

Commission Finds Dismissal Harsh Despite “Racist” Comments at Toolbox Meeting

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Date: 10/02/2026

The recent Fair Work Commission decision of Peter Jones v Exclusive Contracting (WA) Pty Ltd [2026] FWC 253 (the Exclusive Contracting Decision) is a timely reminder of the need to afford employees procedural fairness before deciding whether to terminate an employee's employment.

In this article, Ben Motro (Partner) and Emily Setter (Senior Associate), outline the criteria the Commission must take into account when deciding whether a dismissal was unfair, before setting out the factual background to the Exclusive Contracting Decision, and key takeaways for employers.

1. What is “unfair dismissal”?

The *Fair Work Act 2009* (Cth) (the **Act**) contains protections for employees against “unfair dismissal”. Where an employee falls within the jurisdiction, the key question for the Commission is whether the dismissal was “harsh, unjust or unreasonable” within the meaning of section 387 of the Act.

When deciding whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- 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
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- 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
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- 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

- 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; and
- any other matters that the FWC considers relevant.

2. **Background to the Exclusive Contracting Decision**

Mr Jones was a Ceiling Fixer for Exclusive Contracting (WA) Pty Ltd (**Exclusive**). He was dismissed by Exclusive on the basis he had made inappropriate and racially offensive remarks about Chinese labour within the industry at a company toolbox meeting on 24 July 2025. There were more than 21 employees of Exclusive present at the meeting, including several Chinese employees.

Mr Jones accepted he made remarks that “in 10 years’ time, it will be a Chinese industry” and “employees were worried about our job security”. Based on the consistent evidence of his colleagues, the Commission also found that Mr Jones made comments which included that Chinese workers were “taking our jobs”, “taking over the industry” and “taking opportunities away from apprentices”.

Exclusive decided to terminate Mr Jones’ employment for serious misconduct, and made the decision to do so before notifying Mr Jones of the reason for dismissal. Consequently, Mr Jones was not given an opportunity to respond to the reason for dismissal.

3. **The Commission’s Reasoning**

The Commission found that there was a valid reason for terminating Mr Jones’ employment, however, the dismissal was harsh.

The Commission indicated it respected Exclusive’s strong stance regarding the consequences for Mr Jones for making the racist comments (namely, that his employment would be terminated), however, Mr Jones was entitled to procedural fairness.

The Commission made clear that the size of Exclusive’s business and the lack of human resources expertise in the business did not relieve the business of its obligation to provide Mr Jones with basic procedural fairness.

Mr Jones was awarded \$4,059.44 in compensation. Compensation was calculated on the amount of time the Commission estimated Mr Jones would have remained employed had he been afforded procedural fairness in effecting the dismissal. This was estimated to be three weeks. A reduction of one week was applied on the basis that Mr Jones contributed to Exclusive’s decision to dismiss him.

Key Takeaways

- A dismissal may still be unfair even if the Commission is satisfied that there was a valid reason for dismissal.
- Employees who are protected from unfair dismissal should be afforded procedural fairness, including being informed of the reason for dismissal, and being provided with an opportunity to respond prior to a decision being made on whether to terminate their employment.
- Employers should ensure they comply with obligations arising under the Act, as well as industrial instruments, contracts or policies which apply to an employee (e.g. disciplinary and investigation procedures) in undertaking any disciplinary process.

If you have any queries concerning the Exclusive Contracting Decision, please don't hesitate to contact a member of Piper Alderman's Employment Relations Team.