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When Does a Demotion Amount to Dismissal?

NSW Trains v James [2022] FWCB 55

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Upon termination of employment, employees who have access to the unfair dismissal jurisdiction in Australia may bring such a claim if they consider their termination was "harsh, unjust or unreasonable". However, what about where an employee is demoted, but remains employed? Could this amount to dismissal such that the employee can bring an unfair dismissal claim even if their employment has not been terminated?

This scenario was recently considered by a five-member Full Bench of the Fair Work Commission, in the case of *NSW Trains v James* [2022] FWCFB 55.

Background

The case centred on an employee of NSW Trains, who was the subject of a disciplinary investigation. Following the conclusion of the investigation, NSW Trains determined to reduce the grade and pay of the employee. While the reduction in grade had no practical impact on the employee's day-to-day duties, it did result in a reduction of the employee's salary from AU$141,442 per annum to AU$127,569 per annum (equating to a 9.8% pay cut).

The power to reduce the employee's grade and pay derived from the NSW Trains Enterprise Agreement 2018 (EA) and the Transport Administration (Staff) Regulation 2012 (NSW) (Regulations), which applied to the employee in his employment with NSW Trains. The EA and Regulations conferred on NSW Trains a discretion to impose particular punishments in disciplinary proceedings, including a reduction in "position, rank or grade and pay".

In response, the employee brought an unfair dismissal claim, alleging that he had been dismissed as a result of the reduction in pay and grade, despite the fact that he continued to work for NSW Trains at the lower grade. NSW Trains filed a jurisdictional objection to the application, maintaining that the employee had not been dismissed, as the reduction in pay and grade was permitted by the EA and Regulations.

At first instance, the Fair Work Commission found that NSW Trains had dismissed the employee by reducing his pay, notwithstanding the fact that he remained employed and such action was permitted by the EA and Regulations. The single member of the Fair Work Commission found this to be the result on the basis that section 386(2)(c) of the Fair Work Act 2009 (Cth) (FW Act) indicates that a person has not been dismissed if:

(c) the person was demoted in employment but:

  (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

  (ii) he or she remains employed with the employer that effected the demotion

Given the employee's demotion resulted in a 9.8% pay cut, which the single member considered significant, the employee was considered to have been "dismissed" within the meaning of the unfair dismissal provisions of the FW Act (notwithstanding that the employee's employment relationship with NSW Trains was ongoing, and had not been terminated and replaced by a new employment relationship).

Decision of the Full Bench

The decision at first instance was appealed by NSW Trains to a five-member Full Bench of the Fair Work Commission.

In rejecting the single member's first instance decision, the Full Bench indicated that the words of section 386 did not justify the single member's implication that a significant pay reduction constitutes "dismissal" under the FW Act. Rather, the Full Bench concluded that the term "dismissed" is defined exclusively in section 386(1) of the FW Act, which states that an employee has been dismissed if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

The Full Bench stated that "… a person who has been demoted, but who remains employed by the employer, has only been 'dismissed' if the person's employment has been terminated on the employer's initiative within the meaning of s 386(1)(a) of the FW Act". Further, it said that section 386(2)(c) serves to clarify that section 386(1) does not apply in certain circumstances and does not give rise to a category of dismissal that is separate to section 386(1).

Accordingly, in this case, where the EA and the Regulations allowed the employer to demote an employee as an outcome of a disciplinary process, the demotion itself did not constitute a termination of employment for the purposes of the unfair dismissal provisions of the FW Act. The Full Bench acknowledged that the outcome of this decision meant the employee's unfair dismissal application would be dismissed.

However, the Full Bench noted that "the existence of a power to demote in contract or other governing instrument is not necessarily determinative in all cases". It stated that a critical question in each case will be whether the relevant instrument(s) provide that a demotion authorised by the instrument does not constitute termination of employment.

Implications for Employers

This case provides some clarity to employers on when a demotion or reduction in salary will constitute a "dismissal" for the purposes of the unfair dismissal provisions of the FW Act.

Following the Full Bench decision, it is apparent that where an employee is covered by an enterprise agreement or award that confers the right to demote the employee, or where this is otherwise authorised by the employee's employment contract or applicable legislation, the demotion will generally not amount to a dismissal for the purposes of the unfair dismissal jurisdiction. This will, however, require consideration of the terms of the specific instrument or employment contract to ascertain its effect in the particular case.

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