



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Mr John Sutton**

**v**

**Solar and Batteries Direct Pty Ltd**

(U2018/10246)

COMMISSIONER HUNT

BRISBANE, 13 MAY 2019

*Application for an unfair dismissal remedy - jurisdictional objection - applicant dismissed on respondent's initiative – jurisdictional objection dismissed.*

[1] On 4 October 2018 Mr John Sutton made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that he had been dismissed by Solar and Batteries Direct Pty Ltd (Solar) and that the dismissal was harsh, unjust or unreasonable.

## **Background and jurisdictional objections**

[2] Solar is owned and operated by Mr Iain Parke, who also owns and operates Parke Electrical Pty Ltd (Parke Electrical). Mr Sutton commenced employment with Mr Parke in January 2017 and at various times worked across both entities up until the termination of his employment on 18 September 2018.

[3] In its Form F3 – Employer Response to Unfair Dismissal Application, Solar raised two jurisdictional objections, contending that pursuant to s.383 of the Act Mr Sutton had not completed the minimum employment period, and that pursuant to s.386 of the Act, he had not been dismissed from his employment.

[4] I issued directions requiring both parties to file material regarding Solar's jurisdictional objection as to whether Solar and Parke Electrical were 'associated entities' under s.50AAA of the *Corporations Act 2001*. I also sought the parties' views on whether my decision on this jurisdictional objection could be made on the papers without a hearing.

[5] Mr Sutton filed material in accordance with my directions and advised that he was satisfied for this matter to be decided on the papers. Solar did not file materials as directed and did not express its view as to whether a hearing was required in this matter. I wrote to the parties on 1 March 2019 to indicate that my decision regarding Solar's jurisdictional objection that Mr Sutton was not a person protected from unfair dismissal would be made on the papers and my decision was reserved.

[6] On 10 April 2019 I issued my decision on the jurisdictional objection.<sup>1</sup> I concluded that Mr Sutton's period of employment with Solar and its associated entity, Parke Electrical,

exceeded the minimum period of employment of 12 months; and that as at 18 September 2018 Mr Sutton was a person protected from unfair dismissal.

[7] Accordingly, Solar’s jurisdictional objection that Mr Sutton did not complete the minimum period of employment was dismissed.

[8] Having already determined that Solar and Parke Electrical are associated entities and that Mr Sutton was a person protected from unfair dismissal at the time of the termination of his employment, I do not intend to revisit the factual background relevant to those matters, as they are addressed at length in the decision of 10 April 2019.

[9] The jurisdictional objection as to whether Mr Sutton had been dismissed was listed for a hearing before me on 18 April 2019. This decision deals with whether there was a dismissal pursuant to s.386(1) of the Act.

[10] During the hearing Mr Sutton was represented by his father, Mr Shawn Sutton. The Respondent was represented by Mr Parke. Where I refer to Mr Sutton in this decision I refer to the Applicant.

## **Legislation**

[11] Section 385 of the Act defines the meaning of “unfair dismissal” and states as follows:

### **“385 What is an unfair dismissal**

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

[12] Section 386 of the Act deals with the meaning of dismissed, providing:

### **“386 Meaning of *dismissed***

(1) A person has been *dismissed* if:

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

- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
- (2) However, a person has not been *dismissed* if:
- (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
  - (b) the person was an employee:
    - (i) to whom a training arrangement applied; and
    - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;and the employment has terminated at the end of the training arrangement; or
  - (c) the person was demoted in employment but:
    - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
    - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

### **Summary of Mr Sutton's evidence and submissions**

**[13]** Mr Sutton commenced employment with Solar on 27 February 2017 as a labourer before commencing an apprenticeship in March 2018. He is 19 years of age. He made submissions that he had concerns about his pay being incorrect at different times throughout his employment, and had made enquiries with Mr Parke about his pay during the time leading up to the cessation of his employment.

**[14]** Mr Sutton was advised on Thursday, 6 September 2018 that he did not need to attend work during the week of 10 September 2018 to 14 September 2018, as there was remote work to be performed, including camping. Mr Sutton was invited to attend the camp/work trip but could not attend due to prior commitments; he had already been approved to take annual leave on 13 – 14 September 2018.<sup>2</sup> He had not attended the work site for the four weeks prior to 10 September 2018 as he had been attending TAFE full-time. Mr Sutton stated that he was informed by his supervisor, Mr Kyle Reid, that he should not bother coming in to work at all for the week commencing 10 September 2018.

[15] Mr Sutton's evidence is that it was customary to receive notification by a text message on Sunday evenings about his work for the following week. On Sunday, 16 September 2018 Mr Sutton had not received any contact from his employer and so he assumed there was no work for the coming week. His ordinary commencement time was 5.00am.

[16] At approximately 5:10am on Monday, 17 September 2018 Mr Sutton received a text message from one of his work colleagues, Mike, the electrician, which read:

"John you coming in today? Have a think about it, if you are not in today there is a good chance you won't have a job tomorrow. One missed paycheck isn't worth throwing an apprenticeship away."

[17] Mr Sutton's evidence is that he didn't read the text message at 5:10am, as he was asleep. He didn't take Mike's call at 5.37am because again, he was asleep. In answering questions from me as to what he did on that day once he awoke, he stated that he could not remember. He agreed that he did not try and contact his employer.<sup>3</sup> He agreed that Mike's message was informing Mr Sutton that he should come in to work.<sup>4</sup>

[18] On 18 September 2018 the following text messages were exchanged:

Mr Parke: I take it by not showing up for work and ignoring everyone's calls is your way of letting us know you have finished

Mr Sutton: I was told not to come in last week and then I didn't receive anything about working on Monday until the morning. I haven't been getting paid properly while being at TAFE and I haven't even been paid from 2 weeks ago and I didn't receive a reply after asking about that either.

Mr Parke: Let's just call it a day then if that's your attitude

[19] Mr Sutton stated that he took the last text message from his exchange with Mr Parke to mean that his employment had been terminated.<sup>5</sup>

[20] During the hearing I asked Mr Sutton where in his text message of 18 September 2018 he had indicated to Mr Parke that he intended to continue working with Solar? Mr Sutton stated that he understood at the time of text message that he was not meant to have presented for work on 17 or 18 September 2018 'because of all the stuff that had happened' regarding his pay. He thought that the issues with his pay were leading up to his dismissal and when he did not receive a text telling him when and where to present for work on 17 or 18 September 2018 he thought that he 'wasn't going to be getting another week's work'.<sup>6</sup>

[21] Mr Sutton stated that he had not really thought about what Mr Parke had been trying to say in his first text message of 18 September 2018 before sending his response; he had just tried to tell Mr Parke about the issues leading up to the situation that existed on 17 September 2018.

[22] During the hearing Mr Sutton stated that shortly after the text message exchange with Mr Parke, he texted his father to inform him that he had been fired. The text message exchange read by Mr Shawn Sutton, and shown to Mr Parke during the hearing demonstrates

that Mr Shawn Sutton encouraged his son to request from Mr Parke money owed to him. Mr Sutton sent a text to his father, *"He is going to blow up I reckon."* His father responded, *"Let me know what he says"*, to which Mr Sutton responded, *"He just fired me."*

[23] There was no further contact between the parties after the final message on 18 September 2018 until Mr Sutton filed his application for an unfair dismissal remedy on 4 October 2018.

[24] On 8 October 2018 correspondence was issued by the Commission to Mr Sutton and Mr Parke, regarding Mr Sutton's filing of an unfair dismissal application and the listed conciliation of such. Mr Sutton stated that shortly after the Commission issued that correspondence he began to receive phone calls from Mr Parke, which he did not answer. During the hearing, Mr Sutton confirmed that he had started to receive phone calls from Mr Parke merely 10 minutes after the Commission's correspondence, which was the first contact Mr Sutton had received since 18 September 2018.<sup>7</sup>

[25] Mr Sutton stated that he received the following chain of text messages from Mr Parke, starting at 12:55pm on 9 October 2018:

- "Are you coming back to work, your contract has not been cancelled, we've not been able to get hold of you, if you are not I need it in writing from you that you no longer want to work for us"
- "If you are not coming back kindly return uniforms and any equipment supplied by the company, it's been pleasure working with you so we do hope you come back to carry on the good work"
- "I need to know when you're coming back I have work for you if you are not coming back let me know ASAP"
- "I need to know when you're coming back I have work for you if you are not coming back let me know ASAP"
- "I need to know when you're coming back I have work for you if you are not coming back let me know ASAP"

[26] Screen shots of the text messages received to Mr Sutton's phone confirm that the last text message was received to Mr Sutton's phone three times, with identical wording.

[27] Mr Sutton stated that Mr Parke sent him the following email correspondence on 10 October 2018:

"Hi John

After your failure to show up for work on 17<sup>th</sup> September we have not heard from you. Your contract is still open for your Electrical Apprenticeship and has not ben [sic] cancelled with tafe. We are holding your position open until you let us know in writing of your intention.

I will also be issuing the written warning as discussed for the failure to attend work on 17<sup>th</sup> September. We contacted you numerous times on that day with no answer.

Regards”

[28] Mr Sutton replied on 10 October 2018 with the following:

“Hi Iain,

As you know I have raised with matter with fairwork, on advice I will not be entering into any discussions with you until this has been dealt with by them

John.”

[29] Mr Parke replied on 11 October 2018 as follows:

“I did not realise this had been done can you tell me what the problem is, you are aware you never showed up for work on the Monday. Why don’t you just come in like a real man would and talk about instead of hiding behind people to do the work for you when you know you are in the wrong, stop wasting my time and every one else’s time. You were looked after whilst working for us and is this how you want to repay us. If you want to come back to work you can no one has ever dismissed you.

Iain Parke”

[30] Mr Sutton submitted that no further correspondence was initiated between the parties directly.

[31] Mr Sutton stated that on 14 December 2018, he gained employment as a casual offsider.

[32] In cross-examination, Mr Parke put to Mr Sutton that Mr Reid had attempted to contact him several times on 17 September 2018 to ask why he had not presented for work. Mr Sutton denied that he received any phone calls from Mr Reid on 17 September 2018. Mr Reid was later contacted during the hearing and gave evidence by telephone as to his attempts to contact Mr Sutton on 17 September 2018, which appears below.

[33] Mr Parke put to Mr Sutton that he should have known that he had been required to attend for work at 5:00am on 17 September 2018, as that was the ordinary practice for all of Solar’s employees. Mr Sutton maintained that during the course of his employment he had always received a text message on Sundays which told him when and where he was required to attend for work the next day. Mr Sutton denied that it had been ‘routine’ for all Solar employees to meet at Solar’s offices at 5:00am each day.<sup>8</sup>

[34] Mr Parke asked Mr Sutton why he did not contact him after 18 September 2018 or in response to Mr Parke’s correspondence during early October 2018. Mr Sutton maintained that he thought he had been fired after Mr Parke’s texts of 18 September 2018, and saw no reason to contact Mr Parke again. Mr Sutton stated that he had not responded to Mr Parke’s correspondence during early October 2018 and after lodging his unfair dismissal application on the advice of his then-representative, Ms Madonna Hensley.<sup>9</sup>

[35] In cross-examination, Mr Sutton agreed that he and another employee had failed to return to work after Christmas 2017, and Mr Parke had encouraged him to return to work and provided a pay rise.<sup>10</sup>

### **Summary of Mr Parke's evidence and submissions**

[36] As noted in my decision of 10 April 2019, Solar failed on several occasions to file material relevant to its jurisdictional objections, and therefore at the time of that decision, there was little evidence before me in support of Solar's submission that Mr Sutton had not been dismissed.

[37] The only material received ahead of the hearing on 18 April 2019 was the F3 Employer's Response, which was filed in the Commission on 26 October 2018. In its F3 Employer Response, Solar submitted that Mr Sutton "*has not been dismissed*", that to the date of filing the F3 Employer Response Mr Sutton's Apprenticeship Contract "*has not been cancelled*", and he is therefore "*welcome to return to work whenever he decides*". Further, Solar stated that it had attempted to contact Mr Sutton asking him to return to work but that no response had been received.

[38] Mr Parke appeared at the hearing on 18 April 2019 and provided the following statements and evidence. I asked Mr Parke about his understanding how apprenticeships can come to an end. The following discussion between myself and Mr Parke occurred during the hearing regarding Mr Parke's understanding of apprenticeship contracts:<sup>11</sup>

- |               |  |
|---------------|--|
| Commissioner: | So what's your understanding of how an apprenticeship can end? What needs to happen?   |
| Mr Parke:     | Termination of the apprenticeship contract.  |
| Commissioner: | And can that be unilateral?  |
| Mr Parke:     | It can be one - as far as I'm aware it can be the employer can terminate the contract, or the apprentice can terminate, yes.     |
| Commissioner: | Well it has to be mutual. And if there's difficulties then you bring the department out to help you; is that your understanding? |
| Mr Parke:     | It is now.   |
| Commissioner: | What, since I said it to you just now?   |
| Mr Parke:     | Yes.   |
| Commissioner: | So it wasn't your understanding?   |
| Mr Parke:     | No.  |
| Commissioner: | So did you think that an employer could terminate an   |

apprenticeship?

Mr Parke: I suppose it has to be on both parties because both parties have got to agree.

Commissioner: But there'll be scenarios, won't there, where an employee just doesn't turn up?

Mr Parke: Yes. And then I'd contact the apprenticeship department and find out my course of action.

Commissioner: When did you contact the department in this case?

Mr Parke: It probably wasn't till November I contacted them.

Commissioner: What did you advise them?

Mr Parke: I just - I sent them an email saying that John Sutton was no longer working for me.

Commissioner: Did you give a date? The date would be important for an apprenticeship, wouldn't it?

Mr Parke: Yes. I didn't give a date.

[39] Mr Parke stated that on 17 September 2018 he was informed by Mr Kyle Reid, a supervisor employed by the Respondent that Mr Sutton had not attended for work and had not responded to any attempts to contact him regarding his work.

[40] Mr Parke stated that Mr Sutton had been expected to attend for work at 5:00am on 17 September 2018. Mr Parke stated that it was just assumed that Mr Sutton would turn up for work on any given Monday morning at 5:00am, including Monday, 17 September 2018.<sup>12</sup>

[41] Mr Parke agreed that on 18 September 2018 he texted Mr Sutton the text messages extracted at [18] above. Mr Parke stated that he sent his first text message “...just to see if I'd get a response out of him...to see what his intention was.”<sup>13</sup> Mr Parke stated that he had expected Mr Sutton to attend for work on 18 September 2018 or at least to answer one of the various phone calls and text messages directed to him.

[42] Mr Parke stated that he understood Mr Sutton's reply text message of 18 September 2018 to indicate that Mr Sutton was leaving and he was not interested in his job. Mr Parke agreed that he sent a text message in reply to Mr Sutton stating, “Let's just call it a day then if that's your attitude”. I asked Mr Parke what he had meant by that text message, as follows:

Commissioner: So you write, "Let's just call it a day then if that's your attitude". Isn't that a dismissal?

Mr Parke: Not really. I was referring to his wages.

Commissioner: How?



- Mr Parke: By saying that the wages were right.
- Commissioner: How does, "Let's just call it a day then if that's your attitude" mean, "Your wages are correct"?
- Mr Parke: In my mind that's what I was implying but maybe the text didn't sound that way.
- Commissioner: "Let's call it a day", that's how you'd end something, isn't it?
- Mr Parke: Possibly.
- Commissioner: I'm trying to understand how you think I could think anything other than that. "Let's just call it a day then if that's your attitude". Isn't that you ending the relationship?
- Mr Parke: No. I wasn't terminating his employment.
- Commissioner: So when else would you use the expression, "Let's just call it a day then"?
- Mr Parke: When you finish work at the end of the day.
- Commissioner: He hasn't attended for the Monday and the Tuesday. He hasn't rung to say, "Where am I working?" He says, "I'm not being paid correctly", and you say, "Let's just call it a day then". And then you don't make any further contact with him until you receive notification from the Fair Work Commission; is that right?
- Mr Parke: No. I never received the email from Fair Work until after the - it was about the 17th maybe I got the email.

[43] I asked Mr Parke about his correspondence with Mr Sutton during October 2018, as set out above in [25] – [29]. Mr Parke denied that he received any correspondence from the Commission until on or about 17 October 2018 and after his correspondence with Mr Sutton. Mr Parke's evidence is that the material filed in respect of this matter was emailed to an incorrect email address and he only received the material after it was re-sent to a different email address.

[44] I asked Mr Parke about his correspondence with Mr Sutton during October 2018 and its context if, as Mr Parke stated, he was unaware of Mr Sutton's unfair dismissal application, as follows:

- Commissioner: So why do you call him on 8 October?
- Mr Parke: Just a coincidence that - that was when I was trying to find out what he wanted to do, because I still had a contract open and I'd heard nothing.

Commissioner: So you're giving evidence, are you, that it was 17 October when you first became aware of the Fair Work Commission matter?

Mr Parke: Yes. Because they had to resend the email out to me.

Commissioner: When you send an email on 10 October why do you write:

*"Why don't you just come in like a real man would and talk about - instead of hiding behind people to do the work for you when you know you're in the wrong? Stop wasting my time and everyone else's time".*

What does that mean?

Mr Parke: Just because he wouldn't stand and - - -

Commissioner: Who is he hiding behind if you don't know about the Fair Work matter and you and he are the only ones who are corresponding? You don't - it's pretty clear, isn't it, that you received notification of the Fair Work matter and that's why you wrote that email?

Mr Parke: No. I didn't receive it till after.

Commissioner: Who is he hiding behind and who is everyone else's time that he's wasting? What makes you on 8 October and 10 October pursue him to come back to work?

Mr Parke: I needed to know for his contract.

Commissioner: I'm having trouble with this evidence, Mr Parke, and I don't know why you would give such evidence. It doesn't seem to me to be a hugely compelling issue. The most compelling issue for me is necessarily what happened on 18 September. So, I'm suggesting that your evidence is not truthful as to your first awareness of the Fair Work Commission's involvement. Do you wish to change your evidence?

Mr Parke: No.

[45] In cross-examination, Mr Shawn Sutton asked Mr Parke why he had not contacted Mr Sutton for approximately three weeks after 18 September 2018 to ask him what was happening with respect to his employment. Mr Parke stated that it was not down to him to chase Mr Sutton; Mr Sutton should have been attempting to contact him.

[46] Mr Shawn Sutton put to Mr Parke that Mr Sutton had made inquiries about his pay prior to his dismissal. Mr Parke denied that Mr Sutton had been paid incorrectly prior to his

dismissal. Mr Parke did not recall receiving any phone calls from Mr Sutton regarding his pay prior to his dismissal.

### **Evidence of Mr Kyle Reid**

[47] During the course of the hearing I asked Mr Parke whether Mr Reid may be available to give evidence regarding his attempts to contact Mr Sutton on 17 September 2018. Mr Reid was contacted and gave evidence by telephone.

[48] Mr Reid stated that he is a Supervisor employed by the Respondent. Mr Sutton took instructions from Mr Reid during the course of his employment.

[49] Mr Reid stated that between approximately 5:00am and 7:00am on 17 September 2018 he attempted to call Mr Sutton's phone at least five times and texted him at least once. Mr Reid stated that he asked another staff member to try to get in touch with Mr Sutton as well, but he did not give evidence of who that staff member was or how they attempted to contact Mr Sutton.

[50] Mr Reid confirmed that at 5:17am on 17 September 2018 he sent the following text message to Mr Sutton:<sup>14</sup>

“Make sure you know what you’re doing. Don’t throw your job away over nothing”.

[51] Mr Reid stated that he had expected Mr Sutton to arrive for work at 5:00am on 17 September 2018 at the Respondent's work yard. He stated that it had been the ordinary practice for employees to present for work at the Respondent's work yard and ‘90% of the time’ employees required to present at 5:00am. Mr Reid stated that Mr Sutton would have known he was supposed to be at the work yard at 5:00am regardless of whether or not he received a text on Sunday night describing his work requirements for the next week.

[52] Mr Reid stated that he was informed that on 18 September 2018 Mr Parke and other staff members of the Respondent continued trying to contact Mr Sutton regarding his attendance for work. Mr Reid confirmed that he did not attempt to contact Mr Sutton at any time after 17 September 2018.

[53] In cross-examination, Mr Shawn Sutton asked Mr Reid to confirm the phone number that he had attempted to contact Mr Sutton on, as Mr Sutton's phone number had changed shortly before 17 September 2018, and Mr Sutton had no record of receiving Mr Reid's text message or phone calls. Mr Reid confirmed that his text and attempted phone calls had been directed to Mr Sutton's correct phone number.

### **Consideration**

[54] Mr Sutton's submission is that he was dismissed at the initiative of his employer on 18 September 2018. It is Mr Parke's submission that the text message exchange between himself and Mr Sutton was not in relation to the end of Mr Sutton's employment but was in reference to his wages.<sup>15</sup> Mr Parke contends that Mr Sutton's employment was not terminated.

[55] Accordingly, I must determine whether Mr Sutton's employment with Solar was terminated at the initiative of the employer.

***Was Mr Sutton terminated at the initiative of the respondent?***

**[56]** In accordance with *Mohazab v Dick Smith Electronics Pty Ltd (No 2) (Mohazab)*,<sup>16</sup> a termination is at the employer's initiative when:

- the employer's action 'directly and consequentially' results in the termination of employment, and
- had the employer not taken this action, the employee would have remained employed.

**[57]** In *O'Meara v Stanley Works Pty Ltd*<sup>17</sup> (*O'Meara*), a Full Bench of the Australian Industrial Relations Commission, as this Commission then was, considered *Mohazab* and other case law considering when a termination will have been at the initiative of the employer, and concluded that there must be:

"[23] ...some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end."

**[58]** While the question of whether an act of the employer results directly or consequentially in the termination of employment is an important consideration, all of the circumstances must be examined including the conduct of both the employer and employee.<sup>18</sup>

**[59]** In the current matter, I must determine whether Mr Parke's text message, "*Let's just call it a day then if that's your attitude*", is sufficient to satisfy a termination of Mr Sutton's employment at the initiative of the employer.

**[60]** I have considered the evidence of all parties regarding the attempts to contact Mr Sutton on 17 – 18 September 2018. I consider that the evidence before me is not necessarily contradictory. I accept Mr Reid's evidence that he attempted to contact Mr Sutton several times on the morning of 17 September 2018. I prefer Mr Reid's evidence over Mr Sutton's.

**[61]** It is uncontested that Mr Sutton received a text message and missed a phone call from Mike shortly after 5:00am on 17 September 2018, although I accept Mr Sutton's evidence that he missed that correspondence as he was asleep. Mr Sutton made no effort to contact anybody from the Respondent upon waking, and provided no satisfactory explanation for the failure to do so.

**[62]** It is important to consider the context in which Mr Parke's text messages of 18 September 2018 were sent, which may be summarised as follows:

- Mr Sutton had not worked since the week of 6 August 2018 as he had been attending TAFE full-time for several weeks;
- Mr Sutton had been instructed not to attend for work during his first week back after attending TAFE;
- Mr Sutton had not been paid for his TAFE attendance, personal leave and annual leave during the period of 3 September 2018 – 16 September 2018;

- Mr Sutton had on several occasions attempted to raise concerns about his pay to Mr Parke, but had not received a satisfactory response from Mr Parke;
- Mr Sutton had not received a text message on Sunday, 16 September 2018 informing him when and where to present for work the next day;

[63] I accept Mr Sutton's evidence that he did expect to receive a text message on the Sunday night informing him of his commencement time for the Monday morning. While Mr Reid's evidence is that all employees are expected to attend the premises at 5:00am, the evidence appears to be inconclusive as to when this practice was commenced, noting that Mr Sutton had been away from the workplace attending TAFE, then on sick leave and annual leave collectively for a number of weeks.

[64] There does not appear, however, to be a satisfactory explanation from Mr Sutton as to why he did not make contact with the Respondent at any time on the Monday to learn where he was going to work on Tuesday.

[65] I consider that in the circumstances set out above, and having regard to the text messages between Mr Sutton and his father, Mr Sutton had formed a view that there was going to be an issue between himself and Mr Parke, particularly around his concerns as to his pay.

[66] After receiving Mr Parke's first text message Mr Sutton did not accept Mr Parke's implication that he had resigned from his employment or abandoned his employment. He maintained that he had been told not to come in for work during the previous week and had not been told when and where to present for work on 17 or 18 September 2018 so he had not done so, and again raised to Mr Parke that he had not been paid correctly.

[67] I do not consider Mr Sutton's response, outlining his concerns to amount to a confirmation of Mr Parke's suspicion that Mr Sutton was resigning or abandoning his employment.

[68] Mr Parke could have told Mr Sutton that he remained employed and was expected to attend for work later that day or the next day. He could have responded to Mr Sutton's concerns about his pay or undertaken to do so the next time Mr Sutton was at work. Instead, Mr Parke told Mr Sutton, *"Let's just call it a day then if that's your attitude"*.

[69] I do not accept Mr Parke's submissions that he had intended by his text message to 'call it a day' on the pay dispute between him and Mr Sutton, and not Mr Sutton's employment. I find that it was reasonable for Mr Sutton to conclude on receipt of that text message that his employment was ending at the initiative of the employer. He immediately informed his father by text message that he had been 'fired'.

[70] I note Mr Parke's submission that it was Mr Sutton's responsibility to chase him about returning to work and not Mr Parke's responsibility to chase Mr Sutton, and that despite the above, Mr Parke took it upon himself to inquire about Mr Sutton's employment during early October 2018.

[71] I do not accept Mr Parke's evidence that his correspondence with Mr Sutton during early October 2018 occurred 'out of the blue' and before Mr Parke had received a copy of Mr Sutton's unfair dismissal application. Mr Parke's best evidence was that it was merely

coincidental that he had attempted to call Mr Sutton on 8 October 2018, just 10 minutes after the Commission attempted to serve on him a copy of Mr Sutton's application. I consider that it is far more likely that Mr Parke, upon becoming aware of Mr Sutton's application to the Commission, attempted to contact Mr Sutton to try to resolve the matter before the Commission became further involved and, after failing to contact Mr Sutton, sent further correspondence attempting to retroactively characterise the end of Mr Sutton's employment as an abandonment of employment led by Mr Sutton.

[72] It is clear from the evidence at [28] – [29] that by at least as early as 10 October 2018, Mr Parke was aware of the application before the Commission because Mr Sutton referenced it within his communication to Mr Parke.

[73] I determine that, on the evidence before me, the text message from Mr Parke on 18 September 2018 amounted to a dismissal of Mr Sutton at the Respondent's initiative. I accept that Mr Parke's text message directly and consequentially resulted in the termination of the employment, and had Mr Parke not taken this action, Mr Sutton would have remained employed. Further, it was Mr Parke's evidence that he did not know how to properly end an apprenticeship or how to work with the department governing apprenticeships.

[74] I do not accept that Mr Parke considered the employment, for all intents and purposes, on-foot beyond 18 September 2018. I find that the messages sent in October 2018 were a direct response to him having been notified of the application before the Commission.

[75] There will no doubt be, going forward, consideration given to how long the employment would have remained on foot given Mr Sutton's conduct on 17 and 18 September 2018, having failed to attend for work or make contact with the Respondent to inquire about work when both Mike and Mr Reid were imploring him to return calls.

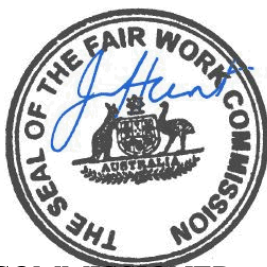
## **Conclusion**

[76] I determine that Mr Sutton was dismissed at the Respondent's initiative on 18 September 2018.

[77] The Respondent's jurisdictional objection that Mr Sutton was not dismissed is dismissed.

[78] This matter will be listed for a hearing of the substantive application before me at a time, date and place to be determined.

[79] It is noted that the parties are in agreement that the Respondent is a small business, employing only four employees, and accordingly it will be necessary for the Commission to determine if the dismissal was made pursuant to the Small Business Fair Dismissal Code.



COMMISSIONER

*Appearances:*

Mr J Sutton, Applicant;  
Ms S Sutton, for the Applicant;

Mr I Parke, for the Respondent.

*Hearing details:*

Brisbane, 18 April 2019.

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<sup>1</sup> *Mr John Sutton v Solar and Batteries Direct Pty Ltd* [2019] FWC 1560.

<sup>2</sup> PN47.

<sup>3</sup> PN65.

<sup>4</sup> PN74.

<sup>5</sup> PN222.

<sup>6</sup> PN216.

<sup>7</sup> PN161; PN177; PN200.

<sup>8</sup> PN151 – PN155.

<sup>9</sup> PN172 – PN189.

<sup>10</sup> PN233.

<sup>11</sup> PN278 – PN287.

<sup>12</sup> PN291 – PN295.

<sup>13</sup> PN301.

<sup>14</sup> PN419.

<sup>15</sup> PN321.

<sup>16</sup> [1995] IRCA 645.

<sup>17</sup> *O'Meara v Stanley Works Pty Ltd* PR973462 (AIRCFCB, Giudice J, Watson VP, Cribb C, 11 August 2006) at [23]; citing *Pawel v Advanced Precast Pty Ltd* Print S5904 (AIRCFCB, Polites SDP, Watson SDP, Gay C, 12 May 2000); *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645; *ABB Engineering Construction Pty Ltd v Doumit* Print N6999 (AIRCFCB, Munro J, Duncan DP, Merriman C, 9 December 1996).

<sup>18</sup> *Pawel v Advanced Precast Pty Ltd* Print S5904 (AIRCFCB, Polites SDP, Watson SDP, Gay C, 12 May 2000); *O'Meara v Stanley Works Pty Ltd* PR973462 (AIRCFCB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AILR 100]; *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* [1995] IRCA 645 (29 November 1995), [(1995) 62 IR 200]; *ABB Engineering Construction Pty Ltd v Doumit* Print N6999 (AIRCFCB, Munro J, Duncan DP, Merriman C, 9 December 1996).