DECISION

Fair Work Act 2009
Section 394 - Application for unfair dismissal remedy

Mr Mark Andrawos
v
MyBudget Pty Ltd
(U2018/2379)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 31 JULY 2018

Application for an unfair dismissal remedy – dismissal on notice for serious misconduct and poor disciplinary record – pre-existing personal friendship with new client – failure to disclose and manage conflict of interest - breaches found – dismissal for valid reason – significant factors in mitigation – material failures in disciplinary process – fair go all round not provided – dismissal harsh despite valid reason and poor disciplinary record – reinstatement inappropriate – payment made in lieu of notice - compensation discounted – no compensation payable

[1] On 7 March 2018 Mr Mark Andrawos (Applicant) applied to the Fair Work Commission (Commission) under section 394 of the *Fair Work Act 2009* (FW Act) for an unfair dismissal remedy. He claims that dismissal by his former employer MyBudget Pty Ltd (MyBudget, the Respondent or the employer) on 14 February 2018 from his position as a Personal Budget Specialist was harsh, unjust or unreasonable. He says that the relationship with his former employer has broken down such that reinstatement is inappropriate. He seeks an order for compensation.

[2] MyBudget oppose the application. The employer says that Mr Andrawos was dismissed on conduct grounds which included serious misconduct. It says that he was paid two weeks in lieu of notice; that it has provided an Employment Separation Certificate and that it had no further obligations on termination. MyBudget goes further. It says that the application to the Commission is groundless and has no reasonable prospects of success. It foreshadows that it intends to make an application for costs against the Applicant.

[3] The application was subject to conciliation by a Commission-appointed conciliator on 5 April 2018. It did not resolve.

[4] I conducted directions hearings on the application on 26 April 2018, 15 June 2018, 22 June 2018 and 2 July 2018.

[5] I issued directions for the filing of written materials on 26 April 2018, with which the parties complied, albeit at the hearing further documents and audio recordings were produced.

[6] At the directions hearing on 2 July 2018 I explored with the parties whether any further Commission assisted conciliation (by a different member of the Commission) could help resolve the matter. Mr Andrawos indicated a willingness to explore that option. The employer, having prepared itself for hearing, declined. At the commencement of the hearing on 5 July 2018 I again raised the prospect, even at that late stage, of Commission assisted conciliation. Mr Andrawos indicated a willingness to do so. The employer again declined.

[7] On the afternoon of the second day of hearing (6 July 2018) I again raised the prospect of a conciliated resolution. The employer agreed to an adjournment to enable Mr Andrawos to speak to Commissioner Platt, who had made himself available to conciliate the matter. During the adjournment, the employer also spoke one-on-one to Commissioner Platt. I was subsequently advised that, despite these endeavours, the matter had not settled. The hearing resumed.

[8] The case before me was of substantial proportions. Its volume and complexity was, in part, a consequence of the breadth of matters relied upon by the employer as relevant to Mr Andrawos's dismissal, his disciplinary history, and the nature of the allegations of misconduct particularly those concerning dealings with a friend and subsequent client James McBryde-Martin.

[9] Adding to complexity was the fact that this matter concerned not only the duty of an employee working in the financial sector, but also the intersection between one's personal life and one's employment responsibilities.

[10] In total, the hearing occupied five days; 5, 6, 9, 11 and 13 July 2018.

[11] Prior to the hearing I dealt with three interlocutory matters.

[12] Firstly, on 26 April 2018 both Mr Andrawos and MyBudget sought permission to be represented by a legal practitioner. By decision dated 15 June 2018[1], and by consent, I granted permission under section 596 of the FW Act for each party to be so represented.

[13] As events transpired, Mr Andrawos's legal representative (Mr Hancock of McDonald Murholme Solicitors) ceased to act on 18 June 2018, two weeks prior to trial. Mr Andrawos was unable to secure alternate representation. He was self-represented at the hearing. The employer continued to be represented, with permission. However, given the change in the Applicant's circumstances, and the considerations of fairness to and between the parties referenced in section 596, I indicated and did, consistent with my statutory obligation as an independent decision-maker, take steps to satisfy myself that Mr Andrawos understood each stage of proceedings and the Commission's role and procedure, was able to advance his oral and documentary evidence and test the oral and documentary evidence of the employer. I asked more questions, and in some instances more probing questions, of employer witnesses than I might otherwise have done, whilst leaving the conduct of their respective cases to the parties.

[14] Secondly, on 7 June 2018 the employer filed an application for confidentiality orders concerning documents filed, the conduct of the hearing and the contents of any published decision. By decision dated 26 June 2018[2] I granted the employer's application in an amended form, largely by consent. I published a confidentiality order on 2 July 2018.[3] The publicly released version of that order included some redacted content, consistent with my decision.

The parties each received an unredacted copy of my order, which they were required to comply with, consistent with my decision.

[15] In making the confidentiality decision and order I indicated that I would keep its utility and terms under review. In this decision I make amendments to that order in light of the evidence, and issue a revised order.

[16] Thirdly, on 21 June 2018 the employer filed an application seeking an order for security for costs against the Applicant. In my decision of 26 June 2018 I dismissed the employer's security for costs application.[4]

The Evidence

[17] I conducted the hearing in open court, but consistent with my confidentiality order the name of some persons are redacted or abbreviated in the public record of proceedings, particularly those who are or were clients of MyBudget and whose financial circumstances needed to be referred to in evidence but who may be unaware of these proceedings. No confidentiality orders concern the identification of persons who gave evidence in the matter, and I refer to each of those persons in this decision and to their evidence, to the extent necessary.

[18] At the hearing, I made an order as to witnesses, in usual form. I refused a request by the employer that its Human Resources Manager Ms Dodson remain in court to hear and instruct on Mr Andrawos's evidence. Ms Dodson was a principal witness of the employer, with a statement of 221 paragraphs and a further 290 pages of attachments. Her narrative departed from that of Mr Andrawos' in some respects. She was integral to the employer's decision to dismiss. I considered it prejudicial to Mr Andrawos to permit Mr Dodson to be present during his evidence. I considered there to be little if any prejudice to the employer from her absence given that I had granted permission for the company to be legally represented, and their representative had time in advance to prepare for cross examination.

[19] Mr Andrawos gave evidence on his own behalf.

[20] The employer called nine witnesses. Six were its employees: Kerry Dodson (Manager, Human Resources), Steven Bailey (Senior Manager, Sales), Elizabeth Saunders (Payroll and Accounts Payable Officer), Kelsey Beyer (Client Relationship Officer), Nicola Martin (Sales Leader) and Claire Wilks (Corporate Training Coordinator). Three were members of the public: James McBryde-Martin (a former client), Donna McBryde (James's mother) and Sam Crawford (James's housemate).

[21] I also received substantial documentary evidence, including audio recordings and records of telephone text messages.

[22] Substantial disputes of fact arose on the evidence. Issues of credit are relevant. In this matter the demeanour of witnesses, the tone and manner of giving evidence, the consistency (or otherwise) between oral evidence and witness statements, the existence (or otherwise) of corroborating documentary or audio evidence, and the inherent plausibility of versions are all relevant to my findings of fact.

[23] Much of the witness evidence strayed from factual matters into hearsay, opinion, assumption and commentary. I place reduced levels of weight on such evidence except where corroborated by direct evidence, is uncontested or inherently believable. I am not bound by the rules of evidence but consider them to be a good and useful general guide. I adopt the approach of a full bench of this Commission which has said:

> "The Commission is obliged by statute to perform its functions in a manner that is fair and just pursuant to s. 577(a) of the Act. Although it is not bound by the rules of evidence and procedure, the Commission tends to follow the rules of evidence as a general guide to good procedure. However, that which is ultimately required is judicial fairness, and that which is fair in a given situation depends on the circumstances."[5]

[24] This is not a matter where, in all instances, I prefer the Applicant's evidence over others, or the evidence of others over the Applicant. The very different nature of the witnesses before me, and the breadth of evidence as a whole make such a broad-brush approach unfair.

[25] Mr Andrawos gave evidence with conviction. His evidence covered a broad spectrum, from his disciplinary record, to the personal friendship he formed with James McBryde-Martin, to his dealings with Donna McBryde, to his suspension, his disciplinary interview, his dismissal, and the effect which dismissal has had on him.

[26] Mr Andrawos was not a poor or unreliable witness but a degree of caution is needed before adopting his evidence as a whole. His memory of events, particularly dealings with James McBryde-Martin was very specific, and is broadly reliable. However, his evidence of prior events in the workplace was less convincing especially where inconsistent with documentation or audio, or the independent recall of others. At least in once instance (his budget allocation for James' birthday) his evidence was a re-construction which lacked credibility. His sense of injustice manifested an unwillingness to concede error on his part. Where he gave opinion evidence, he was prone to assumption about the employer's motives in order to present his conduct or intentions in the best possible light.

[27] In respect of the non-company witnesses:

- I have no hesitation in preferring the evidence of Mr Andrawos over the evidence of James McBryde-Martin, where there are inconsistencies. Mr Andrawos had a very specific and plausible recall of his dealings with James McBryde-Martin. His version is largely (but not exclusively) consistent with the audio and text messages in evidence. James McBryde-Martin's evidence was given without care, was evasive and selective, and should be treated with caution. His recollection of events (particularly 26 and 27 January 2018) must be treated with extreme caution, in part because of intoxication;

- I have no hesitation in preferring the evidence of Mr Andrawos over the evidence of Donna McBryde, although not much bears on that given they had only brief direct dealings. Her evidence was largely hearsay, presented argumentatively, and spiked with subjective opinion and commentary;

- Mr Crawford was a considered witness who gave his evidence carefully. However, on balance, I prefer Mr Andrawos's evidence where there are inconsistencies. Mr Crawford's long and continuing friendship with James McBryde-Martin and his

> dealings with Donna McBryde made him reluctant to vary from their narrative, even where I find it incomplete or wrong. To his credit he conceded some ground in cross-examination. He was honest to acknowledge that his recollection of events (particularly 26 and 27 January 2018) could be wrong, in part due to the effluxion of time.

[28] I found each of the company witnesses, on strictly factual matters, to be generally reliable where their evidence concerned workplace events; however (to greater or lesser degrees) their evidence also strayed into opinion or commentary, and they were keen to portray Mr Andrawos in a negative light.

[29] Ms Dodson and Mr Bailey were key witnesses called by the employer. They not only dealt with Mr Andrawos in the course of his employment, but were the primary participants and decision-makers in the disciplinary process that led to his termination.

[30] Ms Dodson's evidence was reliable, but defensively presented when questioned about her conduct of the investigation and assessments she made of Mr Andrawos during the disciplinary process. She recommended his termination, and was not keen to make concessions about the disciplinary process. Mr Bailey had more to do with Mr Andrawos in day-to-day operations, and had a less negative view of him as a whole. He ultimately made the decision to terminate. Having to explain and defend his decision to dismiss, he too tended to portray Mr Andrawos negatively in order to downplay some of the positive views and interactions he had with Mr Andrawos at earlier times.

[31] Ultimately, where I need to decide key factual matters, I do so based on the aforementioned considerations according to the relevant subject matter and all the evidence and material before me.

The Facts

Employment at MyBudget

[32] MyBudget is a private company providing money-management services to the public through the preparation of personal budgets and customised management of bill payments and debts. In South Australia it operates from the Adelaide CBD and the northern suburbs.

[33] MyBudget holds a credit licence under Australian law, allowing it to provide credit assistance and advice on credit products. It is not a financial services company and is not licensed to provide financial advice. Doing so would breach Australian law, put its credit licence at risk and expose it to action by regulators.

[34] Mr Andrawos worked at MyBudget for eighteen months from July 2016 until his dismissal in February 2018. At the time of dismissal he was a Personal Budget Specialist (PBS), a position held since May 2017. He commenced in the role of a Customer Services Representative and also worked briefly in its Home Loans Department.

[35] Mr Andrawos came to MyBudget with a near 20-year finance industry background. He had worked for major banks (CBA, BSA and NAB) and in the private sector. He has tertiary and technical qualifications in finance and mortgage broking.

[36] As a Personal Budget Specialist, at the date of dismissal he reported to a Team Leader, Nicola Martin. His manager was Stephen Bailey, Senior Manager – Sales.

[37] Mr Andrawos received induction and training on MyBudget policies and practices, including on the distinction between giving credit advice (permitted) and financial advice (not permitted).[6] His contract of employment as a Personal Budget Specialist expressly required him to "comply with the employer's internal policies and procedures".[7]

Employment Record

[38] Mr Andrawos was a productive and personable employee who regularly worked more than his rostered 38 hours per week, requiring the payment of overtime. Some disputes occurred with payroll administrators over whether his overtime had been authorised in advance by managers, leading to informal counselling for inappropriate conduct towards a payroll officer (Mrs Saunders) in August 2017.[8]

[39] Being hard-working and personable, he came to the attention of the Senior Manager Sales, Mr Bailey. Mr Bailey formed the view that Mr Andrawos had a skill in building personal rapport with clients and prospective clients.[9] Mr Andrawos brought customers into the business and fewer of his clients 'cooled off' within the two day cooling off period than other employee averages (although longer term conversion and retention rates of his clients were below average). This led Mr Bailey, on at least three occasions, to praise his work. On one occasion "he did an amazing job which warranted praise" which was broadcast within the company.[10] He also received commendations from a then Sales Coach and subsequently his Team Leader, Nicola Martin.[11]

[40] However, his personable nature saw Mr Andrawos, from time to time, ignore hierarchies and cut corners on company procedures and appropriate workplace conduct. Mr Bailey and other managers informally counselled him on these matters. More formal disciplinary processes followed.

[41] In total, his disciplinary record at the date of dismissal involved twelve incidents of counselling or warning over eighteen months[12]; some minor, some not. A written warning was issued on 2 March 2017 for lateness and for not following procedures (Code of Conduct breach). A second written warning was issued on 21 March 2017 for lateness and for inappropriate conduct to a trainer (Code of Conduct breach). A final written warning was issued on 27 September 2017 for inappropriate comments to a female client (Code of Conduct breach).

[42] Immediately prior to the issues which triggered the Code of Conduct investigation leading to his dismissal, Mr Andrawos was the subject of two further disciplinary processes.

[43] The first concerned punctuality. Allegations of lateness during January 2018 were put to him in a letter of 24 January 2018. A meeting was held on 25 January 2018 at which time he explained his lateness by reference to the internal log-on system (Pure Cloud) and to tram works in the Adelaide CBD. On one of the days (24 January) he says that the company was factually wrong because his starting times had altered with Ms Martin's agreement. On 29 January 2018 he received a warning letter advising that the company considered the allegations of lateness proven. No reference was made in that warning letter to his explanations. He had previously been warned and counselled about punctuality.[13] An

employer is entitled to take a strict approach to punctuality, and this employer seems to do so.[14] However, the evidence of Mr Andrawos about the reasons for his lateness in January 2018 was not implausible. The failure by the employer to address his explanations either in discussion with him or in the warning letter and inform him why they were (assumedly) rejected or considered insufficient casts doubt on whether he was late on every one of those days without good reason. It also casts doubt on whether a formal written warning was merited. I place reduced weight on the warning of 29 January 2018 when considering his disciplinary record.

[44] The second concerned inappropriate conduct towards another employee, Kelsey Beyer. Ms Beyer reported Mr Andrawos's conduct to her supervisor on 31 January and 2 February 2018. As at 5 February 2018 the allegations concerning Ms Beyer had not been put to Mr Andrawos. A draft letter of allegation was in preparation.

[45] The issues which triggered the allegations of serious misconduct leading to his dismissal concerned dealings Mr Andrawos had with James McBryde-Martin. They were first reported to the employer by Mrs Donna McBryde on 5 February 2018. These issues are central to the determination of this matter.

Dealings with James McBryde-Martin

[46] James McBryde-Martin (James or Mr McBryde-Martin) was (at the relevant times) a brash 22 year old. He lived with a long term friend of similar age, Sam Crawford (Sam or Mr Crawford).

[47] James and his brother lost their father at a young age. Monies were put aside until their adult life. James and his brother each inherited $142,000 in December 2017.

[48] James worked at a petrol station (OTR) in suburban Norwood (and also occasionally at an OTR outlet in the Adelaide CBD), often working evening shifts. Mr Andrawos was a regular at the Norwood outlet. Between September and December 2017 he struck a friendship with James. They chatted about all sorts late into the evening. Once Mr Andrawos saw James at a nearby bus stop and drove him home.

[49] The personal friendship between the two largely involved chats, albeit prolonged, at and around James's place of work. James thought nothing of it; he enjoyed the late night company. Mr Andrawos saw James as a young person needing guidance. He came to believe James was vulnerable to poor choices concerning drugs, women, booze and gambling. He saw himself as having mentoring skills, and a personality which could build rapport and trust. In the course of chatting over these months, Mr Andrawos told James that he worked in the finance industry, or words to that effect. He gave James his MyBudget business card which described him as a Personal Budget Specialist. James was impressed and noted that Mr Andrawos drove an expensive car. Occasionally they went to a local hotel together.

[50] James told Mr Andrawos in about November 2017 that he was going to receive a large inheritance. In December 2017 James told him that he had inherited about $140,000. In the course of casual conversation in December 2017 and early January 2018 James asked Mr Andrawos what he (Mr Andrawos) would do with the money if he was in his (James's) position. Mr Andrawos made a number of suggestions; primarily that he should invest in an investment property and make the capital work productively, spending only the income.

[51] By mid-January 2018 Mr Andrawos became concerned that James was using his inheritance unwisely, on personal purchases such as a car, a television and drugs, women, booze and gambling.

[52] Mr Andrawos's concerns materialised. In a month, James had given his mother $10,000 but had otherwise spent about $32,000 in a short time. By the end of January 2018 he had $90,000 of his inheritance left.

[53] In mid-January 2018 Mr Andrawos suggested to James that he sign up to MyBudget in order to control his spending. He (Mr Andrawos) offered to sign him up on a 'friends and family' discount. James orally agreed.

[54] Mr Andrawos spoke to Mr Bailey (his senior manager) and told him that he was bringing in a new client who he knew as a friend. Mr Bailey did not object (and had no grounds to do so). Mr Andrawos also told his Team Leader, Nicola Martin.[15]

[55] Mr Andrawos scheduled an appointment with James for 19 January 2018 to sign him up as a MyBudget client. He spoke to James by telephone from his workplace in his capacity as a MyBudget PBS around lunchtime. James sounded hung-over and had been gambling. After a discussion about what James had just spent and urging him to take a more responsible course, Mr Andrawos rescheduled the appointment for the next day.

[56] The client interview occurred on 20 January 2018. It was conducted in work time with Mr Andrawos at his place of work using company facilities. He was speaking in his capacity as a MyBudget PBS. Via questions and answers, Mr Andrawos signed him up and structured a draft budget. There were also two calls between Mr Andrawos and James either side of the interview that day in which Mr Andrawos prepared him for the discussion and followed up the interview seeking some further details.

[57] As with almost all calls with MyBudget clients, there are audio recordings of these calls across 19 and 20 January 2018, and they are in evidence.[16] However, contrary to required procedure, Mr Andrawos did not audio record the face-to-face interview.

[58] As at 20 January 2018 Mr McBryde-Martin became a MyBudget client. Nonetheless, Mr Andrawos continued to speak to James as a friend and continued to meet him at the Norwood and CBD OTR outlets beyond that date.

[59] Having been signed up as a MyBudget client, the next step in dealing with Mr McBryde-Martin was contact from a Client Relationship Officer (Ms Beyer). On 25 January 2018 Ms Beyer commenced dealing with her new client. She held a lengthy telephone interview with James. In that call James complained that the amount she proposed to set aside for his weekly spending was too little. She was surprised to be told by James that he had $105,000 in the bank. James told her that he was "lazy" to pay off his debts, and that he wanted to renegotiate the level of those debts with his creditors. She told him that while MyBudget can pay debts from funds he deposited (and suggested that he deposit funds for that purpose), renegotiating the level of debt with creditors needed to be done by him, not MyBudget. James agreed to do that. She told him in general terms that "you obviously wanna be wise with those ($105,000) funds" and that whilst it was "pretty tempting to spend quite a bit of money", spending the lump sum "will limit your borrowing power as well". She told

him that his stated goal of purchasing an investment property would be "impeded" due to credit limits and credit rules if these debts remained.[17] She identified what she considered process errors in the way Mr Andrawos set up the file with James, and reported that to her supervisor.[18]

[60] Friday 26 January 2018 was the Australia Day public holiday. Neither James nor Mr Andrawos were at work. During the afternoon, James telephoned Mr Andrawos. Mr Andrawos considered that James was drunk and had been drinking with Sam Crawford. James said that he wanted to take Mr Andrawos to the casino and "shout him" for the night in return for what he had done for him. Mr Andrawos declined and also said that it wasn't wise for him (James) to go to the casino.

[61] James persisted. He made multiple calls to Mr Andrawos. At about 8pm James again telephoned Mr Andrawos. He (James) told him that he was on his way in a taxi to his (Mr Andrawos's) house to pick him up to go to the casino. Mr Andrawos identified that James was even more heavily drunk as he was becoming abusive. Mr Andrawos told him (James) that he would go out to dinner with him but not the casino. James, along with Sam Crawford, arrived shortly after to collect Mr Andrawos. Mr Andrawos got into the taxi. His evidence, which I accept, was:[19]

> "It was obvious to me that Mr McBryde was going to get himself into trouble if he continued to behave in this way, and so for this reason alone I decided to go with him on the proviso that we would have dinner first, which would allow Mr McBryde to sober up."

[62] During the trip, James was clearly drunk and racially abused the taxi driver, for which Mr Andrawos apologised. In the city the taxi stopped on North Terrace. There is a factual dispute over what happened next. I accept Mr Andrawos's evidence. Mr Andrawos intended the group to first eat at Parlamento restaurant (across the road from the casino). James refused. He got out of the car, walked to the rear passenger door where Mr Andrawos was seated, opened the door, grabbed Mr Andrawos by the shirt and said words to the effect that he (Mr Andrawos) was coming into the casino with them.

[63] Mr Andrawos reluctantly agreed, but not after giving James a verbal dressing-down and warning on the footpath about his behaviour.

[64] At the casino, over a couple of hours, the three ate, drank and gambled. Mr Andrawos tried to watch over James but also gambled a small amount of his own money, in low dollar values. James gambled larger sums. Mr Andrawos was unable to control James or keep him in continuous line of sight. James became extremely drunk, abusive and uncontrollable. Mr Andrawos told James that he needed to slow down his drinking and gambling and control his behaviour. At one point, James had on him about $400 cash. Mr Andrawos suggested that he (Mr Andrawos) hold $250 of that cash so James had money left over by night's end. James agreed. A further $100 from that sum was given by Mr Andrawos to James during the evening. Mr Andrawos retained $150 in fifty dollar notes for safe keeping. After a further period, they lost contact. Mr Andrawos went home about 1am (with the $150). At about 4am Mr Andrawos received a text from Sam Crawford[20]. Sam said he could not find James. Mr Andrawos said, by text, that he was "disgusted" and "embarrassed" with James's behaviour and having to apologise to people for James's offensiveness. Sam thanked Mr Andrawos in these terms: "sorry to have to have this conversation but anyway it was good to meet you,

take care of yourself, you seem like a good bloke"[21]. As it turned out, James had been ejected from the casino for unruly behaviour and had ended up on the party scene in the Hindley Street night strip.

[65] Mr Andrawos tried to text James during the following 48 hours but received no response. A response came by text from James late on Sunday 28 January. James apologised for his behaviour and non-responsiveness, saying that he had lost his phone in either the mayhem of the casino or Hindley Street.

[66] Mr Andrawos met James at the CBD OTR outlet on Wednesday 31 January. He (Mr Andrawos) returned the $150 cash he had held for James. James told Mr Andrawos that he had by then spent about $50,000 of his inheritance, leaving a balance of about $90,000.

[67] Mr Andrawos considered that James's reckless spending had to stop. Consistent with advice he had given James on 19 and 20 January 2018, he (Mr Andrawos) told James that he should immediately transfer the $90,000 into a MyBudget account and that the account should have a co-signatory so that James could not alone access or spend the remaining money. Mr Andrawos said that he would be prepared to be the co-signatory. James agreed in-principle.

Complaint by Donna McBryde

[68] Over the weekend of 3 and 4 February, Donna McBryde (James's mother) found on James's phone some texts from a "Mark" requesting James deposit $90,000 into a MyBudget account. She questioned James and Sam Crawford about what was going on. Sam told her that a "Mark" had taken some cash from James at the casino. James had, some weeks earlier, told his mother in general terms that he was friends with a finance person who was a customer at OTR. He hadn't expressed concern to her, nor had she to him.

[69] Mrs McBryde gave evidence that on 3 or 4 February 2018 James told her that he (James) had concerns about Mr Andrawos's intentions. I treat that evidence with extreme caution. It is more probable than not to be an ex post facto reconstruction by Mrs McBryde aimed to damage Mr Andrawos, which Mr McBryde-Martin went along with in the witness box. Even if not, and James had so told his mother, James was likely covering for the fact that he had agreed in-principle to transfer the $90,000 into a MyBudget account.

[70] I find that at no stage prior to his dismissal did James tell Mr Andrawos that he mistrusted him or that he did, in fact, mistrust him. It is not a finding consistent with the texts and conversations between James and Mr Andrawos over that period.

[71] I also find that the relationship was not at any time predatory in a financial sense. The assertions made by Donna McBryde to that effect are without foundation.

[72] On the evening of Sunday 4 February 2018 Mrs McBryde telephoned Mr Andrawos. She was rude and aggressively abusive to Mr Andrawos. On account of the abuse Mr Andrawos hung up, and called her back a short time later hoping she had settled and intending to explain himself. She had not settled. She told him to "fuck off", called him a "foul human being", "vile", "scamming shit", accused him of "stealing" her late husband's money and James's inheritance, claimed that she would go to the police and to MyBudget, and threatened to go to the media whilst at the same time asserting that "the media is already interested". She demanded he leave James alone. Mr Andrawos interpreted her threats as blackmail. A series

of lengthy text messages were exchanged between them late into the night.[22] These are informative, as they reveal a concerned but accusatory and threatening mother who was not interested in hearing from Mr Andrawos. Mr Andrawos's responses were initially firm and professional (offering to sit with her and explain if she was "ready to get the truth"), but eventually he accused her of "vile and slanderous" accusations against him. He affirmed his support and belief in James irrespective of the views she held.

[73] On the morning of 5 February 2018 Mr Andrawos was rostered to commence at 11am. I accept his evidence that he arrived at work early wanting to meet Mr Bailey and explain the extraordinary turn of events with Mrs McBryde the preceding night.

[74] As it turned out, Mrs McBryde spoke to MyBudget before Mr Andrawos.

[75] MyBudget staff had three phone discussions with Mrs McBryde. Two were on the morning of 5 February 2018; one at about 8.05am with a receptionist Ms Sky (made by Mrs McBryde), and one at 9.13am made by a manager Ms Pulbrook (the third was made by another officer Ms Cullinan two days later). Mr Andrawos called for the audio of these calls to be produced at the hearing. They were produced and admitted into evidence.[23]

[76] Mrs McBryde told Ms Sky and then Ms Pulbrook that an employee by the name of "Mark" was asking her son to hand over his $90,000 inheritance to MyBudget, that "Mark" was at the casino gambling with her son, and that witnesses had seen "Mark" take her son's cash. She accused him of being predatory, scamming and acting unethically. She said that she had spoken to the police, had spoken to a solicitor and was going to consumer affairs. She said nothing about her son having received a larger inheritance or having spent more than $40,000 of that in a month. She said she expected MyBudget "to have rules against all of this and do something about it". Ms Pulbrook took notes and assured Mrs McBryde the complaint would be investigated. On 5 and 6 February Mrs McBryde sent a few select screen shots she had taken of text messages from her son's phone.

[77] During the call on 7 February 2018 Ms Cullinan asked Mrs McBryde to source and send further text messages between James and Mr Andrawos. None further were sent.

Suspension and Investigation

[78] Ms Pulbrook immediately reported the complaint to MyBudget's Human Resources Manager, Ms Dodson. Both were concerned and considered that an investigation was needed. Ms Pulbrook typed her notes into an email for Ms Dodson.[24] Ms Dodson believed that Mr Andrawos needed to be suspended with pay pending an investigation. She sought out Mr Bailey to seek his agreement. She extracted Mr Bailey from a meeting, and Mr Bailey, alarmed at the report, agreed. Ms Dodson prepared a suspension letter.

[79] Shortly after his scheduled time for starting work, Ms Dodson took Mr Andrawos aside. She gave him the suspension letter. Mr Andrawos said he had information that could explain what was occurring including Mrs McBryde's threats to him the previous evening. Ms Dodson told Mr Andrawos that she did not want to hear from him then and there; that a formal investigation was to be held and that he would see the allegations before being asked to respond. Mr Andrawos was required to leave the workplace immediately. He was escorted through his place of work, past fellow employees and out of the building.

[80] Mr Andrawos, concerned that he had been suspended just on the say-so of Mrs McBryde, tried to speak to Mr Bailey. However, Mr Bailey, on Ms Dodson's advice, had made himself incommunicado until the formal investigation. All calls from Mr Andrawos to Mr Bailey were blocked.

[81] Mr Andrawos, feeling helpless and let down by his employer, emailed Mr Bailey on 6 February to describe how he was feeling:

> "I was humiliated yesterday being escorted up to my floor and out of the building…when I tried to tell Kerry yesterday she shut me down…I was not even allowed to express my thoughts, my fears, my feelings."[25]

[82] Mr Andrawos received no reply from Mr Bailey. Later that day he emailed Ms Dodson expressing concern at the investigation and her failure to hear his version at that early stage. His plea was rejected in a polite but terse reply email from Ms Dodson.[26]

[83] On Tuesday 7 February 2018 Mr Andrawos received a letter of five allegations summonsing him to a meeting 24 hours later.[27] Two of the allegations concerned James McBryde-Martin (allegations 4 and 5). These alleged serious Code of Conduct breaches. Three concerned other matters (allegation 1 re failure to update client details; allegation 2 re being ten minutes late for work on 2 February; allegation 3 re conduct towards Kelsey Beyer).

[84] After seeking and being granted an extension of time to prepare, the meeting was held on 12 February 2018. Prior to the meeting, Mr Andrawos asked Ms Dodson for witness statements the company was relying on. Ms Dodson declined the request. She also decided not to send Mr Andrawos the screen shots received from Mrs McBryde or the transcripts of the conversations between Mr Andrawos and James on 19 and 20 January which Ms Dodson had by then accessed, listened to and had a staff member transcribe.

[85] Mr Andrawos attended the investigation interview with a support person, Mr Werring. The employer attendees were Ms Dodson and Mr Bailey. A record of the meeting was prepared by the company. It was subsequently signed by Ms Dodson as accurate. It was sent to Mr Andrawos for signing, but he did not do so.

[86] At the meeting, each allegation was put to Mr Andrawos separately. He responded. There was little discussion of or questions asked in relation to his responses. He agreed certain conduct but sought to explain his conduct and intent. He did not agree that he had breached the Code of Conduct. He tabled a written reply[28] which had been prepared in draft by himself and a member of his family, which was still self-evidently in draft.

[87] After the meeting, the company recorded its summary of his written responses in the meeting record.[29]

[88] As the meeting broke up, Mr Andrawos briefly spoke one-on-one more informally with Mr Bailey. He again stated his case to the effect that he had brought James into the business as a client, that Mr Bailey knew he was doing so, and that he had acted in the company's best interests against an unreliable Donna McBryde who he believed had twisted the facts to suit herself and remove blame from her son. Mr Bailey was non-committal.

[89] After Mr Andrawos left the room, Ms Dodson and Mr Bailey spoke briefly. Mr Bailey said he was very disturbed that Mr Andrawos had shown no remorse and had not acknowledged wrongdoing. They agreed to consider the matter further but each felt termination was the likely outcome.

The Dismissal

[90] Ms Dodson believed that the misconduct concerning Mr McBryde-Martin (allegations 4 and 5) had been proven, that it was serious and that termination was warranted. She also considered the allegation of misconduct against Kelsey Beyer proven (allegation 3) and relevant to the decision to dismiss. She used a Termination Decision Summary tool to come to her overall conclusion.[30]

[91] Mr Bailey also considered that dismissal was warranted, because of the seriousness of the breach and the lack of remorse. He believed he could no longer trust Mr Andrawos. He spoke briefly to a company director (Dave) and secured the all-clear to dismiss. Mr Bailey made the decision to dismiss on the recommendation of Ms Dodson. Both also considered his poor disciplinary history. Relevantly, both decision-makers also formed the view that Mr Andrawos was likely or "probable" (in the words of the termination tool) to "relatively easily" (in the words of Ms Dodson[31]) and "very easily" (in the words of Mr Bailey[32]) secure alternative work in the finance industry. This was a considered element in their decision to dismiss which Ms Dodson described "as a factor weighing against a decision to dismiss being harsh on Mark's personal circumstances".[33] I return to this later in my decision.

[92] Ms Dodson prepared the letter of termination, dated 14 February 2018. Although she and Mr Bailey considered they had grounds to instantly dismiss, they decided to pay Mr Andrawos two week's wages in lieu of notice. He was dismissed effective 5.00pm 14 February 2018, and paid wages until that time (plus his statutory entitlements and two weeks in lieu). Already under suspension, he never returned to the workplace.

[93] Mr Andrawos sought but was not provided a reference by MyBudget. He was provided an Employment Separation Certificate, but only a month later after asking, in order to secure Centrelink payments. That Certificate indicates he was dismissed for misconduct.[34]

[94] He commenced proceedings in the Commission on 7 March 2018, after consulting a solicitor.

Impact of Dismissal

[95] The dismissal has had a profound impact on Mr Andrawos. It has impacted him financially, professionally and personally.

[96] Mr Andrawos has actively sought employment since his dismissal. He has applied for jobs, initially in the finance industry but after being unsuccessful, he has applied for work outside his professional skills including manual work.

[97] He has not secured work since his dismissal, in part because of what he considers a lack of a reference from MyBudget, in part because of perceived damage to his professional reputation and in part because of the time he has committed to pursuing his claim especially

once his solicitor ceased to act. Due to financial constraints, he has ceased living at his house in Norwood, and moved into share accommodation with a friend.

[98] At a professional level, Mr Andrawos fears that his reputation has been damaged by a dismissal for misconduct.

[99] At a personal level, Mr Andrawos considers himself to be a strong individual but it is clear from his evidence and advocacy that these events and these proceedings have taken a toll. He says his self-confidence has been shaken and his confidence in others including MyBudget and persons he worked with adversely affected.

Consideration

[100] No jurisdictional issues arise for consideration. I am satisfied that Mr Andrawos was a person protected from unfair dismissal within the meaning of section 382 of the FW Act. He served the statutorily required minimum employment period (section 382(2)(a)). His annual rate of earnings did not exceed the high income threshold (section 382(2)(b)(iii)). His employer was a "national system employer" within the meaning of section 14 of the FW Act. His application was filed within the statutorily required 21 days after dismissal.

[101] I now consider whether Mr Andrawos's dismissal was unfair (in the sense of being "harsh, unjust or unreasonable") having regard to the considerations in section 387 of the FW Act.

[102] In doing so, I take into account all of the evidence and submissions before me. Given the breadth of issues raised, in this decision I have dealt with those matters of evidence that are the most material to arriving at a decision in this matter. Some evidence is not referenced, not because I have not considered it, but because it is less relevant to the findings and conclusions I need to make. Similarly, I have dealt with each primary submission but not every angle of each submission, not because they have not been considered but because doing so would add excessive length to these reasons.

Valid Reason (section 387(a))

[103] Somewhat unusually, the termination letter[35] provided by MyBudget to Mr Andrawos did not state a reason for dismissal. Rather, it notified him that three of the five allegations investigated were "substantiated and relevant to our decision to terminate". These were allegation 3 (dealing with staff member Kelsey Beyer "in an inappropriate manner"); allegation 4 ("serious misconduct" in dealings with James McBryde-Martin causing or having the potential to cause reputational damage to MyBudget) and allegation 5 ("serious misconduct" in mismanaging a conflict of interest in dealings with James McBryde-Martin).

[104] Each of these three allegations was expressed as constituting a breach of the MyBudget Code of Conduct.[36]

[105] It is a clear inference from the above, and the evidence given at the hearing by Ms Dodson and Mr Bailey that Mr Andrawos was dismissed on notice for conduct in breach of the MyBudget Code of Conduct as set out in allegations 3, 4 and 5 of the termination letter.

[106] It is to be noted that the termination letter also advised that allegation 1 (failure to update client details) was not substantiated, "therefore no action will be taken". It is further noted that allegation 2 (punctuality on 2 February 2018) was "substantiated however no action will apply as employment is being terminated as a result of another allegation finding".

[107] In these circumstances, the employer did not rely either at the time of dismissal or at the hearing on allegations 1 or 2 to advance its case. However, Mr Andrawos's disciplinary history (which included counselling and warnings including for punctuality as recent as 29 January 2018) was taken into account in arriving at the decision to dismiss, and relied on at the hearing.

[108] For the sake of completeness, and given that I am not simply reviewing the employer's decision but making my own assessment of conduct, I deal with allegation 2. It claims that Mr Andrawos was late for work by ten minutes on 2 February 2018 (9.10am not 9.00am). The evidence before me is that the employer's assessment of lateness was, in part, based on phone log-on times. Mr Andrawos claimed that this was one of those occasions where he was not late but had simply forgotten to log-on to Pure Cloud when starting up for the day. Ms Dodson acknowledged that this was possible. In those circumstances, I am not satisfied, on the balance of probabilities, that Mr Andrawos was late for work on 2 February 2018.

Beyer Incident (Allegation 3)

[109] The Beyer incident, which occurred on about 24 January 2018, was found by the employer to be "inappropriate" conduct.

[110] Mr Andrawos and Ms Beyer worked in close proximity and had regular interaction on a day-to-day basis. It was alleged that Mr Andrawos, in a phone call (and after being repeatedly asked on earlier occasions by Ms Beyer to upload an electronic data base with an updated client budget in order to enable her to prepare for a client interview) said words to the effect "I don't have time for this, I am over this Kelsey, I'm done" and hung up on Ms Beyer.

[111] Mr Andrawos's explanation, and his evidence, was three-fold. He said that Client L and Client M caused delay in enabling the data base to be updated by changing their view on a bankruptcy option. He said that he was being hounded by Ms Beyer, was very busy and for that reason asked Ms Beyer to update the record herself. He also said that he did not hang up on her; rather he considered the call to be finished.

[112] I prefer the evidence of Ms Beyer[37], which is consistent with information she provided the employer prior to the dismissal.[38] In days prior, she had repeatedly asked Mr Andrawos to update the electronic record. She was putting off dealing with an urgent client issue as a consequence, and felt awkward when speaking to the client without full information. I do not consider that Ms Beyer "hounded" Mr Andrawos in the preceding week; her frequency of request was a product of the client placing pressure on Ms Beyer to deal with an urgent issue (motor vehicle repossession).

[113] I accept that Mr Andrawos was terse to Ms Beyer in their phone call. He was annoyed that Ms Beyer had escalated their disagreement over who should update the record by copying others into their email exchanges. He ended the call on his terms after he decided it had gone on long enough and didn't want to continue the disagreement. In that sense he hung up, but not rudely so.

[114] Mr Andrawos was wrong to show indifference to Ms Beyer's request. It was not however a serious infraction. The phone call was a disagreement between two employees of broadly similar standing over allocation of responsibilities; something not uncommon in the course of business. He was terse but not rude or abusive.

[115] Relevantly, the answer to their disagreement was not clear-cut. Allegation 1 concerned that question. The employer concluded that the alleged breach of duty by Mr Andrawos (not updating the data base) was not substantiated. Ms Dodson's evidence was that "it was unclear as to whose responsibility it should have been, however I determined that Mark probably should have updated the budget when he was asked by Kelsey. As the responsibilities were unclear, I considered this allegation was not substantiated on the balance of probabilities."[39]

[116] In that context, the disagreement between the two staff was understandable, though handled poorly by Mr Andrawos. In the ordinary course, it would have warranted intervention by a manager via a clarification of procedure and informal counselling. In and of itself, it was not a valid reason for dismissal.

[117] This was however, no ordinary situation. Mr Andrawos had a poor disciplinary record where a similar accumulation of relatively minor breaches was, in combination, becoming an unhealthy rap sheet. In those circumstances, the incident with Ms Beyer concerning Client L and Client M was capable of forming part of a valid reason to terminate in the sense of being an infraction that did occur, which occurred only weeks prior to termination, and which evidenced a behaviour that had previously been the subject of counselling and warning.

McBryde-Martin Issues (Allegations 4 and 5)

[118] I now consider what I describe as the McBryde-Martin issues. These were considered by the employer to be "serious misconduct". Whilst I am required to consider whether the conduct in part or as a whole constituted a valid reason for dismissal, it is appropriate to first deal with each specific element of alleged misconduct. In so doing, I am not reviewing the reasonableness of the employer's findings. I make my own findings on the basis of the evidence before me.

Giving non-permitted advice

[119] The employer claims that Mr Andrawos provided non-permitted advice to James about financial products and that MyBudget did not hold a licence to provide such advice. In particular, it was alleged that Mr Andrawos advised James to restructure his telephone contracts and consolidate into a specific provider (Kogan). It was also alleged that Mr Andrawos advised James to take out comprehensive car insurance on his recently purchased motor vehicle. It was further alleged that Mr Andrawos advised James to purchase an investment property. It was said by the employer that each of these advices breached his duty as an employee, including procedures in which he had been trained and which applied under the Code of Conduct.

[120] The evidence before me establishes that Mr Andrawos gave James this unsolicited advice on a variety of occasions prior to 20 January 2018 in his personal capacity as a friend, and in their conversations on 19 and 20 January 2018 whilst signing James up as a client.

[121] Was it non-permitted advice?

[122] Company procedures, and in particular the "PBS Appointment Quality Assurance Marking Guide"[40] make it clear that an employee is not permitted to provide financial advice about financial products, or to recommend a particular product. Examples of permitted and non-permitted advice are given. The guiding rule expressed is that the provision of "general and purely factual information" is permitted if the client has been informed (by way of disclaimer) that it is general advice only "not intended to imply any recommendation or opinion about a financial product".[41]

[123] In providing advice to James on 20 January 2018 to restructure his phone accounts and to do so with Kogan, Mr Andrawos gave non-permitted advice. I take into account Mr Andrawos's evidence, which I accept, that this was an extension of earlier personal conversations between the two about phone contracts well prior to James becoming a MyBudget client, in which Mr Andrawos had told James that he used Kogan and had recommended the deal they had on offer.[42] Nonetheless, for reasons I outline later in this decision, on 20 January 2018 Mr Andrawos was no longer acting in a personal capacity. When dealing with James in his capacity as a MyBudget PBS, Mr Andrawos had a duty to comply with the "PBS Appointment Quality Assurance Marking Guide". On that day, he failed to do so with respect to his advice about the phone account.

[124] I am less convinced that his comments about car insurance whilst framing a draft budget constituted financial advice. Mr Andrawos told James "you have to get it insured man so I'm going to add an insurance premium in" and "you need to get insurance, you can get full comprehensive which is where the accident is your fault then your car is covered as well as the other persons or you could get just third party property cover fire and theft which means only the other party's property is covered not yours…"[43]

[125] A fair reading of this evidence as a whole leads to the conclusion that this was general information about client options and not non-permitted advice. However, there was a breach of policy, albeit less serious. Mr Andrawos failed to issue a disclaimer.

[126] On 19 and 20 January 2018, Mr Andrawos advised James that he should purchase an investment property. I accept Mr Andrawos's evidence that this discussion in the workplace on 19 and 20 January 2018 was an extension of earlier personal discussions in which Mr Andrawos had suggested to James (in response to James's initial inquiry) that a wise use of his funds would be an investment property purchase.[44]

[127] The "PBS Appointment Quality Assurance Marking Guide" provides that "we are able to give some general advice on financial products, including general factual information."[45] Unlike my conclusion regarding the car insurance, Mr Andrawos did more than communicate factual information of a general nature. Although his advice was preliminary in nature, it was sufficiently specific about what to do to constitute non-permitted financial advice. It was also given without a disclaimer.

[128] I note that a few days later Ms Beyer spoke to James on the same topic.[46] However, Ms Beyer did not advise James to purchase a property; that goal was already in the draft budget Mr Andrawos had prepared. Ms Beyer simply drew to James's attention the more factual proposition that failing to pay his debts would impede his borrowing capacity to purchase a property; a point Mr Andrawos had also made to James.

[129] Aside from contesting that these advices were non-permitted, Mr Andrawos said that he was acting to help James reign in his expenses (by consolidating the phone contract), protect his asset and minimise his risk (by insuring the car) and grow his wealth (by purchasing an investment property).

[130] This submission is a subset of the broader 'honourable and honest intent' and 'James was a friend' propositions put to me by Mr Andrawos. I deal with these later in this decision.

[131] Suffice for present purposes to note that Mr Andrawos was not, on 20 January 2018 speaking to James purely as a friend. He was signing him up as a client and was doing so with his MyBudget hat on and from his workplace. Nor can it be said that Mr Andrawos was not trained in the PBS Appointment Quality Assurance Marking Guide. The evidence before me is that he was. Indeed, the evidence of Ms Wilks, which I accept, was that training modules extensively dealt with the often difficult and fine line between general advice, credit advice and financial advice.[47]

[132] I am satisfied that the provision of non-permitted advice by any Personal Budget Specialist is a serious matter for this business, and which it is required to take seriously. If the employer did not have systems in place to train, detect and act on such non-permitted advice its credit licence would be at risk.

[133] That is not to say that all instances of non-permitted advice are serious misconduct or warrant dismissal. Context and circumstance matter. The fact that Ms Beyer herself told James on 25 January 2018 to "be obviously wise" with the lump sum and not simply spend it illustrates the difficulty inherent in dealing with clients who are indifferent to responsible money management.

[134] I am satisfied that giving advice in his capacity as a MyBudget PBS to recommend that James purchase a Kogan mobile product and purchase an investment property, whatever his intent, was a breach of Mr Andrawos's duty. He was trained not to do so, and ought to have known better. The level of seriousness is however diminished by the fact that these advices were no more than a repeat of earlier advice Mr Andrawos had given to James in his personal capacity as a friend, and that the investment property advice was directional and not recommending a particular purchase. The failure to issue a disclaimer when giving general advice about insuring the motor vehicle purchase was also a breach.

[135] In isolation, these breaches being at the lower end of the scale were neither individually nor collectively a valid reason for dismissal. They warranted retraining, counselling or warning but not dismissal. However, in the context of each being one element of other breaches, they were capable of forming part of a valid reason to terminate.

Speaking unprofessionally

[136] MyBudget alleged that Mr Andrawos spoke unprofessionally to James in their recorded conversations on 19 and 20 January 2018. For the sake of analysis, I characterise the unprofessional language in three categories: firstly, unprofessional and excessively familiar greetings: for example, calling James "dude" "bro" and "brother"; secondly, crude language and swearing: for example, you're the "only person I've done the fuckn' friends and family discount for", "piss all fees", "do I need to fucking come and take that money myself off you,

and hold it?" and "I don't want to see you fucking piss it up the wall"; and thirdly, references to drugs.

[137] The employer points to the fact that employees are trained to converse with clients and prospective clients in a professional manner befitting a business managing money matters. It was said by the employer that this breached his duty as an employee, including under the Code of Conduct.

[138] In relation to category one and two, Mr Andrawos accepts that he spoke in these terms. It is clear from the audio recordings that he did. However, he says that context matters. He says that James was young, brash and used language of this type. He says that to secure James as a client willing to submit his affairs and spending to the discipline of a professionally managed budget he needed to speak in James's language. He also says that the conversations on 19 and 20 January 2018 came on the back of a friendship over the preceding four months.

[139] There is some force in Mr Andrawos's submission with respect to categories one and two. Context does matter. The swearing was not abusive or rude. No offence was taken. It was the language in which James spoke. It was the language in which they both spoke to each other over the preceding four months. It was a familiarity consistent with maintaining the trust of a young and brash man to take the step of engaging professional budget services.

[140] Category three, the drug references, are of another character. Firstly, whilst the primary instance (the birthday budget allocation on 20 January 2018) involved James making an initial reference to a "G", Mr Andrawos actively played along, jokingly asking "the white stuff or the clear stuff?". Secondly, in the second instance (a budget to allow James to holiday in Perth) Mr Andrawos made an unsolicited quip that Perth was "the drug capital of Australia". Thirdly, James and Mr Andrawos both referred to "the sauce".

[141] Mr Andrawos denied that he initially understood the reference to a "G" to be a reference to drugs (claiming he took it as a reference to a $1,000 budget allocation) and then claimed in cross examination that he had said "wine or beer" and not "white or clear". When the audio recording was played into evidence, it was obvious that he had said what was alleged, amidst laughter from both he and James. He says that he understood the reference to "sauce" as a reference to alcohol, not drugs.

[142] His denial that he jokingly asked "the white stuff or the clear stuff" was a reconstruction and impossible to maintain after hearing the audio. It did Mr Andrawos no credit. His evidence about what he understood a "G" and "sauce" to mean also lacked plausibility. Whilst this finding requires me to treat his evidence with a higher degree of caution than I might otherwise, I conclude that his evidence as a whole is not unreliable or untrustworthy. I further note that there was no allegation in the proceedings that Mr Andrawos took drugs with James. I accept Mr Andrawos's evidence to that effect.

[143] Whilst making some allowance for the unique context and nature of the conversations on 19 and 20 January 2018 (that Mr Andrawos was endeavouring to maintain James's trust, that James had been a pre-existing friend and commonly spoke in these terms), the fact is that Mr Andrawos was not on those dates speaking to James purely as a friend. He was signing him up as a client and was doing so with his MyBudget hat on and from his workplace. It was

incumbent on Mr Andrawos to move from street banter with a friend to language which reflected a prospective client relationship and his responsibilities as an employee.

[144] I conclude that the language used by Mr Andrawos on 19 and 20 January 2018 included inappropriate and unprofessional language. As such, it was a lapse of professional standards, and warranted sanction. In isolation and in context, the language may have warranted warning short of dismissal, though the drug references heightened the seriousness of the breach. However, in the context of each being one element of other breaches, they were capable of forming part of a valid reason to terminate.

Going to the casino and holding Mr McBryde-Martin's cash

[145] It was alleged that Mr Andrawos went to the Adelaide casino with James on 26 January 2018, took cash from James whilst at the casino, held it for a number of days, and did not return it promptly. It was said by the employer that this breached his duty as an employee, including under the Code of Conduct.

[146] I have made findings that Mr Andrawos did visit the casino with James, did hold $150 of his cash, and did not return it until five days later, 31 January.

[147] Mr Andrawos did not deny that he had done so. He says that he went to the casino reluctantly and in his personal capacity as a friend, to try to control James's behaviour and spending. He says that James freely agreed to give him $150 in cash to hold securely so it was not all spent that night. He says that he returned the cash to James at the OTR at the next available opportunity and did so in an amicable exchange between the two after James had apologised (by text) for his behaviour. I have made findings that these explanations are factual.

[148] I readily accept that it would be inconsistent with the duty of a MyBudget PBS to be gambling with a client and accepting their money (even for safe keeping) if an employee was doing so in the course of their employment or in the name of the employer. However, that is not the evidence. Although James was (by then) a client of MyBudget (having been signed up by Mr Andrawos six days earlier), Mr Andrawos was not acting nor understood by James to be acting in his capacity as a MyBudget PBS when he got into the taxi with James and Sam Crawford, and walked into the casino with them. He had a pre-existing friendship with James which involved social interaction over preceding months. Visiting the casino on a public holiday was an element of that personal friendship. He was acting in a personal capacity.

[149] In this context, was it a breach of Mr Andrawos's duty as an employee of MyBudget to visit the casino with James on 26 January 2018? I do not consider it was. There is nothing in the MyBudget Code of Conduct or the Employee Handbook or other policy before me which prohibits an employee from maintaining a pre-existing personal friendship (including social interaction) with a client who was and continues to be a friend. The fact that the company permits an employee to sign up a friend on a 'friends and family discount' is evidence that the company contemplates that, at least at the time of sign up, there would be a dual personal and business-client relationship in existence. The Code itself is only framed to operate in work circumstances:

> "The Code applies to all employees of MyBudget, regardless of their level of seniority. It covers all circumstances when employees are performing work, duties or functions for the Company." [48] (my emphasis)

[150] The absence of a specific rule against maintaining social interaction with newly signed-up clients means no specific company rule was breached by Mr Andrawos by visiting the casino with James and Sam. Nor is there anything in an employee's duty at common law that would preclude, as a general rule, an employee such as Mr Andrawos from visiting a lawful venue on their day off and in their own time with a person who has been a pre-existing friend and since become a customer or client of their employer's business. Whether one considers it wise for an employee (even a banker, a financial adviser or a money manager) to do so is not to the point; the issue is whether that visit is in and of itself a breach of policy or duty.

[151] A casino is a lawful venue to visit in one's private time. The visit itself did not materially compromise either the business-client relationship (as the business played no part in the visit) or the employer-employee relationship as there was no inherent compromise to Mr Andrawos performing or being able to perform his employment duties, including to clients of the business. He did not gamble James's money. His primary intent was to be James's guardian. Nor did it otherwise risk the employer's reputation. The business was not held out as being associated with his visit. Mr Andrawos was not of such seniority in the business or the public eye as to cause reputational damage by virtue of his mere presence at the casino.

[152] For similar reasons, I do not consider that Mr Andrawos, in his capacity as a pre-existing friend visiting the casino on his day off and agreeing to hold $150 of James's cash for safe keeping and return it later that week was a breach of the MyBudget Code of Conduct or his duty as an employee. There is nothing specific in the MyBudget Code of Conduct or in his training or in his duty at common law that precluded him, as a general rule, from maintaining a pre-existing personal friendship and, as part of that friendship, holding a friend's cash by agreement, for safe keeping.

[153] I therefore find that visiting the casino on 26 January 2018 and holding Mr McBryde-Martin's cash for five days thereafter to not be valid reasons for dismissal.

[154] However, a business-client relationship had been established between MyBudget and James through the agency of Mr Andrawos from 20 January 2018. No longer was Mr Andrawos simply a friend taking care of another friend who was vulnerable to gambling and other addictive behaviours. For reasons outlined later in this decision, I consider that the continuation of a personal relationship with James after 20 January 2018 (including during the period of the casino visit and holding his cash), whilst not a breach of policy or duty, gave rise to a potential conflict of interest. Mr Andrawos had a duty to effectively manage that potential conflict of interest and, by not disclosing the casino visit or disclosing the holding of cash, he failed to do so.

Requesting Mr McBryde-Martin transfer funds to a co-signatory account

[155] It was alleged by MyBudget that Mr Andrawos requested James transfer $90,000 into a MyBudget account, and that Mr Andrawos offered to be a co-signatory to the account. It was said by the employer that this breached his duty as an employee, including under the Code of Conduct.

[156] Mr Andrawos did not deny that he requested James transfer this sum of money. He says that he did so only after it became apparent that James's spending was out of control and that he was wasting his inheritance, and had only $90,000 of the $142,000 lump sum remaining by the end of January. He says that he was acting in James's best interests.

[157] The evidence supports these propositions. For example, in January 2018 Mr Andrawos texted James in the following terms:

> "Mate I need you to send me a screenshot of your latest balance. I have an idea that will stop you spending in crap and make you money short term until you buy a property. This has to stop mate – I'm starting to really worry that you going to give it all away to gambling and hookers and they don't care for you."[49]

[158] Mr Andrawos says that MyBudget accounts are used to hold client money. He says that his proposal to require two signatories to access a MyBudget or bank account was to impose some check on unilateral access by James to the money. He says that whilst he told James that he would be prepared to be co-signatory, he never intended to actually be the co-signatory. He said that he wanted James to agree the concept and that he would then find a suitable co-signatory.

[159] The conversation between Mr Andrawos and James on 19 and 20 January 2018 and text messages between them over the next week clearly establish that Mr Andrawos made this request of James. It was a repeat of suggestions given as a friend, but was subsequently made from the workplace as a request, particularly after the casino episode.

[160] I do not find Mr Andrawos's evidence that he never intended to actually be a co-signatory convincing. I find that this was his initial thought, and although he was open-minded to finding other suitable persons, it had not been discounted. Equally, I find that Mr Andrawos was willing to consider a suitable person other than himself, but wanted to impress on James that it needed to be a person who would be reliable and act in his best interests.

[161] I also find that MyBudget policies and procedures provided no basis for either a substantial capital sum of $90,000 to be deposited in the ordinary course, or for a staff member to be a co-signatory to a client's account. The company operates on the basis that a client deposits agreed funds (usually income) into a MyBudget account, and those funds are then dispersed by the company to pay bills, debts and other expenses in a manner consistent with an agreed budget. At all times a client retains control over their funds.

[162] Mr Andrawos's proposal, whatever its intent or feasibility, breached the MyBudget Code of Conduct and his employment responsibilities. Whilst I accept Mr Andrawos's evidence that this request was an extension of earlier personal conversations between the two about creating a bank or other account with co-signatories prior to James becoming a MyBudget client, nonetheless, on 19 and 20 January 2018 Mr Andrawos was no longer acting in a personal capacity. Whilst dealing with James in his capacity as a MyBudget PBS, Mr Andrawos had a duty to comply with the "PBS Appointment Quality Assurance Marking Guide" which preclude such arrangements.

[163] There is no latitude, and none should be given, when dealing with other people's monies. These are serious matters. A credit or finance house has obligations to manage funds

only in a manner consistent with their charter and client agreements. An employer operating such a business has the right to expect and enforce its protocols, procedures and standards concerning the handling of client funds. Where an employee such as Mr Andrawos faces unique client circumstances that appear not to fit established norms they have an obligation to raise those issues with senior management and seek direction, not to proceed unilaterally to breach those norms in the name of doing what they consider to be in the client's best interests.

[164] This breach was a valid reason for termination.

Mismanagement of conflict of interest

[165] It was alleged that Mr Andrawos put himself in a position where his "personal or private interests interfered or appeared to interfere with his professional judgment and commitment to MyBudget".[50]

[166] In summary, it was alleged that he had a conflict of interest arising (on the one hand) from his personal association with James and (on the other) his professional obligations to MyBudget to manage James as a client in a manner consistent with MyBudget practices, policies and standards. It was further alleged that Mr Andrawos did not take steps to manage that conflict of interest, as required by the company of its employees.

[167] The intersection between a personal friendship and professional obligations as an employee lies at the heart of this case. It is central to understanding what Mr Andrawos did, and why he did it.

[168] Mr Andrawos had been trained in MyBudget policies, including those in the Employee Handbook which incorporates the Code of Conduct. The Code of Conduct specifically deals with conflicts of interest. It provides at item 7 "Manage Conflicts of Interest Appropriately":[51]

> "Employees should not put themselves in a position where personal or private interests interfere or appear to interfere with their professional judgment or commitment to MyBudget. Should a conflict of interest be identified, or disclosed, steps must be taken to manage the conflict effectively." (my emphasis)

[169] Relevant to the circumstance of this matter, the next sentence of the Code of Conduct goes on to say:

> "During regular duties at MyBudget, employees may be exposed to clients in exceptional circumstances. Employees must not provide any assistance that may be misinterpreted as a breach of any laws, regulations or licences that MyBudget are governed by." (my emphasis)

[170] It is clear from the evidence that the Code contemplates an employee dealing with clients who present with exceptional circumstances, but gives no latitude to deal with such clients other than by managing conflicts or potential conflicts of interest effectively. James McBryde-Martin was a client in exceptional circumstances. There is no evidence before me that Mr Andrawos received specific training in how to manage a conflict of interest, particularly in unusual client circumstances. However, the Code of Conduct applied to Mr Andrawos with respect to their relationship once James became a MyBudget client.

[171] It is also noteworthy that Mr Andrawos's contract of employment as a Personal Budget Specialist also required him to "disclose to the employer any interests (whether direct or indirect) which may give rise to a conflict with the performance of your duties."[52] (my emphasis)

[172] I have no hesitation in finding that from 20 January 2018 Mr Andrawos had a private interest that "interfered or appeared to interfere" with his professional obligations. As such, he had, at the very least, a potential if not actual conflict of interest of the type alleged. He had associated with James privately in the four months prior to signing him up as a MyBudget client. His personal friendship was grounded in genuine conversation and advice, and developed into genuine concern when he saw evidence of out of control or addictive behaviours.

[173] As they came to know each other over the counter at the OTR, Mr Andrawos believed he could mentor a young brash man who he considered needed guidance and was vulnerable to life's vices. Once Mr Andrawos learnt that James had received a substantial inheritance his desire to give him financial guidance took over. He thought he could use his professional expertise to good effect. Once James's out of control spending and addictive behaviours became evident, Mr Andrawos urged James in even more direct terms to limit his gambling and recognise that responsible investment of his inheritance could set him up for life.

[174] By the time Mr Andrawos convinced James to become a MyBudget client he was deeply invested in a personal friendship that involved regular discussion of money matters and money management. This intersected with his employment obligations and the broader business-client relationship he had established. From 20 January 2018 his relationship with James comprised these two elements. The potential for a conflict between his friendship and his employment obligations existed, and palpably so. From that point in time, Mr Andrawos could no longer give advice as a friend or mentor, or accompany him to the casino, or hold his cash or propose co-account signatories without having regard to his employment obligation to effectively manage actual or potential conflicts of interest. In my view, this required, at the very least, disclosure to his employer of such advices and activities, if he wished to maintain a personal friendship alongside the business-client relationship.

[175] I consider the failure to disclose to be a serious failure. Whilst he told Mr Bailey and Ms Martin that he was bringing in a friend as a MyBudget client, and secured their general consent, he did not disclose the nature of the relationship or the advices he had previously given. He pressed on with good intent but indifference to his employment obligations. His judgment was flawed by the depth of his personal relationship and personal concern for James's wellbeing, spending and addictive behaviours.

[176] In particular he did not disclose to his employer the casino visit and the holding of monies in the week that followed the Australia Day public holiday. He had the opportunity to do so, but it did not pass his mind. He disclosed it neither to Mr Bailey nor to Ms Beyer, who had received the file from Mr Andrawos and who was already exercising her own employment obligations to speak to James about money matters. Mr Andrawos was not indifferent to James's conduct (indeed he was genuinely concerned), but by withholding these details from MyBudget, no matter how uncomfortable it may have been to reveal them, he was indifferent to the complexities inherent in maintaining a private friendship and his professional obligation to his employer, and to the potential complications arising for other employees who were also dealing with James.

[177] The concessions Mr Andrawos made in cross examination in answer to questions from myself illustrate his latent acknowledgement of the conflict, though he considered that he could maintain a personal relationship if he was not handing the file:[53]

> "DEPUTY PRESIDENT: …Perhaps put it this way, knowing what you now know, do you think you would have done anything differently in terms of your dealings with James McBryde?
>
> MR ANDRAWOS: Absolutely, looking at it now and what MyBudget has you know, where we're sitting now because of this, I certainly would have had it at arm's length and had another colleague do the appointment.
>
> DEPUTY PRESIDENT: So you, are you referring there to the signing up of James McBryde as a client? And are you referring to structuring a budget or asking him questions about a budget?
>
> MR ANDRAWOS: Correct, so the initial appointment where you go through the details I would certainly have that sit with another PBS, to keep it at arm's length to avoid any future problems that it might cause even if unintentional and even with all the good intention of it.
>
> DEPUTY PRESIDENT: So what, in that context, would you have been wanting to keep at arm's length? What was in existence at that time that you now, on reflection, believe you needed to keep or would have tried to keep at arm's length?
>
> MR ANDRAWOS: I would have kept all the dealings with MyBudget with another colleague. The MyBudget dealings I would have kept them separate to my personal dealings.
>
> DEPUTY PRESIDENT: So do I take it from that, that you would have still retained a personal friendship with James McBryde?
>
> MR ANDRAWOS: Sure, we were friends before he was a client and I didn't see any reason why we wouldn't have a relationship as a friend after as well.
>
> DEPUTY PRESIDENT: So if he had been signed up by another MyBudget specialist on your recommendation you would have still, what, dropped in to the service station and spoken to him about his financial affairs?
>
> MR ANDRAWOS: I would have still gone into, you know, my local petrol station, and if he was working there then so be it, yeah. And then if he asked me a question about his financial affairs I would have spoken to him about it or find, you know, someone to speak to him I suppose … he can ask me a question about it, there's nothing stopping him from doing that…"

[178] Mr Andrawos failed to adhere to his obligations concerning potential conflicts of interest that governed his employment. He failed to recognise the potential conflict, failed to disclose it and failed to manage it effectively. Those failures were valid reasons for termination.

Conclusion on Valid Reason

[179] A reason for dismissal is a valid reason if it is "sound, defensible and well-founded".[54] A dismissal for serious misconduct requires the employer to adduce evidence before the Commission to the requisite standard of proof (the *Briginshaw* standard[55]) that the misconduct occurred. It is well-established that a dismissal for serious misconduct will be sound, defensible and well-founded if the employee's conduct creates a conflict between his interests and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between the employer and employee.[56]

[180] I conclude that two categories of conduct constituted a valid reason for Mr Andrawos's dismissal, being requests he made on 19 and 20 January 2018 that Mr McBryde-Martin transfer $90,000 of funds to a co-signatory MyBudget account, and his mismanagement of a potential conflict between his personal friendship and his professional obligations.

[181] These were failures in the management of client affairs and in the exercise of professional judgment. They were breaches of the MyBudget Code of Conduct and Mr Andrawos's duty as an employee. They acted to erode the trust necessary between an employer and an employee. This is particularly so given that Mr Andrawos did not, during the investigation, acknowledge any wrongdoing. In his evidence before the Commission, whilst acknowledging that he might do some things differently if he had his time again (such as having a separate Personal Budget Specialist sign up James as a client), he contested the proposition that he had acted in breach of his duty as an employee.[57] In those circumstances the employer's conclusion that it had lost trust and confidence in his judgment was well-founded.

[182] Although these were serious failures, the gravity is mitigated somewhat by virtue of the fact that the request to transfer funds into a co-signatory account was a repeat of earlier suggestions given in a personal capacity and that the intention to bring a friend (James) into the business as a client had been disclosed and agreed to by the employer.

[183] I have also concluded that Mr Andrawos gave non-permitted advice on 19 and 20 January 2018 to a client (James) concerning a phone contract and investment property purchase, failed to issue a disclaimer on 19 and 20 January, spoke to that client in an unprofessional manner on 20 January, failed to record the face-to-face interview with that client on 20 January, and on 24 January poorly handled a disagreement with another employee (Ms Beyer). However, I have also concluded that each of these breaches were of insufficient seriousness to constitute a valid reason for termination in their own right. Collectively however, they form part of a valid reason to terminate. Decisions of the Commission have made it clear that where an employer has clear policies about behaviour in the workplace, such as how employees must treat clients and each other, an employee's conduct or actions in breach of policy will be a valid reason for termination.[58]

[184] I have concluded that three matters relied on by the employer as grounds for termination (giving general advice to a client (James) concerning car insurance, visiting the casino with James on 26 January and holding $150 of his cash in a private capacity) were not valid reasons for termination. I have also concluded that there was no breach of his punctuality obligation on 2 February 2018, despite the employer having found so. I have

agreed with the employer's conclusion that Mr Andrawos did not breach policy in January 2018 by failing to update an electronic record concerning Clients L and M.

[185] In summary, there were valid reasons for termination, albeit not all of the matters relied on by the employer.

Notification of the reason for dismissal (section 387(b))

[186] I find that the termination letter informed Mr Andrawos that allegations 3, 4 and 5 were made out and that they formed the basis for the decision to terminate. Although the letter did not directly state a singular reason for termination, I am satisfied that the employer provided, through this indirect route, the reason for termination.

Opportunity to respond (section 387(c))

[187] Mr Andrawos submitted that he was denied procedural fairness for a number of reasons.

Procedural Fairness: suspension before discussion

[188] Mr Andrawos claims that he was treated unfairly, and consequently his dismissal was harsh, because he was suspended before being allowed to present information to his employer about his dealings with James McBryde-Martin or Donna McBryde.

[189] I have found, as a matter of fact, that this was so. Ms Dodson and Mr Bailey made the decision to suspend and in so doing Ms Dodson specifically told Mr Andrawos that she did not wish to hear from him at that time. His calls to Mr Bailey were then intentionally blocked.

[190] This resulted in his suspension occurring without knowledge of relevant matters; for example, that Donna McBryde had been abusive and threatening to Mr Andrawos the previous evening; that Mr Andrawos had a personal friendship with James that pre-dated the client relationship and which also pre-dated any receipt by James of an inheritance; that James was a person with addictive behaviours who had received considerably more than a $90,000 inheritance and who had very recently told Mr Andrawos that he had spent approximately $40,000 of that $142,000 inheritance in a month, which Mr Andrawos believed included wasted spending on gambling and other addictive vices.

[191] Mr Andrawos wanted to inform MyBudget of these matters and provide evidence of texts between James and himself proving their prior friendship and that James was apologetic for his mother's outburst. He considered that he had defended both himself and MyBudget the previous evening and that investigation on the basis of a complaint from a threatening person to be unfair.

[192] Suspending an employee, even on pay, is a significant act by an employer. It not only denies an employee the right to work under their contract of employment but may also affect relationships with other employees or established clients with whom they would otherwise be dealing. For these reasons, decisions to suspend as part of a disciplinary process, even where lawful, need to be made on a reasonable basis. Acting reasonably does not however require an employer to make prima facie findings of wrongdoing. Pre-judgment of that type may itself produce unfairness. Suspension needs to be an appropriate course having regard to the

particular circumstances. It is an exercise akin to assessing the balance of convenience; weighing the impact or potential impact on the employee against the need to protect legitimate business interests (for example, obligations under a business-client relationship).

[193] In this matter, the decision to suspend, whilst taken without all available facts, was made to protect legitimate business interests, including the management of client affairs. The nature of the allegations, whilst just that, were that serious and unethical conduct had been committed by an employee of the company concerning a client's affairs. While Mrs McBryde's complaint was accusatory and full of half-truths, she was not incoherent and produced (albeit selective) screen-shot evidence to buttress her demands that action be taken against Mr Andrawos.

[194] The employer's decision to not receive information from Mr Andrawos at that early stage created understandable apprehension and frustration on his part. I accept the evidence of Ms Dodson that to do so may have fragmented his response and would have had Mr Andrawos respond to a complaint rather than actual allegations. I nonetheless consider that it was unreasonable, at the least, to refuse to hear him out. However, in wanting to put early information to Ms Dodson and Mr Bailey, Mr Andrawos was actually hoping to persuade the employer to not investigate the matter, not just to not suspend him. In that context, his objective was misguided. The allegations were serious, and irrespective of his legitimate desire to place contextual or explanatory matters before the employer, they warranted investigation.

[195] In these circumstances I am satisfied that MyBudget had reasonable grounds to suspend Mr Andrawos. However, the manner in which the employer suspended Mr Andrawos (by denying him an early right to be heard) created reasonable apprehension on his part about its open-mindedness to consider his side of the story. That was unnecessary and unfair. Those concerns were compounded by subsequent aspects of the disciplinary process.

Procedural Fairness: multiple allegations

[196] It was submitted by Mr Andrawos that the employer unfairly loaded up multiple allegations involving different subject matters in order to bolster its case and set him up for dismissal. He says that this complicated his response and added to his belief that the employer was not open-minded to his explanations.

[197] As a matter of fact, the matters put to Mr Andrawos in the allegation letter of 7 February 2018[59] involved five issues, only two of which (allegations 4 and 5) concerned James McBryde-Martin. Allegation 1 involved a failure to update client details concerning Client L and Client M; allegation 2 concerned punctuality and allegation 3 concerned the Beyer issue. Factually, allegations 1 and 3 involved different aspects of the same subject matter.

[198] It is not inherently unfair for an allegation letter to raise multiple or different subject matters. What carries the risk of unfairness is if matters that would not be otherwise investigated are included for the sake of convenience, or if trivial matters are included to give the appearance of serious wrongdoing.

[199] Ms Dodson's evidence (which I accept) was that allegations 1 and 3 were already in the early stages of investigation at the time Donna McBryde made her complaint. A draft

letter of allegation was in preparation. In this context, allegations 1 and 3 were reasonably included and neither was concocted or trivial.

[200] Allegation 2 concerned Mr Andrawos being (allegedly) ten minutes late for work on 2 February 2018. This was a triviality particularly alongside the serious matters raised in allegations 4 and 5. The employer relies on context. It says that Mr Andrawos had previously been warned and counselled about punctuality[60] including only a week prior, on 29 January 2018. Whilst this is so, including allegation 2 (which I have found not to be proven) carried the risk of escalating a minor punctuality breach into something more important than it was, and distracting both the employer and Mr Andrawos from the more serious conduct matters under consideration.

[201] I conclude that it was overzealous to include allegation 2 in the disciplinary process. However, that alone did not render the process unfair. Mr Andrawos responded to allegation 2 and had the ability to distinguish between serious and less serious matters. Contrary to my finding, the employer found the breach sustained but given it was less serious, did not rely on it when making its decision to dismiss.

Procedural Fairness: was the response listened to?

[202] A substantial element of Mr Andrawos's case is his belief that his response to the allegations, and in particular to the McBryde-Martin issues (allegations 4 and 5) were not considered with an open-mind. He believes that the employer was going through the motions, and had a pre-determined view that he had done wrong and should be sacked.

[203] The fact that an employee holds this subjective belief is no basis for the Commission to draw such a conclusion, any more than an employer's assertion that it had an open-mind. The Commission's role is to consider whether the facts objectively support such a conclusion.

[204] It is well established that simply going through the motion of giving an employee an opportunity to respond without the ability for their explanation to influence the outcome carries risk that the employee has been denied a real opportunity to defend themselves.[61]

[205] There is objective evidence which points to a conclusion that MyBudget gave Mr Andrawos an opportunity to respond in form only and not in substance.

[206] Firstly, at the time of suspending Mr Andrawos Ms Dodson, on her evidence "formed the view that the conduct was likely to be serious and wilful misconduct".[62] To that extent at least, there was pre-determination.

[207] Secondly, the employer initially, in its allegation letter of 7 February 2018 summonsed Mr Andrawos to respond to a meeting on 8 February 2018; that is, within 24 hours. Whilst the employer subsequently agreed to a request by Mr Andrawos for an extension to prepare his response, the initial time frame was unreasonable given the seriousness of allegations 4 and 5 and the breadth of subject matters in the allegation letter. This short time frame is evidence that, at the time of drafting the allegation letter, the employer considered the matter could be quickly commenced if not quickly disposed of. This supports a conclusion that the employer, initially at least, had only a limited interest in Mr Andrawos's explanation.

[208] Thirdly, whilst the decision to suspend was reasonable, the employer prevented Mr Andrawos putting material or speaking to his managers at that early stage. I have found that was unreasonable.

[209] Fourthly, Mr Andrawos asked for but was denied access to the statements which the employer had secured from other employees. Ms Dodson's evidence was to that effect.[63] Ms Dodson claimed that it was unnecessary to provide such access as the allegations were set out in sufficient detail in the allegation letter. In the context of this matter, I disagree. Mr Andrawos was facing multiple allegations under threat of dismissal. He was entitled to have access to information being relied upon. Given that his explanations were, in part, based on his view of whether a complainant was credible or fair-minded, he was entitled to know who was making the claims and a level of detail that went beyond the allegation letter.

[210] Fifthly, Ms Dodson did not provide Mr Andrawos access to the MyBudget call recordings between himself and James on 19 and 20 January 2018, despite having herself relied on them, and having had them transcribed. Ms Dodson's evidence was "there was no additional information from the call recordings that would have provided necessary context to the extracts that were provided" (in the allegation letter).[64] I disagree. The recordings of calls made three weeks earlier provided evidence of breach but also evidence of mitigation. The failure to make them available to Mr Andrawos is evidence of the employer's propensity to focus on breach at the expense of explanation or mitigation.

[211] Sixthly, Mr Andrawos was not provided by the employer with the screen-shots sent to the employer by Donna McBryde, for his response. Ms Dodson had those. Had he known the selective nature of the material sent by Mrs McBryde, he could have more convincingly explained that (in his view) the opinions of Mrs McBryde did not accord with the fuller facts or the views of her son. Nonetheless, there was no entrapment of Mr Andrawos. He had access to his own phone and text records. He was free to produce those in mitigation or explanation (although, in light of my findings, they were unlikely to have been given full consideration).

[212] Seventhly, for the first week of the disciplinary process Mr Bailey had not been briefed on the fact that Mr Andrawos claimed that Mrs McBryde had made accusatory and threatening statements to him the night prior to lodging her complaint. Mr Bailey said in his evidence that "I was not aware of any issue with the client's mother until that point" (the point of the disciplinary interview seven days after the complaint by the mother).[65] If the employer had an open mind to the outcome, Mr Bailey should have sought out or been briefed on that background.

[213] Eighthly, the employer did not conduct any further fact-finding activities after the disciplinary interview despite Mr Andrawos referring to facts previously unknown to Ms Dodson and Mr Bailey about the prior relationship with James, which could be corroborated by James. In particular, the employer did not at any stage speak to James McBryde-Martin.

[214] I consider it a poor decision by the employer not to conduct further inquiries after the disciplinary interview and especially unfair to not speak to James McBryde-Martin for his version of events. Had it done so, and had James co-operated and told the truth, there would have been corroborating evidence, for example that:

- James had been a friend for months prior to being signed-up;

- James had been a friend months before any issue of an inheritance emerged;
- James had spent a large portion of his inheritance in a short space of time on addictive behaviours which Mr Andrawos had counselled him against;
- James had exercised free choice in maintaining a friendship with Mr Andrawos, speaking to him about money matters and appreciated his advice even if he didn't follow it;
- James had voluntarily given Mr Andrawos cash whilst at the casino to hold for safe keeping and that it was freely given back to him by Mr Andrawos when they next met;
- Mr Andrawos had initially been reluctant to go to the casino with James;
- James had acted badly at the casino and had subsequently apologised to Mr Andrawos; and
- James had given Mr Andrawos the impression that he was estranged from his mother and that she was not a reliable complainant.

[215] Mr Andrawos specifically asked Ms Dodson at the disciplinary interview if she had spoken to James McBryde-Martin, and urged her to do so and not simply rely on Mrs McBryde's assertions. Ms Dodson's evidence was that she did not seek out James because it was not regular practice to involve a client in an internal employment matter. Whilst this may be a reasonable general approach, it carried the risk that simply relying on internal audio and transcripts of the 19 and 20 January 2018 phone calls between Mr Andrawos and James failed to provide relevant context. Corroboration, if it had been forthcoming, would have added weight to Mr Andrawos's explanations. In following up with Mrs McBryde on 5 February and again on 7 February, the employer was not dealing with the matter wholly internally. Further, for the purposes of making out its case to the Commission, the employer chose to contact James, take a statement from him and call him as a witness. Although he had by then ceased to be a MyBudget client, involving James in the unfair dismissal proceedings was involving him in the same employment issue, albeit in a different forum.

[216] I take into account that there would have been no certainty as to what James would have said, and that if it had contradicted Mr Andrawos's version, the employer would have been left with having to decide who to believe. As awkward as that may be, receiving conflicted versions is sometimes a consequence of conducting meaningful investigations.

[217] Ms Dodson's evidence on these issues was instructive. In answer to questions from myself she said:[66]

> "DEPUTY PRESIDENT: Do you believe you were listening to what Mr Andrawos was actually trying to tell you on the 12th of February?
>
> MS DODSON: I believe we were, yes.
>
> DEPUTY PRESIDENT: Were you listening, wanting to understand his explanation, as distinct from hearing whether he agreed or denied certain conduct?
>
> MS DODSON: I think we certainly took into account his explanation, I don't think his explanation mitigated the conduct that took place.
>
> DEPUTY PRESIDENT: So were you, were you wanting to identify, was your purpose of that discussion to identify whether he would admit or deny certain conduct?

MS DODSON: That was part of it but I think it was also trying to, you know certainly when he admitted that the conduct had taken place, that the events had taken place, we were also trying to understand, I guess, whether he understood that what he had done was in breach of our code of conduct.

DEPUTY PRESIDENT: Yes, so you were frustrated that he didn't recognise that that was wrong doing?

MS DODSON: Yeah, I found that difficult.

DEPUTY PRESIDENT: Do you think that frustration meant that you weren't open-minded to the explanations he was trying to give for the conduct?

MS DODSON: No I don't think so, I'm not an overly frustrated person.

DEPUTY PRESIDENT: Alright.

MS DODSON: I don't think that would get in the way of making a sound decision based on the evidence and I guess that he had not disagreed with the conduct that had taken place.

DEPUTY PRESIDENT: But you weren't aware of the fact that he had in various text messages cautioned James McBryde about some of his behaviour and some his conduct and indicated that what his motives might have been in trying to deal with James McBryde?

MS DODSON: No but on reflection that wouldn't have made any difference if we had or had that information because there was still a breach of our code of conduct and there were other ways around helping a friend that you would do that wouldn't interfere and be a conflict of interest with your position at MyBudget.

DEPUTY PRESIDENT: Yes, alright, thank you."

[218] This assumption (that no difference would have been made), coupled with the aforementioned matters, is evidence of a willingness to hear from Mr Andrawos to ascertain whether he would admit certain conduct and whether he considered his conduct wrong but a less than open mind to his explanations and whether those explanations could mitigate the conduct, its seriousness or intended sanction.

[219] I am satisfied that, as a consequence, the employer wrongly jumped to a conclusion that all conduct after the business-client relationship had been formed needed to accord with company policies, without considering whether conduct of a genuinely private nature in private time was in breach.

[220] A related submission made by Mr Andrawos was that the employer acted unfairly in rebuking him for contacting James during the disciplinary investigation. Ms Dodson's evidence was that Mr Andrawos was told in the suspension and allegation letters that he was to have no contact with other employees or persons (other than an adviser or support person) or interfere in the investigation.[67] Her evidence was that contact by way of text or phone with James was a breach of this stipulation.

[221] In the circumstances, I consider this to have been an unreasonable stipulation. Ms Dodson knew from at least the day after the suspension letter that Mr Andrawos was feeling isolated and let down by the process she had commenced. Rebuking him for the understandable desire to speak to James about the turn of events following his mother's complaint was heavy-handed and unfair.

[222] Mr Andrawos also claims that during the investigation interview he was not permitted to engage in general discussion with Ms Dodson or Mr Bailey concerning his overall dealings with Mr McBryde-Martin. He claims that he was only permitted to respond to their questions and allegations. If this was so, that would have been unfair. However, I prefer the evidence of Ms Dodson and Mr Bailey on this point. Whilst the disciplinary interview was structured around dealing with each of the five allegations in sequence, it was more than a question and answer session. When allegations 4 and 5 were raised, Mr Andrawos had the opportunity to put whatever he wished. The meeting record prepared by the employer, although not signed by Mr Andrawos, is evidence that he did present his point of view including some contextual matters.[68] The evidence before me is that Mr Andrawos also tabled his draft written response to each of the allegations, which his sister had helped him prepare.

[223] Mr Andrawos also relies on the fact that his senior manager Mr Bailey said little during the interview and was non-committal in their brief informal discussion when the meeting broke up. I do not consider this to be evidence that Mr Andrawos's response was not listened to. Rather it was evidence that Mr Bailey, having formed an unfavourable view (based on the absence of remorse or recognition of wrongdoing), did not wish to debate the matter. Mr Bailey cannot be fairly criticised for taking that course.

[224] Mr Andrawos also submits that the employer wrongly or excessively concerned itself with its reputational risk and thereby gave insufficient weight or did not have an open mind to the facts he was advancing or to his explanations.

[225] There is some albeit limited force in this submission. I have found that he did not present a reputational risk by being at the casino with James and Sam on his day off. I also find that Ms Dodson formed a view of actual (as distinct from potential) reputational risk because one member of the public (Donna McBryde) had lodged a complaint.[69] To draw that conclusion from one untested complaint that was full of half-truths, threats and demands was unfair.

[226] However, on the broader issue of potential damage to reputation the conclusion reached by Mr Bailey and Ms Dodson was more objective. They did not simply accept what Mrs McBryde alleged. To Mrs McBryde, they undertook to investigate the matter seriously. That was appropriate. They conducted a preliminary investigation, then the fuller investigation. There were legitimate grounds based on both their conclusions and my (different) findings that material reputational risk existed particularly if the potential conflict of interest was not appropriately managed.

[227] Taking all of these factors into account, I conclude that MyBudget provided Mr Andrawos an opportunity to respond in form only and that his responses were not considered with an open mind or with a view that they, or matters arising from them, could materially alter or mitigate the employer's prima facie view – that he had committed serious misconduct warranting dismissal.

Opportunity for support person (section 387(d))

[228] MyBudget did not refuse Mr Andrawos a support person, reasonably or unreasonably. The allegation letter expressly invited Mr Andrawos to seek out a support person and have that person attend the disciplinary interview as a support. Mr Andrawos did so.

Warnings concerning performance (section 387(e))

[229] I have made findings concerning Mr Andrawos's disciplinary record. That record, at the date of dismissal, involved multiple incidents of counselling or warning (including a final warning) over the preceding eighteen months, some for minor conduct and punctuality breaches, others not.

Size of employer's enterprise (section 387(f)) and human resource capability (section 387(g))

[230] MyBudget is a business of medium size, employing approximately 255 persons at the date of dismissal. It has dedicated human resources capability; for example, it has a Human Resources Manager and utilises a Termination Decision Summary Tool. It has well-developed induction and training programmes. It is an employer equipped to provide training and undertake disciplinary processes.

Other matters (section 387(h))

Mitigation: honourable and honest intent

[231] Mr Andrawos submits that his dismissal was not for a valid reason (and hence unreasonable) and unjust or harsh because, even if he breached policy or procedure, he was acting with honourable and honest intent and in the best interests of MyBudget and its clients.

[232] I have found that Mr Andrawos was acting out of genuine concern for James McBryde-Martin. In both his personal capacity and as a MyBudget employee he encouraged James to take a more responsible approach to his spending including by agreeing to become a MyBudget client.

[233] I have also found that Mr Andrawos neither sought nor secured any financial or other benefit from his association, personal or professional, with James.

[234] For example, he reluctantly accompanied James (and Sam) to the casino on 26 January 2018 and for the overriding purpose of wanting to oversee James's conduct and limit his gambling. The evidence is clear that he was distressed by the events of that night and even whilst at the casino and soon after, became very uncomfortable. He expressed that distress in texts to Sam Crawford hours later[70], for example "the night had disaster written all over it…I was disgusted with his attitude and ongoing comments…I was embarrassed and felt humiliated…I will be having a short, sharp chat with him and he may not like what I say but it will be said…".

[235] I have also found that Mr Andrawos had honourable and honest intent in holding $150 of James' cash whilst at the casino and in the five days that followed. He did not withhold money from James or take any of his money for his own purposes.

[236] I have also found that although Mr Andrawos did not disclose to his employer the potential conflict of interest between his personal friendship and professional obligations (because he, wrongly, didn't recognise there to be a conflict), he nonetheless did not conceal from his senior manager nor his immediate manager that he was friends with James and that he was intending to sign up that person on a friends and family discount.

[237] However, I have found that in breaching policy, he put the employer at reputational risk. In that context, he could not be said to have been acting in the best interests of the business even given that, in discussions with Donna McBryde on 4 February 2018, he defended MyBudget.

[238] I am satisfied that Mr Andrawos was acting with honourable and honest intent. I have found that he sought to provide mentorship to James McBryde-Martin and a level of personal oversight over his addictive behaviours. This sentiment finds its way into almost all conversations and interactions between the two during January 2018, both prior to James becoming a client and subsequently. Even in the wake of being suspended and then dismissed, Mr Andrawos maintained his sense of concern for James's wellbeing:

> "Hi James, guess what – your mother has gone through with her threats…give me a call ASAP champ, just want to make sure you're ok…she has cost me my job, my life and I can't deal with this anymore. I helped you, supported you and guided you and want only good things for you James but your mum has totally driven my name into the mud…"[71]

[239] Observing his cross examination of James conveyed a similar impression.

[240] Given his pre-existing friendship with Mr McBryde-Martin and James's unusual circumstances and conduct, I am satisfied that the situation faced by Mr Andrawos was unique and challenging for any employee to manage.

[241] However, a good person doing the wrong thing even for the right reason does not set aside that person's obligation to do the right thing, especially when they have been trained by their employer to do the right thing.

[242] Where misconduct is serious, as was the case here, there are necessary limits to a claim of honourable and honest intent as a ground of mitigation. This is particularly so in a workplace concerned with money matters and where the proven conduct is inconsistent with the expectations or requirements of the business and is capable of attracting the attention of regulators that provide the business with a licence to operate.

Mitigation: James was a friend

[243] Mr Andrawos submitted that his dismissal was harsh because he was dealing with James in a personal capacity, and that some of the conduct complained of, such as going to the casino on Australia Day, occurred outside of work hours.

[244] I have found that James was a friend for at least four months prior to being signed up as a MyBudget client, and that Mr Andrawos displayed genuine personal concern for James's welfare as one friend would to the other. I have also found that Mr Andrawos used his professional background in financial matters and his ability to build personal rapport to encourage James to make wiser choices regarding his spending and other behaviours.

[245] Conduct outside of working hours, including personal friendships, is capable of constituting grounds for findings of misconduct where there is a direct connection to the duties and obligations which that person has to their employer.[72] However, I have found that the visit to the casino and holding $150 in cash over the following five days was not of that character.

[246] Nonetheless, irrespective of the fact that James was a friend, I have found that the conversations with James on 19 and 20 January 2018 from MyBudget's workplace established a business-client relationship. I have also found that a potential conflict of interest existed between Mr Andrawos's personal friendship and his professional obligations from at least that time, and that conflict required effective management (including disclosure).

[247] The fact that Mr Andrawos was trying to act in the best interests of a friend is relevant to the issue of harshness. It is well-established that where an employee has acted out of concern for a 'friend' and has derived no personal gain from their actions that these are not matters which diminish the validity of the reasons for dismissal but are matters relevant to mitigation.[73]

[248] However, for self-evident reasons there also necessary limits to a claim of friendship as a ground of mitigation. For example, I do not accept Mr Andrawos's submission that he simply signed James up on 20 January 2018, and thereafter his relationship was able to revert to a personal one because his file was then handed to a different account manager (Ms Beyer). This misconceives his obligation as an employee. A potential conflict of interest does not disappear simply because a client file passes from one officer to another.

[249] Mr Andrawos was duty-bound to manage the potential conflict of interest irrespective of who was handing the client file. Both a professional relationship and a personal relationship existed between Mr Andrawos and James after 20 January 2018. That personal relationship needed to be disclosed, and could not be disregarded whilst it continued to exist.

Mitigation: harsh impact on Mr Andrawos

[250] It was submitted by Mr Andrawos that his dismissal was harsh because of the impact it has had on him.

[251] I have made findings about those impacts, and they have been profound: financially, personally and professionally. Mr Andrawos is a motivated, engaging and capable person nearly at the mid-point of his working life. He has been shaken by the experience of being dismissed for (as he sees it) trying to do the right thing.

[252] After nearly 20 years in the finance and private sectors he has found himself unemployed. He has actively sought employment in the finance industry and in work outside his professional skills, including manual labour.

[253] In this context he submits that the dismissal was also harsh because both Ms Dodson and Mr Bailey formed the view at the time of making their decision to dismiss that he could easily secure alternate work in the finance industry. Mr Bailey repeated this view in his evidence to the Commission, suggesting that it would be "very easy".[74] Under cross examination, and in answer to questions from myself, it was apparent that Ms Dodson and Mr Bailey had formed this view in the abstract based on Mr Andrawos's qualifications and the number of finance industry jobs on seek.com, without giving any thought to the actual implications for a Personal Budget Specialist seeking work without a reference and on the back of a dismissal for serious misconduct in the management of client affairs. As if to underscore the cavalier nature of the conclusion they drew, Mr Bailey readily conceded that he would not re-employ Mr Andrawos.

[254] In forming these views both Ms Dodson and Mr Bailey incorporated a thoughtless and plainly wrong element into their decision to dismiss. That they did so is evidence of a degree of indifference to Mr Andrawos's situation.

[255] However, in considering the significance of this factor I must weigh it alongside the self-evidently more serious nature of the breaches which I have found, as well as my overall findings concerning procedural fairness and mitigation.

[256] I also take into account that despite the harsh impacts on Mr Andrawos being very real, they are not unique amongst other dismissed employees of his age and work history. Such factors alone do not outweigh conduct in breach of policy or act to sufficiently transform a dismissal for a valid reason into one that can be characterised, at law, as harsh.[75]

Conclusion

[257] Ultimately this is a case of failures in conduct and judgment by an employee with a poor disciplinary record who was working with a client on money matters seeking an order that his dismissal for sound, defensible and well-founded reasons be characterised as harsh, unjust or unreasonable because he had a pre-existing friendship with that client, was acting in what he considered to be that client's best interests, because the investigation into his conduct was deficient, and because of the harsh impact of dismissal.

[258] It is well established that a dismissal may be harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust.[76]

[259] In reaching my conclusion, I adopt the approach set out by a full bench of this Commission in *B, C and D v Australian Postal Corporation T/A Australia Post:*[77]

> **"[58]** Reaching an overall determination of whether a given dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh:
>
> (i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable;
>
> against

(ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.

[59] It is in that weighing that the Commission gives effect to a 'fair go all round'."

[260] It is relevant to note that the employer elected not to dismiss summarily for serious misconduct. It elected to dismiss on notice having regard to Mr Andrawos's employment record as a whole.

[261] I have found that two of the failures of duty (asking that the client's funds be placed into a co-signatory account and failing to manage a potential conflict of interest) were serious by virtue of:

- the nature of the industry in which the employer operates;
- the employer's proper need to enforce and sanction breaches of policies and procedures especially where they concern the management of client affairs and client funds;
- its legitimate concern about reputational risk and its obligation to not breach its duties to clients, to regulators or place its credit licence at risk;
- its loss of trust and confidence in Mr Andrawos (especially given his unwillingness to concede wrongdoing); and
- that Mr Andrawos had been trained in the norms expected of employees, including on giving advice.

[262] I have also found that certain other failures of duty, whilst less serious, cumulatively were valid reasons for dismissal.

[263] I give considerable weight to the fact that Mr Andrawos had a poor disciplinary record, though I give reduced weight to the punctuality warning of 29 January 2018 for reasons outlined.

[264] These factors weigh heavily in favour of not disturbing what is a valid reason for dismissal.

[265] However, there are substantial mitigating factors:

- Mr Andrawos had a genuine and established friendship with Mr McBryde-Martin that he was deeply invested in at the time he committed the breaches;
- the advice given to the client in breach of policy was substantially the same as advice he had earlier given in a personal capacity;
- Mr Andrawos was acting with honourable and honest intent and for no personal gain or advantage;
- the circumstances faced by Mr Andrawos given his pre-existing friendship with Mr McBryde-Martin and the unusual conduct and behaviour of Mr McBryde-Martin presented a unique and exceptional situation for an employee to manage; and
- although the potential conflict of interest was not disclosed, his intention to bring a pre-existing friend (James) into the business as a client was disclosed and agreed (in general terms) by the employer.

[266] Also of significance is that the disciplinary process contained unfair elements which were not mere technical oversights. I take into account the recent observations by a full bench of this Commission in *Federation Training v Sheehan*:[78]

> "It is trite to observe that any issue/s of procedural unfairness may not be of such significance as to outweigh the substantive reason/s for an employee's dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity as to outweigh any other considerations in respect to 'harshness', such as age, length of service, employment record, contrition or personal and family circumstances."

[267] However, in this matter the failure to provide procedural fairness in substance as distinct from form had a material impact on the decision-making process. Those failures prevented facts in explanation, mitigation and corroboration from being considered or considered with an open mind such that they, or matters arising from them, could materially alter the employer's prima facie view – that Mr Andrawos had committed serious misconduct warranting dismissal. The employer also wrongly jumped to a conclusion that all conduct after the business-client relationship was formed needed to accord with company policies, without considering whether conduct of a truly private nature in private time was in breach.

[268] Further, a material fact relied on by the employer, that is that Mr Andrawos could easily secure alternative employment in the finance sector, was wrong and thoughtless.

[269] Taking all of these factors into account, Mr Andrawos's dismissal was not unreasonable, particularly given the reason for his dismissal. Although some breaches of duty were less serious (for example, the Beyer incident and the non-permitted advice), the request on 19 and 20 January 2018 that James McBryde-Martin transfer $90,000 of funds to a co-signatory MyBudget account and his failure to recognise, disclose and manage his potential conflict of interest were serious breaches constituting valid reasons in their own right and cumulatively.

[270] Nor was the dismissal unjust, particularly having regard to his extensive disciplinary record.

[271] Was the dismissal, in an objective sense, harsh?

[272] On balance (and this conclusion is finely balanced), I consider it was. My findings concerning the substantial mitigating factors and the significant deficiencies in procedural fairness, when weighed against the valid reason and poor disciplinary record, combine to lead me to conclude that the dismissal was harsh. In combination, they acted to deny Mr Andrawos a fair go all round despite he having brought the circumstances upon himself.

Remedy

[273] I now turn to the question of remedy.

[274] The employer strongly resisted a reinstatement order. I have found that serious breaches of policy were committed by Mr Andrawos and that his failure to recognise those breaches was, particularly for Mr Bailey, a substantial basis for his loss of trust and

confidence. Reinstatement to a position at MyBudget would be inappropriate, particularly having regard to the nature of the business it conducts.

[275] In any event, whilst Mr Andrawos initially sought reinstatement, at the hearing he indicated that the breakdown in his own relationship with MyBudget precluded such an order. He is now pursuing a compensation remedy only.

[276] I am satisfied that a remedy of reinstatement would be inappropriate.

[277] I now turn to the question of compensation.

[278] Section 392 of the FW Act provides as follows:

> "**392 Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
>
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
>
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
>
> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
>
> (g) any other matter that the FWC considers relevant.
>
> *Misconduct reduces amount*
>
> (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would

otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.[79]

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[279] I note that the discretion to award compensation is not at large; it is a discretion guided by statute. I adopt the approach and principles governing the exercise of this guided discretion in *Sprigg v Paul Licensed Festival Supermarket*[80] which sets out a well-established, structured and transparent methodology for the assessment of compensation.

[280] I now consider each of the criteria in section 392 of the FW Act.

Viability: section 392(2)(a)

[281] There is no evidence before me to suggest that a compensation order would affect the viability of MyBudget.

Length of service: section (section 392(2)(b))

[282] Mr Andrawos had worked for MyBudget for eighteen months, from July 2016 until 14 February 2018. On termination, he was paid two weeks in lieu of notice.

Remuneration that would have been received: section 392(2)(c)

[283] Mr Andrawos was a full time employee with an ongoing contract of employment. Had Mr Andrawos not been dismissed, his disciplinary record and the evidence before me indicates that his employment in the company was not secure. Although he threw himself into his work and enjoyed it, I have found that he had a tendency to cut-corners and not work within established hierarchies. His performance was satisfactory, and even occasionally praiseworthy, but his conduct was also impulsive. By the date of dismissal he had an unhealthy rap sheet of counselling and warnings, including a final warning.

[284] Based on my findings, had he remained in employment and not been dismissed, further warnings would have been warranted. The breaches that I have found to have occurred with respect to allegations 3, 4 and 5 would have warranted sanction.

[285] Further, the employer's evidence was that since his dismissal it has identified other client accounts handled by Mr Andrawos where they consider policy or procedure was not adhered to.[81] Of course, these matters are untested in the sense of not having been put to Mr Andrawos for response, and I consider that evidence in that context.

[286] Taking all of these factors into account, I consider that Mr Andrawos would only have likely remained in employment for a further four weeks before either further disciplinary processes or further incidents of breach would have arisen and led to termination.

[287] The evidence before me is that Mr Andrawos was paid a base annual salary of $60,000 plus superannuation, bonuses and commissions. This represented a base weekly wage of $1,153.85 per week. Bonuses and commissions were discretionary based on targets and performance. I do not intend to take discretionary bonuses and commissions into account in determining this matter. To do so would be speculative and unfair.

[288] Accordingly, I estimate that Mr Andrawos would have earned $4,615.40 base salary plus $438.08 superannuation over the four weeks of prospective future employment had he not been dismissed.

[289] He was paid two weeks in lieu of notice. Consistent with Commission practice and authority, I will deduct that two weeks from the four weeks.

Mitigating efforts: section 392(2)(d)

[290] The evidence before me is that Mr Andrawos has made meaningful efforts to mitigate his loss by seeking alternative employment, both in the finance sector and in alternate work. To date, these efforts have not been successful.

[291] I make no reduction on account of this factor.

Remuneration earned: section 392(2)(e)

[292] Mr Andrawos has not earned income from employment since his dismissal.

[293] I make no reduction on account of this factor.

Income likely to be earned: section 392(2)(f)

[294] There is no evidence before me that Mr Andrawos is likely to earn income during the period between the making of an order and compensation being payable.

[295] I make no reduction on account of this factor.

Other matters: section 392(2)(g)

[296] There are no other matters or contingencies that need to be provided for.

Misconduct: section 392(3)

[297] Section 392(3) of the FW Act requires the amount of compensation that would have been ordered under section 392(1) be reduced by an appropriate amount on account of contributory misconduct.

[298] I have found that Mr Andrawos materially contributed to the employer's decision to dismiss by virtue of serious breaches of policy and procedure, and some lesser breaches. Although he had not received specific guidance on how to manage a potential conflict of interest with a pre-existing friend, I have also found that he had a responsibility to disclose those matters and seek guidance or direction from more senior managers, but did not do so.

[299] I consider that a 50% discount is appropriate in this case. This equates to a two week discount. I also consider that including a further discount for the value of annual leave accruals and superannuation that would have been payable over the four week period is appropriate, given my findings of misconduct.

Shock, Distress: section 392(4)

[300] I note that the amount of compensation allowable by the statute does not include a component for shock, humiliation or distress. Nor does it include any basis for punitive damages.

Compensation cap: section 392(5)[82]

[301] Given the amount I will order is nil, this issue does not arise.

Payment by instalments: section 393

[302] Given the amount I will order is nil, neither does this issue arise.

Conclusion

[303] Having found that Mr Andrawos was an employee protected from unfair dismissal and that he was unfairly dismissed within the meaning of the FW Act I do not, however, consider reinstatement to be appropriate.

[304] Having regard to the loss of likely future earnings arising from the employer's decision to dismiss (four weeks, of which two has been paid in lieu, leaving two weeks) and other considerations provided for in section 392 of the FW Act (resulting in a two week discount), the compensation order that I make is nil.

The Confidentiality Order

[305] As noted, by decision dated 26 June 2018 I issued a confidentiality order on 2 July 2018. That order constrains access by the public, the media or other third parties to confidential financial material before the Commission relating to those clients of the employer not involved in these proceedings, and to the identification of their names and personal details.

[306] When making the order, I indicated that I would keep its utility and terms under review.

[307] Having now heard the evidence as a whole and determined the matter I consider that some narrowing of the order is appropriate in two respects.

[308] Firstly, the definition of "materials" the subject of that order should make it clear that it does not include the Applicant's witness statement or documents lawfully in the possession of the Applicant at the date of dismissal, and which he was not otherwise required to return. Mr Andrawos should not have an obligation under paragraph 3 of the order to return those documents to the employer.

[309] Secondly, the order will provide that nothing in the order will prevent either party approaching the Commission to seek leave of the Commission to access any of the "materials" as defined at any relevant time, even after they are archived, after satisfying the Commission that it has reasonable grounds to seek such access.

[310] I will also vary order 3 to make it abundantly clear that the order for the return of confidential material by Mr Andrawos to the employer does not apply until these proceedings are fully exhausted including the time permitted by law for any related applications or appeals.

Orders

[311] I re-issue the confidentiality order in an amended form in conjunction with an order I now issue consistent with this decision, granting Mr Andrawos's application under section 394 of the FW Act and making a nil order for compensation.

DEPUTY PRESIDENT

Appearances:
M. Andrawos, *on his own behalf*
M. Hii and M. Eleftheriou, *with permission*, *for MyBudget Pty Ltd*

Hearing details:
2018.
Adelaide.
5, 6, 9, 11 and 13 July.

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[1] [2018] FWC 3526
[2] [2018] FWC 3753 at [6] - [20]
[3] PR608433
[4] [2018] FWC 3753 at [21] - [34]
[5] *Pearse v Viva Energy Refining Pty Ltd* [2017] FWCFB 4701 at [14]. See also section 591 of the *FW Act* and *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, 17 March 2000) Print S4213 at [61] - [62]; *Enterprise Flexibility Agreement Test Case* (Print M0464) at page 13; *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 509
[6] R12 Statement of Nicola Martin paragraphs 16 to 59
[7] MA1 Letter of Offer 14 July 2016 paragraph 10.5
[8] R10 Statement of Elizabeth Saunders; R5 Statement of Kerry Dodson paragraph 147.3
[9] R11 Statement of Stephen Bailey paragraph 55
[10] R11 Statement of Stephen Bailey paragraph 54
[11] A10 Text from Nicola Martin: "Congratulations on a ripper day, Mark, proud of you, you've got more contracts in one day than I have in 7 years, let's keep you on point so you can help more people legend! Ps just shout out if you're getting snowed under"
[12] KD1 pages 120 - 123; R5 Statement of Kerry Dodson paragraphs 140 - 184
[13] KD1 pages 262 - 264; R5 Statement of Kerry Dodson paragraphs 196 - 198
[14] A14 PBS Handbook page 5
[15] A5 paragraph 69
[16] The audio recordings, produced in evidence and played at the hearing (KD2), are reduced to transcript at KD1 pages 40 - 53
[17] R13 Statement of Kelsey Beyer paragraphs 13 to 24; KB1 pages 4 - 6
[18] KB1 pages 7 - 9
[19] A1 Statement of Mark Andrawos paragraph 39
[20] MA5
[21] MA5 concluding text: "sorry to have this conversation but anyway it was good to meet you take care of yourself mate, you seem like a good bloke" (textual errors corrected)
[22] MA6
[23] R6, R7 and R8
[24] KD1 pages 22 - 23
[25] MA8 page 2
[26] MA8 page 1
[27] MA9
[28] KD1 pages 117 - 119
[29] KD1 pages 109 - 116
[30] KD1 pages 280 – 281
[31] R5 Statement of Kerry Dodson paragraph 208
[32] R11 Statement of Stephen Bailey paragraph 59
[33] R5 Statement of Kerry Dodson paragraph 208
[34] A8
[35] KD1 pages 288 to 290
[36] KD1 pages 31 to 38

[37] R13 Statement of Kelsey Beyer
[38] KD1 at pages 57 to 59
[39] R5 Statement of Kerry Dodson paragraphs 113 - 114
[40] A13
[41] A13 page 47
[42] A5 page 2
[43] KD1 page 47
[44] A6 paragraph 23
[45] A13 page 47
[46] KB1 pages 4 - 6
[47] R9 Statement of Claire Wilks paragraphs 24 - 28
[48] KD1 pages 31 – 39 at page 36
[49] DM1 page 2
[50] MA9 Allegation letter 7 February 2018 page 4
[51] CW1 pages 14 - 15
[52] MA1 Letter of Offer 14 July 2016 paragraph 13
[53] Transcript audio 9 July 2018 15.47pm
[54] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371
[55] *Briginshaw v Briginshaw* (1938) 60 CLR 336
[56] *Blyth Chemicals Ltd v Bushnell* (1933) 49CLR 66 at 81 - 82
[57] Transcript audio 9 July 2018 15.47pm
[58] *Ali v Toll In2 Store* [2010] FWA 7426; *Browne v Coles Group Supply Chain Pty Ltd* [2014] FWC 3670; *B, C and D v Australia Postal Corporation* [2013] FWCFB 6191 at 36
[59] MA9
[60] KD1 pages 262 - 264; R5 Statement of Kerry Dodson paragraph 94
[61] *Wadey v YMCA Canberra* [1996] IRCA 568
[62] R5 Statement of Kerry Dodson paragraphs 52
[63] R5 Statement of Kerry Dodson paragraphs 196
[64] R5 Statement of Kerry Dodson paragraphs 91
[65] R11 Statement of Stephen Bailey paragraph 19
[66] Transcript audio 11 July 2018 11.53am
[67] KD 1 page 39; KD1 pages 97 to 101
[68] KD9 pages 109 - 116
[69] R5 Statement of Kerry Dodson paragraphs 50
[70] A5
[71] MA11
[72] *Rose v Telstra Corporation Limited* [1998] AIRC 1592; *McManus v Scott-Charlton* [1996) FCA 1820 at 56
[73] *Kore v Chief Executive Department of the Premier and Cabinet* [2017] SAIR 3 at 83
[74] R11 Statement of Stephen Bailey paragraph 59
[75] For example, *Dawson v Qantas Airways Limited* [2017] FWCFB 1712 at [48]
[76] *Byrne and Frew v Australian Airlines Ltd* (1995) 1995] HCA 24, (1995) 185 CLR 410 at 465
[77] [2013] FWCFB 6191
[78] [2018] FWCFB 1679 at 55
[79] Subsection 392(5)(b) indexed amount is $71,000 from 1 July 2017
[80] Print R0235, (1998) 88 IR 21, since updated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages* [2013] FWCFB 431; 229 IR 6
[81] R12 Statement of Nicola Martin paragraphs 100 - 110
[82] $72,700 from 1 July 2018