent

CatchWords : Denied contractual benefits claim - Applicant summarily dismissed -
Applicant entitled to reasonable notice - Application granted in part

Legislation :

Result : Application granted in part

Representation:

Applicant : In person

Respondent : Ms C Debono (as agent)

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings)

- 1 Mr Jason Koval commenced employment with the respondent in the position of restaurant manager on 14 January 2019 and he was dismissed from that employment on 28 January 2019 in a phone call with the general manager of The Local Shack Mandurah, Mr Bradley Wright.
- 2 Mr Koval was dismissed without notice and was not allowed to work any notice or given any payment in lieu of notice. Exhibit 1 in these proceedings is a contract of employment which provides that he was on probation for a period of six months and at clause 4 it provides as follows:

Please note that a failure to meet the employer's standards may, depending on the circumstances, result in any of the following steps being taken:
- 3 It goes on to provide at subclause (c):

"Your employment being terminated with or without notice depending on the circumstances."
- 4 Ms Debono, who appears for The Local Shack Mandurah, says the circumstances were such that it was a fair thing and within the contract that Mr Koval be dismissed without notice. Ms Debono says that if that is not the case, then clause 14, which provides for notice periods, applies to Mr Koval and clause 14 contains a table which says that if someone is dismissed when they have less than one year's service, they are entitled to four weeks of notice.
- 5 Mr Koval says, by way of his case, that clause 14 applies to him and that the circumstances were not such that he could be terminated without notice, that he could only be terminated with notice and that clause 14 makes provision for the notice period.
- 6 The evidence is that Mr Koval was dismissed because of what happened at the restaurant on the morning of Sunday, 27 January 2019 and also because of a failure on his part, so far as the respondent was concerned, to complete a set of computer manuals or modules which has been referred to in these proceedings as "OP Central", which essentially sets out policies, procedures and practices for The Local Shack chain and that ensures consistency across The Local Shack entities.
- 7 There are, according to Mr Wright, 12 manuals. Mr Koval says that he completed some of them, although, because of a bug in the system, that may not have been obvious to Mr Wright when he has checked.
- 8 Mr Wright said it is not possible for there to have been a bug in the system which would disguise, or camouflage, or not make it plain to him that Mr Koval had completed modules or manuals when he had done so and he rejects that Mr Koval had completed modules or manuals when he had done so and he rejects Mr Koval asserting that he had completed some of the manuals.
- 9 In relation to the events on 27 January 2019, Mr Koval says that he only had three staff on, that it was not enough staff, that the staff that were there, that is the front of the house staff numbering three, became overwhelmed by the custom at the restaurant and that wait times blew out. He says that his plan of attack, given his assessment that he did not have enough staff, was for him to fulfil the role of barista whilst the other two staff took and ferried orders. He says that times may have blown out to half an hour, or more than half an hour, he was not aware of that being the case on the day because he was so busy, but times did blow out.

- 10 Mr Wright is the person who investigated with Mr Koval the problems on Sunday, 27 January 2019. I do not think it matters whether the phone call between the two was on the Sunday or the Monday, but there was a conversation about what happened on 27 January 2019 in which Mr Wright investigated that matter.
- 11 Mr Wright put it to Mr Koval that wait times had blown out. Mr Koval did not deny it and, at the end of the day, accepted when a third person said that the wait times were as much as 30 minutes that that may have been the case. Obviously, from the respondent's point of view, wait times blowing out to that extent is completely unacceptable and led to negative social media comment.
- 12 I find that Mr Koval did not complete all of the manuals that he was required to under the "OP Central" system.
- 13 Whether or not there was some bug in the system, and I doubt that there was, there is just no evidence that Mr Koval either completed those manuals or, as Mr Wright I think fairly says, brought to the attention of his employer that he was unable to complete the manuals or unable to establish to the employer's satisfaction that he was able to or that he had done the manuals because of a glitch in the system.
- 14 I find that there was a failure on Mr Koval's part to complete the "OP Central" manuals.
- 15 I also find that there were problems on Sunday, 27 January 2019 that ought not to have arisen and that Mr Koval, probably through a mixture of embarrassment and so on, was not upfront about those straight away. At the same time and to his credit, he did not fight his corner unreasonably and as soon as it became clear that someone else was keeping an eye on the exact time and nominated what it was, he accepted it. So there were problems, but I do not think Mr Koval was a dishonest person or anything like that in relation to how he dealt with that with his employer.
- 16 The next question is, having found that there was that failure to complete the "OP Central" manuals and that there were problems on the Sunday which ought not have occurred on the watch of Mr Koval as the restaurant manager on that day, or the shift leader on that day as Mr Wright called him, what was the appropriate response from the employer? The employer says those things alone were enough to effectively summarily dismiss Mr Koval.
- 17 A summary dismissal is, and as is set out at clause 14(3) of the contract of employment, in effect, allowed where there is "dishonesty, fraud, theft, neglect of duty, disclosure of confidential information or other serious misconduct".
- 18 The behaviour that an employer finds against an employee must be so serious that dismissal without notice is appropriate. I just do not think that Mr Koval's conduct fell into that category.
- 19 However, I do not think that Mr Koval's employment could possibly have survived the probation period, given that he had not completed what was in the "OP Central" system and that he had proven ineffective on the Sunday. I do not think he was going to continue, that is fair.
- 20 By the same token, I do not think that he had engaged in such "dishonesty, fraud, theft, neglect of duty, disclosure of confidential information or other serious misconduct" as at that date to warrant his summary dismissal. That is, a dismissal without a proper investigation or any investigation, dismissal without payment of any entitlements and dismissal without the payment of notice.

- 21 Does that mean that clause 14 applies? I do not think so.
- 22 Ms Debono very fairly said that if the employment being terminated without notice was not the right thing that clause 14 ought apply. I do not agree with that, as fair as it was on Ms Debono's part to say it.
- 23 In my view, a fair reading of the contract is that clause 14 kicks in once a person has become a permanent employee or an ongoing employee under the contract. That is, once they have survived their probation period.
- 24 I do not think it is sensible that someone who, for instance, had worked one day on probation and then the employer decided that the person was no good and that the employment ought not continue, which is something that might be done under a probationary period, would be entitled to four weeks of notice.
- 25 I think that is too long. I think that clause 14 is for persons who have survived their probation period.
- 26 I think during the probationary period I am entitled to imply, as the law does, that a person must be given reasonable notice when they are being dismissed where notice is required.
- 27 I find that notice was required, that is, the circumstances were not so bad that Mr Koval could be terminated without notice, but I do not think he gets four weeks' notice. I would imply into clause 4 a reasonable notice provision and for someone who had been employed for two weeks, I would have thought a reasonable period of notice would be one week.
- 28 My decision in this matter is that Mr Koval is entitled to one week by way of a notice period and he has told me, and I do not think there is any argument about it, that one week of salary for him is \$1,153.85.
- 29 I will make an order that the respondent, CHD Pty Ltd, pay to the applicant, Mr Jason Koval, the sum of \$1,153.85 forthwith.