



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Daniel Volker**

v

**Westpac Banking Corporation T/A Westpac**  
(U2018/4594)

COMMISSIONER MCKINNON

MELBOURNE, 6 DECEMBER 2018

*Application for an unfair dismissal remedy – unauthorised use of mobile phone – unauthorised transfer of confidential information – whether harsh, unreasonable or unjust.*

## Introduction

[1] Daniel Volker was employed by Westpac Banking Corporation (Westpac) as a Relationship Manager for Westpac Premium from 20 January 2014 until 12 April 2018 when his employment was terminated on the grounds of breach of policy.

[2] On 3 May 2018, Volker applied to the Commission for a remedy for unfair dismissal under section 394 of the *Fair Work Act 2009* (the Act). Volker says the dismissal was unfair both on procedural grounds and because he says dismissal was not a proportionate response to the alleged conduct.

[3] Westpac says the dismissal involved serious breaches of its Code of Conduct, Technology Code of Use and Group Privacy Policies. It says that in the circumstances, both the dismissal and the process leading to dismissal were fair.

[4] The matter was conciliated on 30 May 2018 and 8 August 2018 and was not settled.

[5] After seeking the views of the parties, a hearing was held on 24 and 25 September 2018 in Melbourne. Each party was represented with permission.

## Preliminary matters

[6] The application was filed 21 days after the dismissal. It is not in dispute that at the time of dismissal, Volker had completed the minimum employment period of 6 months and was employed under the *Westpac Group Enterprise Agreement 2016*<sup>1</sup> which applied to his employment. Volker is protected from unfair dismissal.

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<sup>1</sup> AE416731

[7] It is also not in dispute that Volker was dismissed by Westpac for reasons that did not include redundancy and that Westpac was not a small business employer at the time of dismissal. It is therefore not necessary to decide whether the dismissal was a case of genuine redundancy or consistent with the Small Business Fair Dismissal Code. Neither is relevant to the case at hand.<sup>2</sup>

### **Was the dismissal harsh, unjust or unreasonable?**

[8] In determining whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account the criteria in section 387 of the Act. Those are considered in turn.

*Was there a valid reason for the dismissal related to Volker's capacity or conduct?*

[9] The reasons given to Volker for dismissal were:

1. Giving his mobile work phone to his Aunt for her personal use on 29 January 2018;
2. Dishonesty in response to allegations about his Aunt's use of his work mobile phone; and
3. Repeatedly using his personal Gmail account for work purposes, including sending a significant volume of customer files and other Westpac Group documents to that account on 16 February 2018, placing customers' details at risk.<sup>3</sup>

### The mobile phone allegations

[10] Westpac says Volker gave his work mobile phone and sim card to his Aunt for her use while he was at work, in breach of its Code of Conduct and Technology Code of Use. It says it became aware of the breach on 29 January 2018, when Jenny Maugueret, Relationship Director, tried to call him on his work mobile number. After leaving a voicemail message, she received a return phone call from Volker's Aunt who suggested ringing Volker on his personal number, which she gave to Maugueret. According to Westpac, Maugueret then realised Volker's mobile phone number as listed on its internal contact list was not his work issued mobile phone number. That gave it reason to believe Volker was using his personal mobile phone for work purposes.<sup>4</sup>

[11] The facts as set out above are not in dispute. Volker agrees that he gave his Aunt his work mobile phone.

[12] There is a dispute about precisely what occurred in relation to the mobile phone. The facts are important because they underlie the accusation of dishonesty against Volker.

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<sup>2</sup> *Fair Work Act 2009* (Cth), s.385

<sup>3</sup> Exhibit 1, Statement of Daniel Volker, Attachment DV-5

<sup>4</sup> Exhibit 1, Attachment DV-5; Exhibit 6, Statement of Mosa Gherjestani,

*The allegation of dishonesty*

[13] The letter of allegation on 16 February 2018 in relation to mobile phone misuse records Volker's response to Maugueret that he used his personal phone and personal sim card for work, as the work issued phone was "no good".<sup>5</sup>

[14] Volker says on 29 January 2018, he asked his Aunt if she had used his work phone and she said no. He says it was only in late February 2018 that the Aunt admitted she knew his pin code. An email from Maugueret to Westpac on 26 February 2018 confirmed her discussion with Volker that day about his Aunt's use of the work phone. It records his advice to her that "it was not possible" his Aunt had called her back on 29 January 2018.<sup>6</sup> The reference to "late February 2018" must then mean a time after 26 February 2018, because on that date, Volker could not account for how his Aunt had been able to return Maugueret's call.<sup>7</sup>

[15] On 16 February 2018, Volker met with his Manager, Mosa Gherjestani, to hear about the allegations. He was asked not to respond immediately but instead to respond in writing by 19 February 2018. The response date was later extended to 26 February 2018, taking into account a period of leave Volker had scheduled for 19 to 23 February 2018.

[16] Volker provided his response to the mobile phone allegations, as required, in an email on 26 February 2018.<sup>8</sup> The email:

- acknowledges the "incident" and apologises;
- explains that he uses his work mobile phone as much as he can but its capacity sometimes compromises the quality of his work because it is not compatible with Westpac's online banking application ("the Westpac app");
- explains that he "recognised the shortfall of using the Nokia handset late last year" and requested a Samsung phone from Westpac, but the request was refused and he was offered another Nokia or a Microsoft phone;
- admits he had been using his own Samsung phone with "dual sim" but after his dual sim was cancelled, he had to resort back to using both the Nokia and his own phone, involving "a lot of double handling";
- notes that he had now ordered a Westpac Samsung phone;
- states that he has "never allowed anyone including my aunt to use my work phone or work number", explaining that in an oversight, he had left it at home on the day she answered it;
- denies ever providing his aunt with the pin for his work mobile phone; and
- explains that he copies work meeting invitations to his Gmail account so that he has the alerts in his calendar.

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<sup>5</sup> Exhibit 6, Attachment MG-4

<sup>6</sup> Exhibit 6, Attachment MG-5

<sup>7</sup> Ibid

<sup>8</sup> Ibid

[17] The email response of 26 February 2018 was a modified version of an earlier draft that Volker inadvertently filed in the proceeding. Volker says the draft version was prepared by his fiancé, “Mischa” and edited by him to make sure “it was correct” before sending.<sup>9</sup> It shows certain deletions of text, including:

- Any references to a personal OPPO phone he also used in connection with work;
- Volker’s decision to use the work sim in the OPPO phone and keep his Samsung for personal use;
- That his Aunt knew his pin code;
- That he had never provided his Aunt with the pin code for his work phone; and
- That his Aunt had returned Maugueret’s call.

[18] On 4 April 2018, Volker made a further statement in relation to the mobile phone allegations to Westpac. He said “My use of my Gmail and my personal mobile phone for work purposes has occurred only when technical Westpac issues have arisen on a limited number *[sic]* occasions.”<sup>10</sup>

[19] On 5 June 2018, Volker made a statement in the proceeding, attesting to the following:<sup>11</sup>

- He used the Nokia with his work number until January 2017.
- From February to August 2017, he used the OPPO phone as a “dual sim” phone. Westpac IT helped him set up the dual sim in the OPPO phone.
- In August 2017, he asked and was refused the option of ordering a Samsung phone by his manager, Erika Perkins. The conversation occurred “as she was walking near the printers where [Volker] was collecting documents” and while they walked back to their desks.
- Between August and November 2017, he used his OPPO phone for both work and personal use and the Nokia phone when he needed work emails on the road or to call clients.
- In November 2017, he purchased a Samsung phone and began using it for both work and personal calls. His work sim remained in the OPPO phone.
- As at 16 February 2018, he had both the OPPO and a personal Samsung phone. Neither was set up to receive work emails. He also had the Nokia issued by Westpac. It was set up to receive work emails.
- He used his Samsung for work (including with his own phone number) because he had issues with Optus service.
- When his Aunt called Maugueret in January 2018, she did so using his work sim on the OPPO phone. She never had access to the work Nokia phone.
- He allowed his Aunt access to his OPPO phone from time to time while she was in Australia so that he could contact her if required. At no stage did he authorise her to make calls from that phone.

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<sup>9</sup> Exhibit 1, Attachment DV-3; Exhibit 5, Track Changes copy of Attachment MG-5; Audio recording of Hearing.

<sup>10</sup> Exhibit 6, Attachment MG-8

<sup>11</sup> Exhibit 1

[20] On 13 August 2018, Volker made another statement in the matter. Among other things, it says:<sup>12</sup>

- He never allowed anyone, including his Aunt, to use the Nokia handset which was left at home or to use his work number in his OPPO phone to make calls.
- His aunt initially denied calling Maugueret and later denied making any calls from “that phone” but admitted she had seen him put his pin code into the phone in an “L shape”. He did not know his Aunt had made phone calls from his work number until she admitted it in late February 2018.

[21] The evidence Volker gave at the hearing was, at times, hard to follow. He said the OPPO phone had his work issued sim card in it. He said he leaves his Nokia phone at home, suggesting that this was more than an isolated occurrence. He said his Aunt did not have access to the OPPO phone but also said he let his Aunt use the OPPO phone with work sim.

[22] Volker says Mischa prepared the initial draft of his response to the mobile phone allegations and her draft was “not his version”. He said he changed the initial draft to ensure the response was correct, but agreed that deleted sections of the response referring to the OPPO phone were correct. He did not know why he deleted references to the OPPO phone in the response, but also said he was trying to be clear that he was “using the Samsung phone” and chose not to include any reference to the OPPO phone in his response. In my view, he was also trying to avoid having to explain his use of two personal phones, including the OPPO, for work purposes. While he had only purchased the Samsung phone in November 2017, he had been using the OPPO phone all year. Confining his use of the Samsung phone was also consistent with his explanation that he had only departed from using the Nokia phone due to functionality issues, and only after his request to Ms Perkins for a different phone in August 2017 had been denied.

[23] When asked about why he had told Westpac he forgot his phone and left it at home on the day his Aunt answered it, he said he had been confused, and that he had been going through a difficult time because his mother in law was unwell. Yet according to Volker, he had time to prepare and edit his response to Westpac before it was sent, to ensure it was “correct”. The suggestion that this was an isolated incident is inconsistent with his later evidence that he gave the phone so that he could contact her while he was at work. It is difficult to see where the initial confusion arose.

[24] Westpac says it only became aware of the OPPO phone when it received Volker’s witness statement of 5 June 2018. It suggests that Volker simply ‘made it up’ to suit his version of events. I do not agree. Volker says Westpac knew about the OPPO phone. Although there is no evidence that it did, Westpac only led limited evidence in the matter and I cannot be certain it did not.

[25] I find that the OPPO phone did exist and that from November 2017, Volker had three phones: the Nokia, the OPPO and the Samsung. The OPPO phone and the Nokia were on the Optus network and could be used with his work sim card. The Samsung was on the Telstra network and could not. I find that Volker rarely used the Nokia phone because it did not have the functionality he wanted from his mobile phone. I accept he may have used it from time to time to access emails while ‘on the road’ or with clients, but he also had his laptop for that

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<sup>12</sup> Exhibit 4, Reply Statement of Daniel Volker

purpose. I find that he used the OPPO phone for work with a ‘dual sim’ for convenience until November 2017, when he began using his personal Samsung phone for work because it had better coverage than his OPPO phone.

**[26]** A close reading of Volker’s response to the mobile phone allegations on 26 February 2018 confirms his own admission that leaving out any reference to the OPPO phone was deliberate. His email of 26 February 2018 is carefully worded. It refers to his having a Samsung phone and having to resort back to “using two phones”, including the Nokia, after the dual sim card he used on the Samsung had been cancelled. His later evidence is that part of the reason for his purchase of the Samsung phone was that his dual sim card had been cancelled. Despite saying so expressly, there is no evidence that he ever used a dual sim in his Samsung phone.

**[27]** The response refers to having left his “work phone” at home when it was answered by his Aunt. While the response does not specify which phone that was, earlier it refers to the Nokia as the “handset which I use as the mobile work phone”. The only reasonable inference Westpac could have drawn was that it was the Nokia phone his Aunt had “answered”. Yet at the time the response was written, Volker knew that not to be the case because his work sim was in the OPPO phone. It could only have been that phone that his Aunt had used to speak with Maugueret.

**[28]** There is no credible explanation before me about how she came to have Volker’s pin if he did not give it to her, because the pin was personal to Volker. It is not in dispute that Volker gave his Aunt a phone, with his work sim in it, to answer. Although it was initially denied, it is no longer in dispute that his Aunt knew the pin for that phone and that she used the phone to make calls. There is no evidence about how technology savvy his Aunt is, but circumstantially relevant is the fact that she was a 70 year old woman visiting her nephew from overseas for a short period, who must not have had her own mobile phone to use.

**[29]** There is also the question of motivation. Giving his Aunt the pin (or not) affects whether Volker can then be said to have given her access to Westpac’s sim card and any content stored either on the sim card or phone. If all Volker’s Aunt did was answer a phone call, she did not need to know his mobile phone pin and without the pin, she could not have accessed any other content on his phone, including work contacts or emails. On the other hand, if Volker’s Aunt listened to a voicemail message and returned a phone call, she must have first used the pin to unlock the phone. If she could unlock the phone to make calls, she could unlock the phone for any purpose, including to access emails. I find that when Volker gave her the phone to use, he also showed her the pin for that phone.

**[30]** I accept Volker’s evidence that Erica Perkins refused his request for a different work mobile phone, because there is nothing but the hearsay evidence given by Gherjestani to contradict it, to which I have attributed no weight. I find that Volker asked both Perkins and another Westpac employee about ordering a new mobile phone and they responded to the effect that he would need the approval of the Westpac Group General Manager, Consumer Bank which was unlikely. I find that he did not then pursue the matter until early February 2018, after Maugueret told him he could order a work Samsung phone in the context of dealing with the mobile phone allegations.

[31] For the above reasons, I find that Volker was not honest with Westpac:

1. On 26 February 2018, in stating that he left his phone at home on 29 January 2018;<sup>13</sup>
2. On 26 February 2018, when he chose not to disclose the use of his OPPO phone with his work sim card;<sup>14</sup>
3. On 26 February 2018, in denying he gave his Aunt the pin for the phone connected to his work sim card;<sup>15</sup> and
4. On 4 April 2018, in stating that he used his personal mobile phone for work purposes “only when technical Westpac issues have arisen on a limited number of occasions”.<sup>16</sup>

*The consequence of giving his Aunt access to the work mobile sim*

[32] Volkers’ Employment Terms and Conditions expressly required him to observe and comply with its procedures and policies, including Westpac’s Code of Conduct, Information Security Policy and Technology Code of Use.<sup>17</sup>

[33] The Code of Conduct includes the following expectations:

- not using or disclosing confidential information except as authorised or permitted by law;
- only using Westpac Group property, including information technology, for proper purposes; and
- not using funds, property or information belonging to the Westpac Group or our customers for our personal benefit, nor helping others to do so.

[34] I am satisfied that Volker was familiar with the Code of Conduct, because of the way he framed his response to the mobile phone allegations:

“I have always tried my best to comply with Westpac’s group policies and processes as well as the Group’s Code of Conduct surrounding any professional matters that I carry out in or outside the office”.<sup>18</sup>

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<sup>13</sup> Exhibit 6, Attachment MG-5

<sup>14</sup> Ibid, Attachment MG-5

<sup>15</sup> Ibid, Attachment MG-5

<sup>16</sup> Exhibit 1, Attachment DV-8

<sup>17</sup> Ibid, Attachment DV-1

<sup>18</sup> Exhibit 6, Attachment MG-5; Exhibit 1, Attachment DV-10

[35] Westpac's Working Remotely Policy<sup>19</sup> is also relevant. It sets out, among other things, the following expectations:

- “Make sure you keep all work information secure especially customer records and any other sensitive material. You must take reasonable care of our information and equipment.”
- “Take reasonable steps to keep our technology, equipment and information safe.”
- “If you have a Westpac Group issued phone, this should be used for all work related calls when you’re working remotely.”
- “Discuss any changes that might affect your ability or safety in working remotely with your People Leader.”

[36] Volker was trained on the Working Remotely Policy on 22 August 2016. By his own admission, there was a great deal of training going on in his role, and there were many important issues that he had to be aware of.<sup>20</sup> He had completed a Diploma of Financial Services on 17 August 2015. He had received regular workplace training on a range of subjects including the Technology Code of Use (28 January 2014), the Code of Banking Practice (18 May 2014), Consumer Protection (18 May 2014), Privacy Training (19 May 2014), Knowing Westpac (3 July 2015), Relationship Manager Induction Guide (31 July 2015), Risk Foundations Workshop (27 July 2015 and 24 August 2016), Working Remotely (22 August 2016), Introduction to Understanding Security Workshop (25 August 2016), Serving Our Customers Fairly, Ethically and Responsibly (1 August 2017), Spotlight on Fraud (30 November 2017), “Doing the Right Thing” (27 January 2018) and various Security Modules (24 March 2018).<sup>21</sup>

[37] Volker was trained in the Technology Code of Use on 28 January 2014, although the precise content of the Technology Code of Use at that time was not established. Volker says he was not aware of the Technology Code of Use document shown to him in the hearing until after he was terminated. Letters sent to Volker on 16 February 2018 and 29 March 2018 each referred to the Technology Code of Use, but a current copy of the Code of Use was only sent to Volker by email after his employment was terminated on 12 April 2018.

[38] Volker participated in “Doing the Right Thing” training on 27 January 2018, approximately one month before he gave his Aunt access to the OPPO phone and work sim card. The training covers, among other things, The Technology Code of Use and the Code of Conduct.<sup>22</sup> It says:

“You can help us by:

1. Following our policies and procedures relevant to your role and familiarising yourself with our key policies.

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<sup>19</sup> Exhibit 6, Attachment MG-2

<sup>20</sup> Exhibit 4, [4]

<sup>21</sup> Exhibit 4, Attachment DV-17

<sup>22</sup> Exhibit 6 at [19]

3. Living our Values, our Code of Conduct, rules and familiarising yourself with our Technology Code of Use.”<sup>23</sup>

[39] Doing the Right Thing Training also included content on “Information Security”, “Privacy” and “Managing Customer Data”.<sup>24</sup> It contains statements such as:

“Information security is about keeping our personal, customer and business information and systems safe and secure. At Westpac, we work with sensitive information every day and protecting that information, both digital and physical, is essential for our business.”

“Never leave sensitive information unattended anywhere. Know where your devices are and lock them when not in use.”

“Our customers trust us with their personal information and they expect us to protect it and keep it safe.”

“Ensure company devices are secure.”

“Don’t ignore processes or requirements designed to ensure information is secure.”

[40] I am satisfied that Volker knew giving his Aunt access to his work sim card was inconsistent with the expectations that Westpac had of him as an employee.

[41] I find that his conduct, together with his dishonesty about it, was a valid reason for dismissal.

#### The data transfer allegations

[42] On 16 February 2018, Westpac says Volker sent a large amount of its customer data to his personal Gmail account (the data transfer).

[43] Volker does not deny the allegation. He says he sent the information to his Gmail account so that he could continue working on client applications and generating new client business from home, or from the hospital, when his wife’s mother was unwell. He says he did not misuse any of the client information, and that it was deleted as client work was completed. He says his work laptop does not always work and when it does, it is too slow. He says he tried to resolve these issues with Westpac’s IT Department on a number of occasions.

[44] The data transfer occurred in the early hours of 16 February 2018, within hours of his having been notified on 15 February 2018 of a meeting on 16 February 2018 to discuss the mobile phone allegations.<sup>25</sup>

[45] The data transferred to Gmail included all of Westpac’s relationship manager data, including all excel customer and potential customer lists on its shared drive for premium staff

<sup>23</sup> Email from Respondent, 24 September 2018, Introduction to doing The Right Thing v2.0

<sup>24</sup> Email from Respondent, 24 September 2018, Doing the Right Thing: Integrity v2.0, Doing the Right Thing: Courage v2.0, Doing the Right Thing: Achievement v2.0

<sup>25</sup> Exhibit 6, Attachment MG-3

and another drive.<sup>26</sup> It included names, contact numbers, addresses, details of banking products held and income credits, monthly incomes, average earnings and loan balances. Some of the information was relevant to his work while some of it was not.

[46] While the timing of the data transfer and the disciplinary meeting is highly coincidental, I accept Volker's explanation that he was transferring the data to begin preparing for an impending restructure, with the aim of ensuring that his portfolio was structured correctly for the next 12 months. It was a busy and important time of the year for planning. Volker was aware of the pressure from within his team, the black cloud over the financial services industry more broadly and Westpac's focus on performance. He wanted to ensure "an exceptional year". He did not think the mobile phone allegations were serious. There is no evidence that he had any untoward motivation in acting the way he did, or that he was planning on using the data for any purpose other than set out above.

[47] Even so, it was a significant lapse of judgment. It placed a large amount of premium customer data, including the detailed personal information of hundreds of individuals, in an online environment over which Westpac had no control. It placed Volker in possession of important confidential information that did not belong to him, to use for whatever purpose he saw fit, whether for the benefit of Westpac or not.

[48] It was also not an isolated incident, but rather the continuation of a pattern of conduct involving the use of Gmail, a third party platform operating outside Westpac's secure internal system, for daily work activities.<sup>27</sup> I accept that Westpac's systems and equipment may have been slow or inefficient and that he had difficulties with his laptop and had tried to address them with Westpac's information technology department. I also accept that his self-designed 'work around', using Gmail and his own mobile phones, was both more convenient and allowed him to act nimbly in response to client needs, supporting his mandate to build client relationships. However, it was not within Volker's remit to work outside of Westpac's established systems. By devising his own, more efficient system of work, Volker prioritised customer service ahead of the safety and security of bank and customer information. He did so contrary to Westpac's expectations in a most fundamental way.

[49] Volker's Employment Terms and Conditions expressly required him to safeguard, keep and treat as confidential its "confidential information", defined to include information about the business, financial affairs, assets or liabilities of Westpac and any of its customers, as well as customer lists and any databases or other records of Westpac or any other member of the Westpac Group.<sup>28</sup> It also stated as follows:

"You must check with your manager before you remove any Confidential Information from your workplace. Unless you are required to do so in the course of performing your duties, you must not make any copy or summary of any Confidential Information."

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<sup>26</sup> Audio recording of hearing, 24 September 2018.

<sup>27</sup> Exhibit 1, [50], Audio recording of hearing, 24 September 2018

<sup>28</sup> Exhibit 1, Attachment DV-1

[50] I have set out above relevant extracts from the Code of Conduct,<sup>29</sup> including the expectation that employees not use or disclose confidential information except as authorised or permitted by law.

[51] Westpac's Working Remotely Policy included its expectations that work information, including customer records and any other sensitive material, be kept safe and secure.

[52] Volker's training record and the content of his training in "Doing the Right Thing" is also set out above.<sup>30</sup>

[53] Volker's decision to transfer a large amount of Westpac's confidential information to his Gmail account occurred in circumstances where he was aware of his obligation to use Westpac's processes and systems and keep customer and bank information secure. It was in breach of his duty to both Westpac and its customers. It was a valid reason for dismissal.

*Was Volker notified of the reason for dismissal?*

[54] I am satisfied that Volker was notified of the reasons that I have found to be valid reasons for dismissal relating to his conduct. They were set out extensively in the letters of 16 February 2018 and 26 March 2018.

*Was Volker given an opportunity to respond?*

[55] I am satisfied that Volker was given an opportunity to respond to those reasons for dismissal, including in the meetings on 29 March 2018 and 12 April 2018.

[56] Volker says he was only given one day to respond to the mobile phone allegations because the timeframe for response coincided with his period of leave. I do not accept the submission. His own evidence is that initially, he did not take the mobile phone allegations seriously, thinking he might receive a 'slap on the wrist'. I have accepted Volker's submission that the data transfer was motivated by work imperatives and so that he could continue to work while on leave, including at the hospital where his mother in law was sick. If he was in a position to undertake future planning work in that period, he was also in a position to prepare his response to the mobile phone allegations. He did so, with the assistance of his partner, Mischa, and there are two versions of the draft response in evidence. The evidence supports a finding that Volker had, and took, the opportunity to carefully prepared and consider his response to the mobile phone allegations before submitting it to Westpac.

[57] The meeting on 29 March 2018 was approximately 5.5 hours. It was, by any measure, a long meeting. The time was mostly spent trying to get Volker's laptop to work and then going through Volker's Gmail account to delete confidential information belonging to Westpac.

[58] The letter of 29 March 2018 given to Volker in that meeting was headed "Re: Intent to Terminate Employment". It dealt primarily with the mobile phone allegations. It also contained the data transfer allegations for the first time, and sought a response to the new set

<sup>29</sup> Exhibit 6, Attachment MG-5; Exhibit 1, Attachment DV-10

<sup>30</sup> Exhibit 4, [4]

of allegations by 3 April 2018. Volker responded on 4 April 2018 and then a further meeting to discuss the allegations occurred on 12 April 2018, where his employment was terminated.

*Unreasonable refusal of a support person*

**[59]** There is no evidence of any unreasonable refusal to allow Volker to have a support person assist in discussions about the dismissal. Volker attended both the meeting on 29 March 2018 and the meeting 12 April 2018 with his union representative.

*Was Volker warned about unsatisfactory performance?*

**[60]** Volker's dismissal was not related to unsatisfactory performance, but rather to his conduct. This criterion is not relevant.

*The size of the employer's business*

**[61]** Westpac is a large employer in Australia with sophisticated policies and procedures. The size of the business had no detrimental effect on the decision to dismiss or the process undertaken by Westpac in connection with the dismissal. If anything, it was a factor in ensuring due process was followed in relation to the dismissal.

*Access to dedicated human resources management specialists or expertise*

**[62]** Westpac has dedicated human resource management specialists and access to relevant expertise both internally and externally. These resources are likely to have supported the application of what I consider to have been a fair process leading to dismissal.

*Other relevant matters*

I accept the unchallenged evidence that Volker was good at his job, committed to delivering for Westpac and that, but for the discovery of his unorthodox approach to work, he would have remained a valued employee of Westpac. On the other hand, Volker's evidence that it never occurred to him that using Gmail to store such a large quantity of confidential customer information might not be acceptable to Westpac was surprising, especially given the training he had received. Volker points to emails sent by the IT Department to his Gmail account containing what he described as 'highly confidential passwords' as somehow justifying his own conduct. The comparison is not a fair one. The IT Department was sending single use passwords to support Volker's access to Westpac's secure systems. Volker sent a large amount of confidential information about customers and potential customers from inside Westpac's secure systems to an external online environment over which Westpac had no control.

**[63]** In my view, the mobile phone allegations, answered honestly and with contrition, would not have warranted dismissal. Volker expressed remorse and a willingness to change his behaviour once checked. However, he also responded with what can only be described as an 'evolution of the facts'. In doing so, he was not honest with Westpac and this made his conduct more serious.

**[64]** The data transfer was a serious lapse of judgement and it placed both Westpac and its customers at risk of harm. It is no answer to the allegations that there was no actual harm

caused. Volker had an obligation to work within authorised Westpac systems and Westpac's instruction to him to do so was both reasonable and lawful.

[65] Volker tendered extracts from evidence given in relation to Westpac in the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*. He asked why Westpac could treat his conduct so seriously, when it did not take any comparable action in other potentially more serious cases of misconduct. The question is a fair one, but I do not have the full facts of those matters before me and nor can I know what, if any, disciplinary response was, or will be, the result of matters arising out of the Royal Commission. Regardless, the fact that one person may have acted improperly is no shield against the conduct of another.

[66] The *Australian Bankers' Association Inc. Banking Industry Conduct Background Check Protocol* (ABA Protocol) has imposed a new layer of risk on employees working in the financial institutions who are signatory to it. If an employee ceases employment in circumstances characterised by their employer as misconduct, the ABA Protocol requires that misconduct to be disclosed to prospective employers of the employee. While disclosure can only be made with the consent of an employee, the likelihood is that an employee who does not consent will be treated as an employee to whom misconduct has been attributed.

[67] The consequences of a record of "misconduct" are potentially significant for employees because it lasts for five years. In that period, the record may well prevent them from working in many of the major financial institutions in Australia. That is the case whether or not alleged misconduct has been proven. I would also observe that it is not for the Commission to find whether an employee has committed misconduct for the purposes of the ABA Protocol. That is a matter for the signatories to that Protocol, once apprised of all relevant facts.

[68] Finally, after the hearing, Volker drew my attention to another recent decision of the Commission involving an alleged breach of the Technology Code of Use at Westpac.<sup>31</sup> The facts in that matter are quite different to those in this case, both in terms of the conduct alleged and the process undertaken by Westpac in dealing with its concerns. It does not bear on my findings in this matter.

## Conclusion

[69] I have considered each of the matters specified in section 387 in the context of the particular facts and circumstances detailed above. On balance, I am satisfied that the dismissal of Volker was a proportionate response to the conduct that I have found occurred, and the process followed by Westpac was fair. I find that the dismissal was not harsh, unjust or unreasonable. It was not unfair.

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<sup>31</sup> *Deng v Westpac Banking Corporation* [2018] FWC 7334

[70] The application is dismissed.



COMMISSIONER

*Appearances:*

*R Preston* of counsel for the Applicant

*A DeBoos* for Westpac Banking Corporation

*Hearing details:*

2018.

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