

[2019] FWC 8552

The attached document replaces the document previously issued with the above code on 23 December 2019.

Paragraph [122] substitute the phrase “Air-conditioning Project” for “BMS Project”

Paragraph [130] substitute “Mr Lewis” for “Mr Weeks” in the second sentence

Paragraph [133] line 2 delete the word “and” where second appearing

Paragraph [153] line 1 add the word “is” so as to read “there is no”

Associate to Deputy President Anderson

Dated 2 January 2020



DECISION

Fair Work Act 2009

Section 394 - Application for unfair dismissal remedy

Simon Lewis

v

SGA (1994) Pty Ltd
(U2019/6862)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 23 DECEMBER 2019

Application for an unfair dismissal remedy – hospitality sector – chief engineer – summary dismissal – procurement practices – non-disclosure of conflict of interest – alleged kickbacks – alleged falsification of quote - duty of fidelity – valid reason on some but not all allegations – procedural fairness – dismissal not harsh, unjust or unreasonable – application dismissed

[1] On 21 June 2019 Simon Lewis (Mr Lewis or the Applicant) applied to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy in relation to his summary dismissal by SGA (1994) Pty Ltd T/A Stamford Grand¹ (Stamford, the Respondent or the employer). He claims to have been unfairly dismissed on 14 June 2019.

[2] At the date of dismissal Mr Lewis was employed by Stamford as Chief Engineer of the Stamford Adelaide hotel in Glenelg, South Australia.

[3] Mr Lewis claims his dismissal was harsh, unjust or unreasonable. He seeks an order for compensation. He does not seek reinstatement.

[4] Stamford oppose the application. It says it terminated Mr Lewis's employment summarily on the ground of serious misconduct. Stamford contend the dismissal was not harsh, unjust or unreasonable, and no issue of remedy arises.

[5] No jurisdictional issues arise in determining this matter. Mr Lewis was 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 took effect.

[6] Conciliation of the application by a Commission-appointed conciliator occurred on 29 July 2019. It did not resolve. The application was referred for hearing and determination.

[7] On 8 August 2019 I issued directions concerning case management.

[8] On 25 September 2019, by consent, I granted permission under section 596 of the FW Act for both Mr Lewis and Stamford to be represented: Mr Lewis by a paid agent, and Stamford by a legal practitioner.²

[9] Further interlocutory issues arose concerning the attendance of witnesses. On the employer's application and by consent, on 23 October 2019 I ordered that two former employees (Trieneke Collins and Andrew Baggaley) and a supplier of services (Lochlan Weeks), attend to give evidence.

[10] I heard the matter (merits and remedy) by formal hearing in Adelaide on 28, 29 and 30 October and (with Mr Lewis's representative by video conference) on 19 November 2019. Upon reserving my decision, I provided a further opportunity for additional written submissions on remedy, which I subsequently received.³

[11] Mr Lewis was represented by a paid agent, Unfair Dismissals Australia. Stamford was represented by Mr Healy of counsel instructed by Mr Payard of Holding Redlich Solicitors (and its agent Finlaysons) with Mr Ong of Stamford in attendance.

[12] The proceedings were lengthy and, in their initial stages, not efficiently conducted due to:

- Cross examination of Mr Lewis being delayed on account of Mr Lewis not having been provided by Unfair Dismissals Australia a copy of a witness statement filed by the Respondent upon which Mr Lewis was being cross examined; and
- Cross examination of Mr Lewis being further delayed following the Applicant's paid agent tendering two supplementary statements by Mr Lewis after Mr Lewis had completed his examination in chief and cross examination had commenced, with neither statement having been previously notified to the Respondent nor the Commission. Both statements were prepared by Mr Lewis in advance of the hearing in accordance with my directions. Mr Lewis had sent both statements to his paid agent but an apparent failure on the part of Unfair Dismissals Australia had resulted in those statements not being seen by his representative prior to hearing.

[13] These apparent instances of representative error on the part of Unfair Dismissals Australia had the potential to prejudice Mr Lewis's case. Given the latitude I provided to ensure Mr Lewis's case was ultimately fully put, it has not done so. I note that I granted permission for the parties to be represented on the basis that in a complex matter such as this, the taking of evidence would likely be more efficiently conducted via representatives. This was the case; but only once the aforesaid relevant materials (including documents prepared but not provided pre-hearing) were before those witnesses and parties.

[14] During the hearing a further issue arose concerning the attendance of a witness, Jamie Nicholls (called by the Applicant). A statement from Mr Nicholls had been filed pre-hearing however Mr Nicholls was not present on the first or second day of hearing. At the request of Mr Lewis, I issued an order on 29 October 2019 for Mr Nicholls to attend to give evidence the following day. Mr Nicholls duly did so.

[15] In the course of his evidence, Mr Nicholls provided an explanation for not attending voluntarily. He asserted that he had received a letter from solicitors for Stamford threatening

civil action over alleged losses whilst Mr Nicholls had been its employee. Mr Nicholls said that this letter had arrived only after his witness statement in these proceedings had been filed. He said that the letter made no reference to these proceedings but that he considered it “corporate bullying”.⁴ Stamford disputed any connection between its alleged correspondence to Mr Nicholls and these proceedings. The correspondence was not tendered in evidence. It is not before me. I have no basis to make any finding as to its content or express any view, provisional or otherwise, on the inference asserted by Mr Nicholls. In those circumstances, I take no further action other than to note, as acknowledged by counsel for Stamford, the seriousness of the allegation being inferred.

The Evidence

[16] I received oral evidence, written statements, documents (including those produced in consequence of directions) and outlines of submissions from both Mr Lewis and Stamford.

[17] I heard evidence from eleven persons:

- Simon Lewis (Applicant);
- Jamie Nicholls (former Acting General Manager and Food and Beverage Manager, Stamford);
- Leo Demetriou (contractor and owner Plumfast Pty Ltd);
- Trieneke Collins (former Financial Controller, Stamford);
- Andrew Baggaley (former Area Human Resources Manager, Stamford Land Corporation);
- Gerard Knight (General Manager, Stamford);
- Lochlan Weeks (contractor and owner Green Air Control Services);
- Paul Diaz de Rivera (Area Chief Engineer, Stamford and former Chief Engineer Stamford Plaza);
- Luke Harrington (Financial Controller, Stamford Land Corporation);
- Tamika Binnie (Assistant Human Resources Manager, Stamford Land Corporation); and
- David Donald (General Manager, Stamford Land Corporation).

[18] There are substantial and material disputes in evidence, particularly (but not limited to) the evidence of Mr Lewis and Mr Weeks.

[19] Resolving disputed facts is necessary in determining this matter. Issues of credit are relevant.

[20] Mr Lewis gave evidence in a measured and controlled manner, but caution is required. Whilst categorical in his denials of misconduct, he was vague in recall on some matters, and somewhat evasive in evidence about his relationship and dealings with Mr Weeks and tended to answer some questions with questions.

[21] Given the nature of some of the allegations for which he was dismissed and upon which he gave evidence and was cross examined, I issued Mr Lewis a general warning in relation to his rights against self-incrimination.⁵

[22] Mr Weeks is a tradesperson. He appeared unfamiliar with the formalities of litigation. He gave evidence in an apparent desire to assist the Commission but did so in a casual and

unsophisticated manner. As with Mr Lewis, caution is required in considering his evidence. He was required to correct his witness statement in material respects. His recall varied from specific to poor, depending on the issue. He appeared somewhat selective about aspects of his conduct but readily able to recall Mr Lewis's conduct, including alleged misconduct. I also gave Mr Weeks a caution in relation to his rights against self-incrimination.⁶

[23] As to the relationship and dealings between Mr Lewis and Mr Weeks, and even allowing for lapses in recall due to the effluxion of time, I consider that neither were entirely unreliable but neither fully truthful in their evidence.

[24] Ms Collins gave evidence in a clear and firm manner. Whilst generally reliable, some degree of caution is required. Her recall was vague on some matters and she displayed some wariness on her specific involvement in a transaction that authorised a progress payment to Mr Weeks.

[25] Mr Nicholls was a reliable witness with good recall. His evidence was clear, though of limited relevance given that he had left the employ of Stamford at the time of most relevant events.

[26] Mr Diaz de Rivera, Mr Harrington, Mr Donald, Mr Knight and Mr Baggaley each were employed in managerial capacities by Stamford at relevant times. Each gave their evidence in a professional manner. Their evidence can be relied upon. It was non-emotive and did not convey the impression of being rehearsed. Each was prepared to make appropriate concessions and each displayed a sound recall of events.

[27] Mr Demetriou is a tradesman who gave evidence clearly notwithstanding its limited relevance.

[28] Ms Binnie, although in a human resources managerial role with Stamford, was not directly involved in disciplinary matters concerning Mr Lewis. Her evidence was brief and reliable, but of limited value.

[29] Where relevant to my decision, I make findings based on 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 evidence and the inherent plausibility of versions of events.

[30] I do not consider this to be a matter where I generally prefer the evidence of Mr Lewis over the evidence of witnesses called by the employer, or vice versa. The variation in witnesses renders such an approach unfair. I do generally prefer the evidence of Mr Diaz de Rivera, Mr Harrington, Mr Donald, Mr Knight and Mr Baggaley over the evidence of Mr Lewis where there is dispute. On other matters, such as clashes between the evidence of Mr Lewis and Ms Collins, and between the evidence of Mr Lewis and Mr Weeks I deal with each relevant issue, where required, in its own right.

[31] Some of the evidence before me 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 or surrounding circumstances, is uncontested or inherently believable.

The Facts

[32] I make the following findings.

Background

[33] Stamford is a large pan-national business in the hospitality sector, based in Singapore. There are a variety of companies in the Stamford group. For current purposes, the respondent to these proceedings SGA (1994) Pty Ltd operated the Stamford Adelaide at Glenelg, and employed persons at that hotel, including Mr Lewis. A related company Stamford Land Corporation oversees property management in the group, including capital expenditure at the Stamford Adelaide.

[34] The Stamford Group also own and operate the Stamford Plaza hotel in the Adelaide CBD. The Stamford Plaza has separate operational and engineering management from the Stamford Adelaide, though managers liaise when required.

[35] Mr Lewis commenced employment on 23 January 2017 and had two and a half years of service until dismissed on 14 June 2019. His work was exclusively at the Stamford Adelaide in Glenelg. He was employed as the Chief Engineer of that hotel. He remained in this position at all relevant times, though in the week before he was terminated his duties were restricted.

[36] Mr Lewis came to be employed at the Stamford after having performed a similar role as chief engineer with a different employer at the Mayfair Hotel in Adelaide.⁷ Although experienced in the work of a chief engineer, he had no formal qualifications as an engineer. His learning was on the job. His trade qualification was as an auto electrician.⁸

[37] As chief engineer Mr Lewis performed a variety of tasks concerning maintenance and improvement of the hotel's infrastructure. Principal amongst them was responsibility for procurement and oversight of capital works, short term maintenance and longer term capital investment.

[38] As a part of the procurement process, Mr Lewis's role was to make recommendations to the hotel's General Manager and its Financial Controller (and where necessary, to senior officers of Stamford Land Corporation) for capital works to be performed; to secure quotes from service providers for approved work (via a tendering process, where required⁹); to make recommendations on preferred suppliers or tenderers; to inform tenderers of the outcome of a procurement process; to arrange for and oversight the performance of work by selected suppliers; to liaise with finance staff concerning progress or final payments for work done; and to oversee general compliance by suppliers with the contracted terms and scope of work.

[39] Mr Lewis was not a decision-maker on the selection of tenderers for major capital works. Nonetheless, he performed, in conjunction with the General Manager and Financial Controller a significant role in recommending major works, sourcing quotes, recommending preferred suppliers and overseeing their work. Even where General Managers had experience in such matters, the General Manager and persons responsible for approval of recommended works placed significant reliance on recommendations made by the Chief Engineer.¹⁰ He was, in the words of Mr Harrington "the subject matter expert".¹¹

[40] A Capital Expenditure Requisition Form (CER) was used for the purposes of seeking approval for major capital works. A Vendor Quotation Summary Form (VQS) was used for the purpose of recommending a preferred supplier. Each was required to be prepared by the Chief Engineer. In addition the General Manager and Financial Controller were required to review and, where appropriate after discussions with and examining quotes provided by the Chief Engineer, counter sign these forms before they were submitted to the senior business hierarchy for final approval.

[41] Mr Lewis was part of the management group of the Stamford Adelaide which comprised approximately five heads of department (of which he was one) each reporting to the General Manager.¹²

[42] Multiple different persons held the role of General Manager (or Acting General Manager) during the period Mr Lewis was employed. One such person had been Mr Nicholls (on an acting basis). At the time of events leading to dismissal, the General Manager was Mr Knight.

The BMS Project

[43] In 2018, Stamford undertook a significant project (some \$217,900) to upgrade the hotel's Building Management System (BMS Project).

[44] Mr Lewis had operational responsibility for the project. A tender process was commenced.

[45] Mr Lewis invited Mr Lochlan Weeks to tender for the project.

[46] Mr Lewis specified the scope of works on advice from a consultant, Mr Edgar. The CER completed by Mr Lewis (dated 16 February 2018) recommended total expenditure of \$217,910 with the project to be completed in six months.¹³ An upfront payment of \$48,000 was to be made and progress payments at 7 day intervals "only made after sign off and approval of works completed and checked by the Chief Engineer."¹⁴

[47] By VQS dated 2 February 2018 and CER dated 16 February 2018¹⁵ Mr Lewis (together with Mr Nicholls and Ms Collins) recommended a preferred supplier, Green Air Control Services SA (Green Air). Mr Weeks is the sole owner and operator of Green Air. The recommendation by Mr Lewis was accepted.

[48] On 12 April 2018 Stamford entered into a works contract with Mr Weeks for the BMS Project to the value of \$217,900, with completion within six months.¹⁶

[49] The BMS Project was beset by substantial delays, primarily as a result of repeated failures by Mr Weeks to complete the project within its scope of works.

[50] There is a factual dispute over the circumstances by which a large progress payment beyond the work then completed was made to Mr Weeks. I deal with that issue in considering valid reason.

Relationship between Mr Lewis and Mr Weeks

[51] Mr Lewis had approximately two years of prior dealings with Mr Weeks before recommending him as preferred supplier. He had engaged Mr Weeks on a project at Mr Lewis's former place of work, the Mayfair Hotel. As a result of that, they became friends, in a professional and on-line sense, but not social context.

[52] The Stamford supplied Mr Lewis a business issued mobile phone. Mr Weeks had access to that number but also to Mr Lewis via his private mobile.

[53] On a number of occasions prior to and during the time Mr Lewis worked at the Stamford, Mr Weeks performed work privately for Mr Lewis at his private properties. There is a factual dispute as to whether Mr Lewis paid for some of that work. I deal with that issue in considering valid reason.

[54] There is a dispute as to whether Mr Lewis advanced a private loan of \$7,500 to Mr Weeks during the course of his employment. Mr Lewis claims that he did so in cash, and that monies he subsequently received from Mr Weeks were in the form of loan repayments. Mr Weeks claims that he didn't seek or secure a private loan, and that monies he paid to Mr Lewis were in the nature of kickbacks on payments for his work at the Stamford. I deal with that issue in considering valid reason.

[55] During the course of his employment, Mr Lewis acquired for private use a motor vehicle owned by Mr Weeks. There is a dispute as to whether the vehicle was loaned or purchased and whether any money transacted between Mr Lewis and Mr Weeks (and vice versa) for the motor vehicle. I deal with that issue in considering valid reason.

[56] The relationship between Mr Lewis and Mr Weeks was friendly and (in a professional sense) closer than that of an arms-length supplier of services. They enjoyed each other's company. However, during the second half of 2018 the relationship soured for reasons I deal with in considering valid reason.

Air-conditioning Project

[57] In 2018, Stamford undertook a significant project (initially budgeted up to \$1 million but ultimately at a price of around \$790,000) to replace 100 air-conditioning units in guest rooms (the Air-conditioning Project).

[58] Mr Lewis had operational responsibility for the project.

[59] A tender process was commenced. Mr Lewis received a quote from a number of businesses, one of which was Johnson Controls Australia Pty Ltd (Johnson Controls) for \$822,000. Mr Lewis made a recommendation for a preferred supplier from amongst the tenderers. He did not recommend Johnson Controls. The Johnson Controls quote which Mr Lewis attached to the CER and VQS forms was in an altered form to that which had been submitted by Johnson Controls. There is a factual dispute as to whether Mr Lewis was responsible for altering the Johnson Controls quote allegedly so as to strengthen the case for Stamford choosing his (different) recommended supplier. I deal with that issue in considering valid reason.

[60] There is a dispute as to whether Mr Lewis conducted or was required to conduct an audit of the air-conditioning units to determine how many required replacement, before seeking approval for the works. I deal with that issue in considering valid reason.

[61] Mr Weeks initially expressed interest in tendering for the Air-conditioning Project but did not lower his quote during the tendering process. There is a dispute as to whether Mr Lewis entered into negotiations with Mr Weeks to tender for the work and at what price and whether such discussions included proposals advanced by Mr Lewis for the receipt of secret commissions. I deal with that issue in considering valid reason.

[62] In a CER and VER dated 18 October 2018, Mr Lewis recommended a business, Waymill Services trading as Reliable Air Conditioning, as the preferred supplier at a contract price of \$792,580. There is a dispute as to whether Mr Lewis was required to or conducted due diligence on Waymill prior to recommending them for the Air-conditioning Project or on the required scope of the project. I deal with that issue in considering valid reason.

Cooling Towers Project

[63] In 2018/19, Stamford undertook a significant project (ultimately at a cost of \$313,000) to replace two cooling towers which operated in connection with the air-conditioning system (the Cooling Towers Project).

[64] Initially, Mr Lewis had operational responsibility for the project.

[65] A tender process was commenced. By a CER and VER dated 26 February 2019¹⁷ Mr Lewis again recommended Waymill as the preferred supplier at a cost of \$494,000. Concerned at the cost, Stamford asked Mr Diaz de Rivera to assist Mr Lewis in securing alternate quotes. An alternate was provided by a separate business (TechniChill) at \$415,000. Shortly thereafter, Waymill revised its quote to \$410,000. There is a dispute as to whether Mr Lewis provided details of the competitor's quote to Waymill so as to enable his preferred supplier (Waymill) to undercut their price. I deal with that issue in considering valid reason.

[66] Mr Diaz de Rivera, Mr Knight and Mr Harrington also noted that Waymill's revised quote was for a lesser price even though the scope of works on which it was quoting had increased. Apart from their suspicion that Mr Lewis had improperly disclosed the competitor's tender price to Waymill, they were also concerned that Waymill had by then been recommended by Mr Lewis for two major and overlapping capital works projects with a combined tender value of \$1.2 million. They subsequently made a decision to exclude Mr Lewis from further involvement in the tendering process for the Cooling Towers Project.

[67] A second CER for the Cooling Towers Project dated 29 March 2019¹⁸ saw work recommended to a different supplier Watson Fitzgerald at a cost of \$313,000.

Disciplinary Process

[68] In the second quarter of 2019 Stamford became concerned with Mr Lewis's procurement practices, and in particular whether he conducted appropriate due diligence before recommending the replacement of 100 units for the Air-conditioning Project. Stamford asked the Chief Engineer of Stamford Plaza Mr Diaz de Rivera for his view on whether the

scope of work, cost and contractor, which had been recommended by his counterpart Mr Lewis, was justified.

[69] On 3 June 2019 Stamford sent Mr Lewis an allegations letter.¹⁹ It set out a series of allegations concerning the Air-conditioning Project. It advised that he was suspended from duties, required to prepare a written response and attend a meeting the following day (4 June) at 4.00pm to provide a written and oral response. It encouraged him to bring a support person and reminded him of his obligation to be truthful and not wilfully mislead.

[70] The meeting was held on 4 June 2019 at 4.00pm. Mr Knight attended for Stamford, together with another employee Ms Jenna Kellaway. Mr Lewis attended without his nominated support person (Mr Nicholls) who was unavailable at that time. There is a dispute as to whether Mr Lewis sought but was refused a delay for an hour to enable his support person to attend. I deal with that issue in considering whether the employer unreasonably refused a support person.

[71] After the 4 June 2019 meeting, Mr Lewis received a further letter from the Stamford. It noted that “you raised four points that require further investigation on our part”. It advised Mr Lewis that his suspension continued. It required him to attend a further meeting at 3.00pm the following day, 5 June 2019. He was again encouraged to bring a support person.

[72] On 5 June 2019 Mr Knight met Mr Lewis and gave him a letter of that date (under Mr Knight’s hand) advising “the outcome of the disciplinary process we have undertaken”.²⁰ It advised that the allegations were sustained. It advised that Stamford considered his actions “gross negligence”. It asserted “the manipulation of the quote to be serious misconduct and grossly unethical”. It advised that Stamford “is to issue you with a first and final warning and to relieve you of all future procurement duties.” It added:

“please be aware that the company takes this matter very seriously and any further acts of this nature may result in termination of your employment.”

[73] Mr Lewis signed at the base of the letter acknowledging receipt of the first and final warning.

[74] In the days following the 5 June 2019 meeting, Mr Lewis sent a letter to Mr Knight.²¹ That letter advised that Mr Lewis did not accept the first and final warning, considered it unjustified, asserted that he was pressured to sign it despite wanting to take it away and digest it and was issued in spite of a medical certificate he produced at the time. He also advised that he was seeking legal advice.

[75] Between 5 and 14 June 2019 Stamford continued its investigation into Mr Lewis’s procurement activities and considered the matter further, including Mr Lewis’s post 5 June letter.

[76] On 13 June 2019 a senior manager Mr David Donald (Area Manager covering both the Stamford Adelaide and the Stamford Plaza) was informed that certain suppliers had advised Stamford during these subsequent investigations that Mr Lewis had sought kickbacks in return for work. Mr Donald made his own enquiries, including visiting the geographic address of the business Waymill, which he found to be a house in a residential street. Mr Donald formed the view that this “new information”²² together with breaches already found warranted

summary dismissal. He recommended to Stamford Land Corporation's Head Office (in Singapore) that Mr Lewis be dismissed. That same day, dismissal was approved. A letter of dismissal was prepared (by Stamford Land Corporation's legal department) and signed under Mr Donald's name (who at that time had also become operationally responsible for the Stamford Adelaide as Mr Knight had moved to a new role).

[77] Having decided to dismiss Mr Lewis and having secured approval for that course, Mr Lewis was notified that he was required to attend a meeting at 9.00am the following day, 14 June 2019.

[78] That meeting was between Mr Donald and Mr Lewis. It was brief. Mr Lewis was shown what were alleged to be altered quotations and asked for his explanation. There is a dispute as to his response and whether he made any admissions or concessions.

[79] Mr Lewis was then given the letter of termination.²³ The letter advised that he had received an earlier final warning "pending investigations", and that "it is clear that you have materially breached the terms of your Agreement". The letter set out a series of alleged breaches of duty which the employer considered sustained. This included (in what was said to be a "non-exhaustive list") failure to disclose prior relationships with selected suppliers, failure to disclose that selected suppliers were one-man outfits with limited resources, corruptly obtaining secret commissions from selected suppliers, wrongly facilitating the payment of 80% of contract value to a selected supplier for work not completed and wrongly altering quotations to preference a preferred supplier.

[80] The dismissal letter advised that Stamford were continuing investigations and quantifying its losses. It also advised that Stamford intended to provide its findings to "relevant authorities" and had instructed its solicitors to commence legal proceedings against Mr Lewis.

[81] Mr Lewis was escorted from the premises as a dismissed employee. He claims that he was not (and has still not) been paid his accrued annual leave entitlement.

[82] At 10.35am on 14 June 2019 Mr Donald sent an email to Stamford managers advising that Mr Lewis had been terminated from his employment. It advised, in part:

- "1. ... I put the evidence of altering supplier quotations to him, he initially denied, although then said it was possible that he did so based on the evidence put forward to him. I also confirmed that we have been reliably informed of requests for personal payments (by himself) to several contractors. Initially he wanted to know who the contractors were that provided this information and when I said that I would not disclose this detail whilst the investigation continues. He then denied ever receiving payments from contractors. I advised that the group is continuing its investigation into the serious misconduct, and is considering legal proceedings against him and that he would be notified in due course. He was provided with a signed copy of the letter received from SHR legal overnight.
2. I have collected all items that were in [h]is possession belonging to the hotel (Hard Keys / Hotel ID / Phone / Hotel Master Swipe Card / Car park Pass).
3. I escorted him to his office and then to his car.

4. BMS access has been deactivated from his personal phone (we have changed the password). He claimed he was unable to delete the app from his personal phone (attempted to several times in front of me).
5. We are currently assessing other systems he had access to, and will delete accordingly.
6. He would not sign the termination checklist.
7. Tamika will send a SHR internal announcement this morning.
8. I have had separate meetings with both the hotel Exco and Engineering teams. At both meetings I have advised that Paul Diaz will be overseeing the maintenance function, although would be predominantly engaged in the CER projects over the coming weeks.
9. Paul was onsite at 9:30am and is now working with team.”

[83] In the weeks following dismissal, Stamford continued its investigation. It spoke to suppliers, including Mr Weeks. On 17 June 2019 Mr Donald met with Mr Weeks. On 20 June 2019 Mr Weeks provided Stamford a sworn statement.²⁴ That sworn statement, which is in evidence, alleges that Mr Lewis demanded payments from Mr Weeks in return for submitting work tenders at the Stamford (including \$1,000 per unit for each of the 100 air-conditioning units), that other payments of \$17,500 had been made to Mr Lewis by Mr Weeks (including \$15,000 in cash), that Mr Weeks performed personal work on Mr Lewis’s home for which he was not paid, and that Mr Lewis took and on-sold for his personal benefit copper metal product from the Stamford. Mr Weeks made a further sworn statement on 26 July 2019.²⁵

[84] On 21 June 2019 Stamford, a week after the dismissal and one day after Mr Week’s first sworn statement, appointed Ernst & Young (EY) to conduct an external forensic examination of emails and electronic devices of Mr Lewis (and Ms Collins) as part of its continuing investigation into Mr Lewis.

[85] Mr Lewis commenced these proceedings on 21 June 2019.

[86] Since his dismissal, Mr Lewis has secured alternate work in the private sector but on a significantly reduced annual salary.

[87] EY produced a report to Stamford on 5 August 2019. That report is in evidence.²⁶

[88] On 2 August 2019 solicitors for Stamford sent Mr Lewis a letter of demand.²⁷ That letter alleged multiple breaches of fiduciary duties. It sought payment of \$392,608.96 for alleged losses and damages. That civil claim is contested and remains unresolved.

Consideration

[89] The issue for determination by the Commission is simply put: was Mr Lewis’s dismissal “harsh, unjust or unreasonable” having regard to the considerations in section 387 of the FW Act and, if so, is it appropriate to order a remedy by way of reinstatement or compensation?

[90] I am under a duty to consider each of the criteria in section 387 of the FW Act,²⁸ and now do so. In so doing, I take account all of the evidence and submissions before me. Given the volume of evidence and the breadth of issues raised, I specifically deal with evidence that is most material to arriving at a decision in this matter. Some evidence is not referenced, not

because I have not considered it, but because I do not need to make specific reference to it. 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.

[91] Section 387 of the FW Act provides as follows:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person - whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

Valid Reason (section 387(a))

[92] An employer must have a valid reason for the dismissal of an employee. It is the Commission’s task to determine if a valid reason exists. The reason(s) should be “sound, defensible and well founded”²⁹ and should not be “capricious, fanciful, spiteful or prejudiced.”³⁰

[93] In a conduct-based dismissal³¹ the test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct. The Commission must itself make findings as to whether the conduct occurred based on the evidence before it.³²

[94] Where an employee is dismissed for misconduct, as in this case, an evidentiary onus rests on an employer to establish that on the balance of probabilities the misconduct occurred.³³

[95] It is also well settled that where, as in this case, an employer dismisses for serious misconduct, the standard of proof requires “a proper level of satisfaction”³⁴ that the conduct did in fact occur having regard to the seriousness of the allegations. This is commonly referred to as the *Briginshaw* standard³⁵. This requires more than mere satisfaction that it is more likely than not that conduct occurred. Rather it requires a proper degree of satisfaction that the conduct did in fact occur.

[96] Multiple forms of misconduct are alleged by Stamford. All are matters of significance. Those that concern alleged corrupt conduct in the form of offering inducements or soliciting or taking bribes or kickbacks or conduct in the form of the falsification of documents or theft are allegations at the high end of the scale of seriousness. In the form alleged, such conduct has the potential to constitute criminal offences. The level of satisfaction I am required to reach on those matters is not the criminal standard. Nonetheless, on those matters a proper degree of satisfaction is at the higher end of the civil scale. As Dixon J said in *Briginshaw*:³⁶

“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.”

“When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues...but, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.”

[97] Other allegations advanced by Stamford, which are also of significant consequence, such as alleged breaches of employment duties relating to conflicts of interest and alleged breaches of company procurement policies and practices also require proof on the balance of probabilities to a proper level of satisfaction, given that those alleged breaches are said to have constituted misconduct justifying summary dismissal.

[98] I now consider whether, on the evidence before me, the alleged breaches of duty occurred to the standard of proof required and, if so, whether they collectively or individually constitute a valid reason for dismissal

Inducements, bribes and kickbacks

[99] This allegation is multi-faceted.

[100] Primarily it is alleged that Mr Lewis negotiated, demanded and received payments of money in the form of secret commissions from Mr Weeks as kickbacks for recommending Mr Weeks as a preferred tenderer on works at the Stamford.

[101] It is also alleged (the secondary allegation) that Mr Lewis negotiated or sought to negotiate such arrangements with other suppliers and that if and when they refused to provide kickbacks then he would refuse or cease to recommend them for works.

[102] These are allegations of a particularly serious nature. The conduct as alleged would constitute serious criminal offences. It is alleged that Mr Lewis enriched himself in the course of his employment by wielding power and influence over tenderers, making menacing demands, secretly receiving monetary (cash) and non-monetary benefits (such as not having to pay for work done at his private residence) and kept this secret from his employer.

[103] My task is not to determine whether Mr Lewis committed criminal offences. It is to determine whether he engaged in conduct that breached his fiduciary duty to his employer. If he had done so as alleged either via the receipt of secret commissions, kickbacks or offers of bribes or inducements (or making such demands) that conduct would fundamentally have breached his duties and warranted summary dismissal.

[104] It is noteworthy that the bribes and kickbacks conduct alleged by Stamford was not fully known by the employer at the time of dismissal. On the employer's case, most of this information came to light only in post dismissal investigations.³⁷ However, post dismissal evidence, if it concerns facts that occurred prior to dismissal, is relevant to considering valid reason for the purposes of unfair dismissal proceedings under the FW Act.³⁸

[105] With respect to the secondary allegation, the employer claims that suppliers or potential suppliers (such as Mr Ainstrope of Remote Air Services and Mr Gordon of Industrial Medical Piping Systems Pty Ltd) informed it of this conduct prior to and during the EY post-dismissal investigation.

[106] Aside from Mr Weeks, no other business owner or supplier or person who alleged they had paid, had been asked to pay or negotiated payment of a secret commission, inducement, bribe or kickback gave evidence before me. Nor is there documentary or circumstantial evidence of or relating to such persons or payments other than the hearsay evidence of conversations Mr Harrington and Mr Knight had with contractors. In the absence of direct evidence from those contractors, let alone evidence to a proper level of satisfaction, the allegation is assertion. I make no such finding on the secondary allegation.

[107] I turn to the allegation as it relates to Mr Weeks. These are matters of substance in these proceedings. Mr Weeks gave evidence that such payments were demanded, negotiated and in some instances, paid. Mr Lewis flatly denied that he had done so or received any such money or benefit.³⁹

[108] Leaving aside the issue of Mr Lewis acquiring Mr Week's motor car and leaving aside the issue of an alleged benefit for work done without payment on his private home (each considered below) the allegation is that kickback payments were demanded of and made by Mr Weeks to Mr Lewis.

[109] I have noted that the evidence of both Mr Lewis and Mr Weeks as to their dealings was evasive and lacking in candour.

[110] Although damning of Mr Lewis, I do not simply accept the evidence of Mr Weeks on face value. His evidence varied in material respects from the sworn statements he made on 20 and 26 June 2019. It also varied from his witness statement as submitted, with that statement having to be amended in the witness box in material respects concerning the number, value and timing of payments he says he made.⁴⁰ He sought to walk a fine line – denying that he

reached any “agreement” with Mr Lewis to pay secret commissions but claiming that under the pressure of demands he made such payments despite no agreement to do so.⁴¹

[111] Together with his vagueness and inconsistency in recall, these variations create doubt as to the reliability of his evidence.

[112] Having also concluded that the evidence of Mr Lewis was evasive, I look to the documentary evidence before me to consider whether the version of either witness is plausible or credible.

[113] That documentary material includes copies of bank statements of Mr Lewis and Mr Weeks.⁴² It also concerns records of text messages exchanged between them.⁴³

[114] The evidence, plain on the face of the bank statements and not disputed by Mr Lewis or Mr Weeks, is that Mr Weeks made the following payments to Mr Lewis:

\$5,000 on 4 June 2018; and
\$2,500 on 17 July 2018.

[115] What is in dispute is why these payments were made, and whether they were kickbacks as alleged.

[116] Those payments were not made in cash. They were made in electronic form via conventional bank transfers. In that sense they were not secretive. They were capable of being traced. The first (4 June) was described by the payer (Mr Weeks) as “car payment” to the payee (Mr Lewis). The second (17 July) was described as “car loan”.

[117] The descriptions “car payment” and “car loan” make no sense, even in the context of the allegation (considered below) concerning non-disclosure by Mr Lewis of an arrangement with Mr Weeks whereby Mr Lewis came to acquire a motor vehicle owned by Mr Weeks. If Mr Lewis had purchased the vehicle or acquired it by loan it would have been he, not Mr Weeks who was the payer. I discount these descriptions as having any relevance in fact to the motor vehicle arrangement between the two.

[118] There are grounds to draw an inference that these descriptions were part of a ruse between the two, designed to mislead. Neither could explain these descriptions. Mr Lewis said he saw them when the transactions came though, considered they lacked meaning but didn’t follow up with Mr Weeks why he described the payments in that manner, as he was simply keen to get his money. In contrast, Mr Weeks said that Mr Lewis asked for these false descriptions to be made, and he acquiesced. Mr Lewis denied making the request.

[119] Mr Lewis did not deny that he was the recipient of each payment. However, he claims that he had advanced a private loan of \$7,500 to Mr Weeks during the course of his employment. Mr Lewis claims that he did so in cash⁴⁴, and that the monies he subsequently received from Mr Weeks were personal loan repayments.

[120] There is some evidence to support Mr Lewis’s version. His evidence about Mr Weeks seeking a loan based on his then marital circumstances was plausible.⁴⁵ Although Mr Weeks denied that he asked for a loan he did not deny that he came to Mr Lewis about his marital troubles and was in a bad way.⁴⁶ Moreover, Mr Lewis produced documentary evidence in the

form of his bank statement that he did withdraw \$7,500 in cash on 19 February 2018.⁴⁷ Although this is not evidence that this sum was paid to Mr Weeks, on balance I accept the evidence of Mr Lewis that he did so.

[121] I find that Mr Lewis made a personal cash loan to Mr Weeks in the sum of \$7,500 on or about 19 February 2018. The further evidence of Mr Lewis that shortly thereafter, when he started to doubt if he was going to be paid back or paid back in a timely manner, is plausible.⁴⁸ It is consistent with his evidence and that of Mr Weeks that Mr Lewis started to become demanding of Mr Weeks in terms of incomplete work at Stamford and repayment of the personal loan. By mid-2018 Mr Lewis became demanding on both fronts. I find that Mr Weeks ultimately repaid the loan in two sums, on 4 June and 17 July 2018.

[122] Once Mr Lewis was repaid his money and at least in light of Mr Lewis being embarrassed in a work context by the slow rate of progress by Mr Weeks in completing the BMS Project,⁴⁹ the relationship soured.

[123] It does not necessarily follow that because Mr Weeks made a payment of \$5,000 to Mr Lewis on 4 June 2018 in part satisfaction of the personal loan, that he did not make other payments to Mr Lewis by way of secret commissions at the request of Mr Lewis. Mr Weeks says that he made a separate payment of \$5,000 to Mr Lewis in April 2018. Mr Week's bank statement⁵⁰ indicates that Mr Weeks made a \$5,000 withdrawal in cash on 20 April 2018. Clearly this was a separate financial transaction from the electronic transfer of \$5,000 to Mr Lewis coded as 'car payment' on 4 June 2018.

[124] The 20 April 2018 cash withdrawal by Mr Weeks creates grounds for inquiry and suspicion given that it occurred eight days after Stamford signed a legally binding works contract with Mr Weeks (the BMS Project) to a value of \$217,900 plus GST, on the recommendation of Mr Lewis (by CER of 16 February 2018, countersigned by Mr Nicholls and Ms Collins). However, the mere fact of withdrawal by Mr Weeks of \$5,000 on that day does not, of itself, allow a finding that those monies were paid to Mr Lewis let alone payable under some secret commission arrangement in return for the BMS Project having been awarded to him eight days earlier (12 April 2018) on Mr Lewis's recommendation. Mr Weeks says that he put the cash in an envelope and gave it to Mr Lewis.⁵¹ In circumstances where this is denied by Mr Lewis and in circumstances where I treat Mr Weeks evidence with an appropriate degree of caution, I am unable to make a finding to the required standard of proof that this transaction was for the purposes of paying an agreed secret commission. Unsatisfactory as it may be, these proceedings leave the nature and purpose of this cash withdrawal unexplained.

[125] The text messages exchanged between Mr Lewis and Mr Weeks also create doubt as to the possibility of underhanded conduct between Mr Lewis and Mr Weeks.

[126] On 18 June 2018 (a year prior to dismissal) the following texts were exchanged after Mr Weeks claims⁵² that he refused a demand by Mr Lewis for inflating a quote on the Air-conditioning Project (by \$100,000) in return for paying that sum as secret commissions (\$1,000 per unit for 100 units):⁵³

“Lewis: We have been friends for a while now and I've always done everything I can to help you out, looked after you and given you as much work as I can. I know you have been fucked over in the past but I've always

ensured you have been paid ASAP. I'm a person of my word, if I agree to something I stick to it! There's a lot happening at work and I will continue to give you all I can but you need to stick to what we agreed and I will do the same by giving you all the work I can. Chat tomorrow.

Weeks: I'm not going to respond Simon as I appreciate the work. If you want to find a replacement then no problem...
...I don't need this crap in my life at this time...
...Can't believe you went down this path I guess from now on all my invoices will be sent direct to Trinaka

Lewis: I have to sign all invoices. We agreed on something you're the one backing out not me. And nothing is off the table. So it's up to you.

Weeks: No I'm being pushed in a corner. I don't like it
You took all the copper my car" (*my emphasis*)

[127] On 23 May 2019, following Stamford threatening legal action if Mr Weeks continued to fail to deliver work as required by contract for the BMS Project, the following was exchanged:

"Weeks: Unfortunately Stamford grand has gone legal on me and I have no choice to detail everything that's had transpired from the start of quoting the job if thereon accept my letter delay

Any suggestions what I should write back in regards

Lewis: I'd just say, this is the date I will finish everything...but rooms. And re-negotiations on omitting the rooms see what they say. I will help you out wherever I can"

[128] And then again on 14 June 2019 (the day of dismissal):

"Lewis: Did you find out who made up the bullshit?

Weeks: Its bigger than both of us
Not good
I can't comment anymore until I see my lawyer

Lewis: You need to set them straight or they will fuck you worse

Weeks: It's not me I have said nothing
If I'm taken to court I can't lie" (*my emphasis*)

[129] The conduct of Mr Lewis vis-a-vis Mr Weeks creates considerable doubt about his judgment and about the true nature of his dealings with Mr Weeks. The text messages exchanged as well as gaps in the evidence of Mr Lewis and evidence of conduct he cannot plausibly explain (such as receiving monies in his bank account that were incorrectly described but taking no action to correct the descriptors) create a fertile ground for adverse inferences to be drawn.

[130] Moreover, the texts have a cryptic element to them. Mr Lewis refers to an “agreement” and accuses Mr Weeks of “backing out”. Mr Weeks in turn claims he is “being pushed into a corner” and then (after the dismissal) says that he “can’t lie” if taken to court. The cryptic element of these texts supports an inference that an arrangement between the two existed that neither wanted exposed, which Mr Lewis wanted carried out and which Mr Weeks became uncomfortable about. If the “agreement” referred to in these texts was benign (claimed by Mr Lewis as simply the agreement with Stamford to complete the BMS Project on time) the reference made by Mr Lewis to “backing out” makes no sense. At no stage had Mr Weeks made representations to Mr Lewis or the Stamford that he wanted to “back out” of completing the BMS Project despite his difficulties with it. This reference to “backing out” is consistent with Mr Weeks reneging on an arrangement to pay kickbacks.

[131] It is also true that to be repaid his personal loan Mr Lewis needed Mr Weeks to be cashed up with funds. I was urged to draw an inference that this need was consistent with Mr Lewis flowing funds from Stamford to Mr Weeks. Whilst Mr Lewis did both (advance a personal loan and recommend and then facilitated the flow of funds to Mr Weeks under a work contract) his errors of judgement in both respects do not necessarily mean that the two were causally connected. In the context of an allegation of unjust enrichment, I decline to draw that inference in the absence of more substantial evidentiary proof.

[132] Evidence of the payment of kickbacks or secret commissions cannot be expected to be accompanied by a clear paper trail. Those that want to keep such arrangements secret are unlikely to document their wrongdoing. Communications are likely to be limited or cryptic. Cash payments in envelopes, as alleged by Mr Weeks, are less readily traced than electronic transfers. Proof of such arrangements may well be based, in part, on circumstantial evidence.

[133] There is circumstantial evidence before me supporting the allegation that Mr Lewis demanded and received kickbacks. This includes the timing of Mr Lewis recommending Mr Weeks for the BMS Project, its awarding to Mr Weeks, the withdrawal of \$5,000 cash by Mr Weeks shortly thereafter, the timing of tenders for the Air-conditioning Project, the text messages exchanged shortly thereafter accusing Mr Weeks of “backing out”, Mr Weeks not submitting a further quote for the project and the relationship between Mr Weeks and Mr Lewis then souring.

[134] However, joining the dots of this circumstantial material to safely draw a conclusion of serious misconduct relies in part on the evidence of Mr Weeks. Whilst the circumstantial evidence points towards an adverse inference I decline to make a finding to this effect. The standard of proof required of me is to be satisfied to a proper degree that in fact such payments or demands were received or made. Given the caution I treat Mr Weeks evidence, and given that Mr Weeks was the only person to give direct evidence of kickbacks or secret commissions (or demands for the same) I am not able to make such a finding to a proper level of satisfaction.

[135] On the materials before me in these proceedings, this allegation is not made out.

Falsification of quotes

[136] This allegation concerns the Johnson Controls quotation for the Air-conditioning Project.

[137] I have found that Mr Lewis received a quote from a number of businesses, one of which was Johnson Controls. Mr Lewis made a recommendation for a preferred supplier from amongst the tenderers. He did not recommend Johnson Controls.

[138] The Johnson Controls quote which Mr Lewis attached to the CER and VQS forms was in an altered state to that which had been submitted by Johnson Controls.

[139] The allegation is that Mr Lewis altered the Johnson Controls quote so as to strengthen the case for Stamford choosing his recommended supplier (Waymill).

[140] There is no doubt that the Johnson Controls quote as submitted by Mr Lewis in the CER and VQS was different to the Johnson Controls quote as submitted to Mr Lewis by Johnson Controls as part of its tender. This much is not in dispute. Nor are the nature of the differences in dispute. Each are in evidence before me.⁵⁴ The alterations between the submitted quote and the quote attached by Mr Lewis to the CER and VQS were significant:

- a minus sign forming part of the figure “-\$32,000” had been removed; and
- an adjacent line in the quote which read “PRICE-SAVING: Substitute YBK WSHP for Temperzone HWP 59RKSYS” had been removed in its entirety.

[141] Further, in the CER and VQS (recommending Temperzone units be installed) Mr Lewis represented the Johnson Controls quote as \$854,000. In fact, the Johnson Controls quote for installing Temperzone units was, at all times, \$822,000. Having regard to the alterations which had been made, Mr Lewis added the sums of \$822,000 and \$32,000 to represent the Johnson Controls quote as \$854,000.

[142] In its quote Johnson Controls had also indicated that it could reduce the figure of \$822,000 by \$32,000 (to \$790,000) if York units (rather than Temperzone units) were installed.

[143] Mr Lewis’s preferred tenderer (Waymill) quoted \$792,580 (installing Temperzone units).

[144] During the course of the tender process (and after Johnson Controls had submitted an even earlier quote for \$790,000 on York units) Mr Lewis had advised that he wanted a consistent tender on Temperzone units. This led to Johnson Controls submitting its \$822,000 quote.

[145] Mr Lewis denies that he made the alterations to the Johnson Controls quote. He says that at the time of submitting the CER and VQS the quote had been altered but he had not noticed the alteration. He also says that he made an arithmetic “mistake” in the CER and VQS by adding the figure \$32,000 to \$822,000 and thus wrongly representing the quote as \$854,000 rather than \$822,000.

[146] The evidence that Mr Lewis altered the quote is circumstantial but strongly points to that conclusion. The facts are:

- The quote was sent to Mr Lewis on his simon lewis @ Stamford email account and electronically stored by Mr Lewis in his computer and in hard copy in a folder in a rack on his desk;
- At all relevant times Mr Lewis had access to the electronically stored quote and the hard copy quote;
- It was Mr Lewis, and Mr Lewis alone, who attached the quote to the CER and VQS;
- It was Mr Lewis, and Mr Lewis alone, who added the sums of \$822,000 and \$32,000 to wrongly represent the quote as \$854,000; and
- Mr Lewis did not recommend Johnson Controls.

[147] There is no direct evidence before me as to how the altered quote came to find its way onto Mr Lewis's electronic file in substitution for the original quote. However, there is evidence that this altered quote was not the only altered version. A different altered version of the Johnson Controls quote was uncovered by the EY investigation. That differently altered quote entirely deleted reference to the option of using York units or the price saving of “-\$32,000”. That differently altered quote was sent internally from Mr Lewis's work printer to his work email as an attachment to the simon lewis @ Stamford email account at 10.47am on 5 September 2018.⁵⁵

[148] By way of explanation for the altered quote he attached to the CER and VQS, Mr Lewis says that someone else must have accessed his work computer, altered the quote and substituted the original electronic copy with the altered electronic copy, with the intention of having him dismissed.⁵⁶ Mr Lewis says that he does not know who did so but suspects Mr Weeks as he says this occurred at a time when his relationship with Mr Weeks had soured.⁵⁷ He says that although Mr Weeks was a supplier, their close friendship meant that Mr Weeks had access to his work electronic file.

[149] This attempt to implicate Mr Weeks or other unknown or un-named persons is speculative and implausible. I do not accept it.

[150] Firstly, leaving aside whether it was possible or consistent with Stamford policy for a contractor to access the business files of the Chief Engineer, Mr Weeks was not in the final analysis, seeking to perform the Air-conditioning Project. There is no plausible reason why Mr Weeks had an interest in Waymill securing that project or rendering the Johnson Controls quote uncompetitive.

[151] Secondly, whilst the personal relationship between Mr Weeks and Mr Lewis had soured by September 2018, a professional relationship remained. It was not in the interests of Mr Weeks for Mr Lewis to be sacked as that course risked exposing their private dealings and adding to what Mr Weeks had expressed three months earlier as “this crap in my life”. A different Chief Engineer on the BMS project may also have been less empathetic to delays and his contractual breaches.

[152] Thirdly, making and storing the alteration without detection required a degree of sophistication. It required a sequence somewhat along these lines: accessing the original electronic quote and altering it electronically or downloading the original quote and altering a

hard copy then scanning it back and then storing it electronically in substitution (and deleting the original quote).⁵⁸ This required knowledge and access to internal scanning systems, passwords and electronic files. It is not plausible that Mr Weeks, an external air-conditioning contractor, was capable of undertaking so sophisticated a task.

[153] Fourthly, there is no evidence before me why others with internal IT control over electronic files on Mr Lewis's computer or operational staff would have had similar motivation. The alterations to the quote occurred nine months prior to dismissal and well before more senior staff became suspicious of Mr Lewis's procurement practices.

[154] What is not speculative is that on 18 October 2018 Mr Lewis attached the altered quote to the CER and VQS. In the disciplinary meeting with Mr Knight on 4 June 2019 and again at the dismissal meeting with Mr Donald on 14 June 2019 these documents were put to Mr Lewis. On both occasions his explanation was that he made an arithmetic error: "I added to the quote instead of subtracting".⁵⁹

[155] Although superficially attractive, this explanation does not withstand scrutiny. It is specious. I reject it.

[156] For the explanation to be credible Mr Lewis needed to have known at the time (18 October 2018) that a subtraction was required but mistakenly made an addition. However, in circumstances where the quote he attached made no reference to a deduction (as the minus figure had been removed as well as the price saving text) it cannot be said that a failure to make a deduction was a mistake. Only someone with knowledge of the original quote would have known that a deduction (for a different product) was contemplated by the tenderer. Further, there is no sense in which a deduction was mistaken if, as Mr Lewis correctly claims, Stamford had (a month earlier) decided to proceed on the Temperzone (not York) units. It was not a mistake to add rather than subtract. At its highest, it was simply a mistake to add. The quote of \$822,000 without addition or subtraction was the quote for the product sought to be procured.

[157] Mr Lewis claims it is implausible that he was responsible because the change made no difference to the outcome of the tender as Johnson Controls, even on their unaltered quote, was uncompetitive on price: "the successful quote that was presented by Waymill Services was still cheaper".⁶⁰ On this Mr Lewis is factually correct. On a like-for-like product basis, Johnson Controls quoted \$822,000 whereas Waymill quoted \$792,580.

[158] However, this does not make it implausible that Mr Lewis made the alteration. He was required to submit three quotes for consideration. Representing the Johnson Controls quote as \$854,000 rather than \$822,000 put double the distance between its quote and that of his recommended tenderer, making the chances of Johnson Controls being considered more remote. Further, removing any reference to the York units made it impossible for the decision-makers to consider or reconsider whether they wanted to pursue the option of a cheaper tender price using the York unit.

[159] Nor is this an acceptable explanation. To focus on outcome alone wrongly ignores conduct giving rise to that outcome. Mr Lewis was a key figure responsible for managing a procurement process, not simply the outcome of that process. In the context of his employment duties, the end could not justify the means if the means involved serious misconduct.

[160] The circumstantial evidence against Mr Lewis points strongly towards an inference that he altered the quote and did so for no proper reason. Although his claim of making an innocent mistake has some superficial attraction, on examination it is a weak denial. He and he alone received the original at his business email address, he and he alone attached the altered quote to the CER and VQS, the altered quote remained at all times under his control and altering the quote made it more likely that his recommended tenderer would be selected over Johnson Controls and denied a line of sight over a cheaper quote for a different product.

[161] The circumstantial evidence relating to the falsification allegation is necessarily different circumstantial evidence to the kickback allegation. The evidence about falsification does not require the same degree of weight to be attached to the evidence of Mr Weeks. The alteration to the quote was conduct of a single individual whereas the kickback allegation involved a payer and payee. Unlike the kickback allegation where Mr Lewis provided a plausible explanation (the personal loan) for at least two payments, there was no plausible explanation provided for the falsification allegation.

[162] Nonetheless, in circumstances where the allegation of serious misconduct is an allegation of falsification of a business document the standard of proof remains at the higher end of the scale.

[163] Having carefully considered this matter, I am satisfied that the circumstantial evidence coupled with the implausible explanations lead me to conclude to a proper level of satisfaction that Mr Lewis altered the Johnson Controls quote of 4 June 2018 by removing text and a minus sign from the figure “-\$32,000”. This was conduct by Mr Lewis. It was serious misconduct and a valid reason for dismissal in its own right.

[164] Aside from whether Mr Lewis made the alteration, his failure to exercise care and diligence in not including in the CER and VQS the correct quote as submitted by Johnson Controls was negligent conduct and itself a performance failure. It had the effect of misrepresenting the position tendered on major works by a potential supplier.

[165] That negligence, by an experienced professional, warranted counselling and warning. As a failure of duty, it was capable of forming part of a collective of reasons that constituted a valid reason irrespective of how the quote came to be altered.

Unauthorised removal of scrap metal

[166] This allegation is to the effect that Mr Lewis removed scrap metal (copper piping) from the property of Stamford that was left at the hotel from previous works and secured a private benefit by on-selling it for money.

[167] This allegation is based entirely on the evidence of Mr Weeks. It was not known by the employer at the time of dismissal. It emerged when Mr Donald spoke to Mr Weeks in the weeks that followed. It was contained in the sworn statement by Mr Weeks of 20 June 2019.

[168] There is no corroboration or verification of this allegation beyond the oral evidence of Mr Weeks.

[169] The allegation was denied by Mr Lewis. His denial included an explanation as to the nature of the scrap material that was left behind. Mr Nicholls said that scrap material had been left behind by contractors and not collected.⁶¹

[170] Essentially this is an allegation of theft. That being a serious allegation, the standard of proof is at the higher end of the scale. Given my overall caution about the evidence of Mr Weeks, the denial by Mr Lewis and in the absence of any corroborating evidence I do not make a finding to this effect.

[171] For the purposes of these proceedings, this allegation is not sustained.

Failure to disclose personal dealings with suppliers or conflicts and potential conflicts of interest

[172] This allegation relates to three instances of alleged conduct:

- Failure to disclose a personal cash loan made by Mr Lewis to Mr Weeks;
- Failure to disclose the acquisition by Mr Lewis of a car owned by Mr Weeks; and
- Failure to disclose that Mr Weeks had been engaged by Mr Lewis to perform work on his private property.

[173] The allegation also concerns a general failure to disclose to Stamford that Mr Lewis knew and had prior dealings with Mr Weeks before recommending Mr Weeks as a supplier of works. It also emerged from the evidence that Mr Demetriou had on a number of occasions performed work on private properties owned by Mr Lewis, prior to performing emergency work at the Stamford and being a successful tenderer for works at the Stamford.⁶² Mr Lewis did not deny that Mr Demetriou had performed work on his private properties.⁶³

[174] It is not disputed by Mr Lewis that these events concerning Mr Weeks occurred, and that they were not the subject of formal disclosure to Stamford. He claims that in respect to the latter two (the car and the private work) this had been made known by him to Mr Nicholls (his then Acting General Manager) and that his general friendship with Mr Weeks was known.⁶⁴ He also claims that another employee (Ms Collins) had private work performed on her home by suppliers including Mr Weeks.⁶⁵ With respect to Mr Demetriou, Mr Lewis says that Mr Demetriou both won and failed to win tenders at the Stamford.

[175] I have found that Mr Lewis made a cash loan of \$7,500 to Mr Weeks out of personal concern for his circumstances. This loan was made at a time when Mr Lewis had (three days earlier) recommended Mr Weeks perform work in excess of \$200,000 at the Stamford. This loan involved a private financial arrangement at a time when Mr Lewis sought to be responsible for overseeing a substantial contract between Mr Weeks and Stamford, including payment and progress payments for works done. By this time, their relationship was not transient or fleeting. Mr Lewis had known Mr Weeks for two years when he made the loan.⁶⁶

[176] Irrespective of the issue of alleged inducements or kickbacks, the scope for a conflict of interest clearly existed. Mr Lewis held a duty to disclose conflicts of interest or potential conflicts of interest given his role in procuring the services of suppliers. He was indifferent to this duty. He considered that a private financial arrangement with Mr Weeks could be just that, private; in his words “a personal loan between us”.⁶⁷ Yet, as events transpired, a fall-out over the performance of works by Mr Weeks and a desire by Mr Lewis for the timely

payment of monies to him intertwined then complicated and eventually soured the relationship.

[177] The text messages exchanged between Mr Weeks and Mr Lewis, and the evidence of Mr Lewis about those messages points directly to that conflict between his business obligations and personal interests. Without needing to rely on the evidence of Mr Weeks, the evidence of Mr Lewis is that his “agreement” with Mr Weeks was an agreement that combined the dual obligations held by Mr Weeks: to do the job at the Stamford without making Mr Lewis look bad to his colleagues, and to repay the personal loan to Mr Lewis:⁶⁸

“... he was just beside himself because his wife was leaving him, and whether this is another reason for his financial difficulties I don't know and I'm not going to assume anything, and asked me if he could borrow some money, and said, "Sure, that's fine." I said, "But on the understanding and the agreement is that, (1) you pay it back to me, and (2) you've just got to finish this BMS project. I need to get this BMS project done. I will help you out as much as I can with any other future work. You'll be able to quote as any other contractor on any other scope of works that you - that are coming up within the building, but we agree upon that you pay me back and that you please complete the BMS project.”

[178] Mr Lewis readily accepted that there was a quid pro quo for repayment of the personal loan:

“In return, if he did honour those, I would allow him the opportunity to quote on future projects.”⁶⁹

“I agreed that if I lent him the money, I would then, further down the message I said, ‘I will be more than happy to allow you to tender for every other project that you wanted to tender for’.”⁷⁰

[179] His text message to Mr Weeks of 18 June 2018 put it this way:⁷¹

“I will continue to give you all I can but you need to stick to what we agreed and I will do the same by giving you all the work I can”

[180] And in response to further questions from myself:⁷²

DEPUTY PRESIDENT: Did you ever give some thought to the fact that you yourself were combining a personal matter with a business matter?

MR LEWIS: No, because I didn't see any issue with trying to help somebody out that was desperately in need of assistance...

DEPUTY PRESIDENT: Did it cross your mind that in offering to loan him seven and a half thousand dollars, that you were doing so with respect to a person that you were also engaged in recommending for work on the Stamford?

MR LEWIS: No. Honestly at that point in time I felt I could trust him.

DEPUTY PRESIDENT: Yes, but did it cross your mind that you as an employee of the Stamford...

MR LEWIS: No.

DEPUTY PRESIDENT: ...may be putting yourself in a position of some conflict?

MR LEWIS: No, it never occurred to me whatsoever.
...

MR LEWIS: No, I didn't at the time. I just thought it was a short term thing and I would get paid back, and then he would finish what he needed and then we would all move on."

[181] I do not accept Mr Lewis's assertion that the loan of \$7,500 was "not a lot of money"⁷³ and that this excuses or mitigates his non-disclosure. It was a significant and material financial transaction between the two. The loan came with conditions, one of which was repayment. That Mr Lewis required repayment is evidence that he considered the monetary value of significance to him.

[182] Concerning the transfer of a motor vehicle between Mr Weeks and Mr Lewis, the evidence before me is that on or about 30 April 2018 Mr Weeks provided Mr Lewis a motor vehicle which he owned, for the personal use of Mr Lewis. More than a year later, the vehicle had not been returned by Mr Lewis to the possession of Mr Weeks. This transfer occurred at a time when Mr Lewis had recommended Mr Weeks for work at the Stamford and a works contract to the value of \$217,910 had been entered into. This much is not the subject of disputed facts.

[183] These non-disputed facts are a sufficient basis for me to conclude that Mr Lewis had a duty to disclose this private arrangement between he and Mr Weeks. It is not to the point that the motor vehicle may not have had a high dollar value. Mr Lewis was securing a personal benefit (the use of a motor vehicle, if not its ownership) from a supplier he had recommended for works.

[184] The issue is whether Mr Lewis did in fact make a disclosure. Mr Lewis claimed that he informally advised Mr Nicholls of the motor vehicle acquisition.⁷⁴ Mr Nicholls agreed that he had been informally advised.⁷⁵ I consider it more likely than not that Mr Lewis did informally mention this to Mr Nicholls. However, Mr Lewis made no formal disclosure in the context of recommending Mr Weeks for works and having initially invited Mr Weeks to tender for the project. An informal disclosure to Mr Nicholls did not have the effect of making it known to those deciding whether to approve the CER (concerning Mr Weeks) that a private arrangement existed between Mr Lewis and Mr Weeks concerning a motor vehicle. I consider that Mr Lewis failed in his duty to adequately inform Stamford in a sufficient manner about the potential for a conflict of interest concerning his private arrangement with Mr Weeks for possession of a motor vehicle.

[185] As to whether the arrangement was a loan of the car for an indeterminate time (as claimed by Mr Weeks) or a purchase (as claimed by Mr Lewis) is of less materiality. On the evidence before me I find that it was intended to be a purchase. The text exchanges between Mr Lewis and Mr Weeks suggest as much⁷⁶; otherwise Mr Lewis would not have sought and received papers to effect a vehicle transfer with the relevant authority. There is however no evidence that Mr Lewis made a payment to Mr Weeks for the vehicle. What is clear is that Mr Lewis secured a private benefit from Mr Weeks without paying for it. There is no evidence (from either party) that it was a mere gift. That leaves questions in abeyance as to what benefit or consideration, if any, Mr Lewis provided Mr Weeks for the value of his vehicle. For some reason Mr Lewis saw fit not to pay Mr Weeks for the purchase even though he acquired possession and never returned the car.

[186] Mr Lewis held commercial power over Mr Weeks in the sense that he (Mr Lewis) had the capacity to recommend Mr Weeks for substantial dollar works at the Stamford and facilitate payment or part payment for contracted works. There are some grounds for drawing an inference that Mr Lewis did not pay for the car (even though he took ownership) simply because he could get away with it, based on his assessment of the larger financial dependency Mr Weeks had on Mr Lewis. However, my caution about the overall evidence of Mr Weeks leads me to conclude that the material before me is not sufficiently probative for that inference to be safely drawn.

[187] The third allegation concerns a failure to disclose to Stamford that Mr Weeks performed private work on the residence of Mr Lewis. Mr Lewis did not dispute that Mr Weeks had done so. There is a dispute over whether payment was made for work performed (installation) or simply the capital purchase of an air-conditioner. The evidence before me from Mr Weeks was that Mr Lewis did not pay for the installation (only the capital purchase). Mr Lewis's evidence was that he did not pay for the labour.⁷⁷

[188] I do not need to determine the issue of whether payment was made by Mr Lewis and if so for what. Irrespective of whether Mr Lewis paid for the installation, a failure to disclose this private work was a failure of duty. Mr Lewis says that he informally told Mr Nicholls of their friendship and past work, and Mr Nicholls agreed that this had been mentioned in passing.⁷⁸ For similar reasons concerning the motor vehicle acquisition, there are grounds for drawing an inference that Mr Lewis did not pay for Mr Week's labour simply because he could get away with it based on his assessment of the larger financial dependency Mr Weeks had on Mr Lewis. However, my caution about the overall evidence of Mr Weeks leads me to again conclude that the evidence before me is not sufficiently probative for that inference to be drawn in relation to the alleged non-payment for services performed at his private residence.

[189] Stamford had established policies on conflicts arising from procurement, and on personal relationships affecting purchasing decisions.

[190] The Stamford 'Purchasing' Policy relevantly provided as follows:⁷⁹

- “4. When an employee, who is involved in the procurements of goods or services and/or has related direct or indirect vested personal financial interest in the chosen supplier, that person must comply with the following procedures:

- a. The employee concerned shall submit the nature and extent of the financial and vested financial interest to the COO, the RFC and any relevant parties for their respective approvals, if necessary.
- b. If a senior executive has vested direct or indirect financial interest in a supplier, that person shall seek approval from the hotel's General Manager and/or the next immediate superior, who could be based at either the Corporate Head Office or SLC.
- c. ... *(extracted below)*
- d. The approval under this Section may be granted with attached terms and conditions. A copy shall be extended to Internal Audit Manager for information and to ensure compliance.
- e. The supplier's contracted period is approved on a case-by-case basis. In general, the approval to employ the supplier shall be for a period not exceeding 12 months.
- f. The employee concerned shall not be involved in any transactions conducted with the supplier. The selection of the final supplier for any transaction shall be based on 3 quotations, which shall be executed and reviewed independent of the employee concerned."

[191] The Stamford 'Relationships at Work' Policy relevantly provided:⁸⁰

"2. Although not always the case, the implication of personal relationships at work could include:

- Effect on the trust and confidence of colleagues in relation to a conflict of interest, fair treatment and their own ability to discuss issues openly within a team or with their manager;
- Perception of suppliers, contractors, clients or the general public in relation to the professionalism and fairness of the Company and its employees;
- Operational issues affecting the ability to deliver services effectively;
- Conflicting loyalties and breach of confidentiality."

[192] The 'Relationships at Work' Policy required employees to "declare their existing personal relationships in writing to their respective HOD (Head of Department) or GM (General manager) AND Human Resources as soon as possible".⁸¹ It defined relationships beyond family members to include "any other individuals with whom the employee has a personal relationship e.g. clients, external contractors or service providers whom the Company professionally engages in business."⁸² *(my emphasis)* It provided:

"4. Such matters will be treated in confidence and will allow Management to consider the implications of the personal relationship, including potential operational issues and conflicts at work, and make alternative arrangements to avoid such issues and conflicts. The written declaration and all agreed arrangements will be recorded in the employee's file."⁸³

[193] In failing to disclose to any company officer (formally or informally) the private loan arrangement he entered into with Mr Weeks, and in failing to formally disclose his personal friendship with Mr Weeks, the private work Mr Weeks had performed on his properties and the private arrangement acquiring Mr Week's motor vehicle, Mr Lewis acted in breach of these policies.⁸⁴

[194] Further, each of these policies provided that disciplinary action, including termination, could arise from breach:

“Conflict for the purposes of this policy may include but is not limited to behaviour and/or conduct that:

- Results in performance or behavioural issues that would ordinarily be subject to disciplinary action;
- Results in neglect of duties (e.g. exercising favouritism towards the person employee or contractor with whom you are in a relationship when you are in a position of authority);
- Results in a breach of employment contract...
...
- Impedes on decision making process relating to contractual agreements with external contractors or service providers;
- ...”⁸⁵ (*my emphasis*)

“Non-disclosure of vested financial interest is a serious matter in breach of employment contract and may be subjected to disciplinary action, termination of employment or legal proceedings.”⁸⁶ (*my emphasis*)

[195] I conclude that Mr Lewis’s conduct in failing to disclose conflicts and potential conflicts of interest was a serious failure of duty. Having regard to the position he held and the responsibility he was entrusted (with others) to recommend preferred tenderers as part of a procurement process and the significance of the commercial arrangements arising from those processes it was a failure at the higher end of the scale. It was, in its own right, a valid reason for dismissal.

Disclosure of quotes to competitors

[196] This allegation is that Mr Lewis compromised the integrity of Stamford’s tendering process by providing copies of competitor quotes and details of the price quoted by competitors to his preferred suppliers, so as to enable them to underquote their competitors and be recommended for works.

[197] Mr Lewis says, in response, that he occasionally did so but all times was acting in the best interests of Stamford as he was seeking to secure the lowest possible price. He also says that this practice was common in the industry, and that other managers (including Mr Knight) knew or asked him to seek a lower quote from a preferred supplier.

[198] The evidence before me is that Mr Lewis provided information to his preferred suppliers about the quote of a competitor or a suggested price or price range in order to enable his preferred suppliers to underquote their competitors and be recommended for works. Aside from circumstances where Mr Lewis provided information about a price point, Mr Lewis admitted that he sent full quotes on two or three occasions.⁸⁷ Mr Demetriou said that Mr

Lewis supplied him with quotes or quoted prices of competitors, allowing him to consider undercutting those prices.⁸⁸ Mr Knight's evidence, which I accept, was that after the first CER on the Cooling Towers Project, he formed the view that Mr Lewis was "sharing pricing rather than asking people to put their best foot forward in terms of price".⁸⁹

[199] In doing so, Mr Lewis compromised the procurement process. He disclosed commercial information provided to Stamford by one private business (the tenderer) to another private business (his preferred supplier) without the knowledge or permission of the tenderer. Whether Mr Lewis did so by providing the full quote of the tenderer or simply informing his preferred supplier of the dollar figure quoted by the tenderer or the dollar amount they needed to reduce their quote to undercut the tenderer is immaterial. In either instance his conduct provided inside information that had the potential to distort decision-making as well as damage the relationship between an unsuccessful tenderer and Stamford.

[200] Stamford's procurement policies make no allowance for such conduct. The stated objective of the Stamford Purchasing Policy was "the best possible quality, at the most competitive prices and in terms of payments, and the selection and purchasing processes are accurately documented."⁹⁰

[201] As a senior manager responsible for procurement, I find that Mr Lewis displayed, on his own evidence, a disturbing naivety about the consequences of such conduct, describing his approach as "whatever it took".⁹¹

"my job is to get the best product at the best price for the Stamford that I worked for at the time, and that was my job and that's what I did, whatever it took to get them the best most cost effective product as part of my job, So, yes, I did."

"my obligation to my employer was to get them the best price, and I utilise that to negotiate it."

[202] And in the following exchanges with myself:⁹²

"DEPUTY PRESIDENT: You don't think that you had some inside knowledge about what a commercial entity was tendering for work and that you were going to pass that that inside knowledge on to a competitor of that business – you didn't think there was any issue with that?

MR LEWIS: No, I was just trying to get the best price for the company. As I said, it happens everywhere."

...

"DEPUTY PRESIDENT: You don't see that that has any implications for the relationship that the Stamford has with companies that may miss out on winning the tender?

MR LEWIS: No."

[203] I do not accept Mr Lewis's claim that he was directed by other managers to disclose quotes or quoted prices of competitors or that he informed managers of his practice without

their protest. The evidence before me is that on occasion Mr Knight would ask Mr Lewis to go to a preferred supplier and seek a revised quote.⁹³ I do not find that Mr Knight asked for more than that.⁹⁴ Inviting a tenderer to submit a revised quote or asking whether their quote was their best price is not akin to informing a tenderer of the price quoted by a competitor. As a professional responsible for procurement Mr Lewis knew or ought to have known that there is a world of difference between (on the one hand) neutrally asking for a revised quote and (on the other) disclosing details of the actual quote or price a competitor, or suggesting a price or price range to win a competitive quote. Mr Lewis failed to draw that distinction and was indifferent to the fact that he was failing to do so.

[204] Nor do I accept Mr Lewis's claim that he was acting in the best interests of Stamford by seeking a cheaper price. This is a spurious proposition. Firstly, the best interests of his employer was value for money having regard to the scope of works. This involved considerations not just of price but also a supplier's capacity, timeliness and capability. Inviting a supplier to underquote on price simply for the sake of winning work in circumstances where the scope of work remained unchanged had the potential to raise questions about that supplier's capacity and capability to do the job without cutting corners. Secondly, if the objective was simply securing a cheaper price Mr Lewis did not, once he received a revised lower quote, go back to the underquoted tenderer and invite it to underquote the underquote, and so on. His objective was not simply the cheapest but for his preferred supplier to be selected as the cheapest amongst those quotes he had secured.

[205] I also reject the submission that this practice was explicable because it was common industry practice. I have no evidence before me to form a view on common industry practice, beyond the assertion of Mr Lewis (which was disputed by Mr Diaz de Rivera⁹⁵). What I consider relevant is the duty Mr Lewis held to his employer as a manager entrusted with responsibility for procurement and his conduct in that regard. Whilst he was not the only manager involved in procurement, as Chief Engineer he was Stamford's critical link between suppliers, tenderers and the business. He initiated CER processes, he framed the proposed scope of work, he recommended suppliers and preferred suppliers and he oversaw work in accordance with contracts entered into.

[206] I conclude that Mr Lewis's conduct in providing copies of competitor quotes or details of prices quoted by competitors to his preferred suppliers was misconduct. It was a failure of judgment and duty that distorted the integrity of the tendering process. He was indifferent to that distortion. Having regard to the position he held and the responsibility he was entrusted (with others) to source tenders and recommend preferred tenderers and the significance of the commercial arrangements that flowed for Stamford and private tendering businesses (and their relationship with Stamford) it was a failure at the higher end of the scale. It was, in its own right, a valid reason for dismissal.

Failure to conduct due diligence on preferred suppliers

[207] This allegation concerns two matters.

[208] It is alleged that Mr Lewis recommended Waymill for two projects⁹⁶ in circumstances where Waymill was a 'one man band' with only limited capability, where its nominated address was a residential not business premises, where there was no evidence that it had in fact previously completed complex work of the nature it claimed, and where it was not known or recognised in the industry as having done so.

[209] It is also alleged that Mr Lewis did not disclose in the CER that Green Air was also a 'one man band' operated by Mr Weeks.

[210] Stamford also allege a separate but related failure of duty, being that from time to time Mr Lewis novated works to his preferred suppliers without authorisation.

[211] Capital and maintenance works on commercial property is performed by a variety of businesses in the economy. Some businesses are large and complex with significant internal resources. Others are small self-employed businesses with a private residence as a business base and which are reliant in part on sub-contracting should additional labour or skills be required. Some businesses have considerable history, others are newer or less experienced. This matrix is the reality in which procurement for works operates.

[212] That reality does not lessen the duty of an engineer to source or recommend suppliers in a tendering process that are fit for purpose. Absent company policy to the contrary, it is not a breach of duty to recommend a self-employed operator over a larger business any more than it is to recommend a long-term business over a start-up. In terms of duty, the issue is one of due care and diligence in making a professional judgement and recommendation and disclosing relevant facts to decision-makers that allow an assessment of risks and benefits.

[213] The evidence before me is that Waymill was a supplier with whom Stamford had not previously contracted. The scale and cost of the projects tendered for by Waymill were significant. Being an entity unknown to Stamford, Mr Lewis had a duty to conduct appropriate due diligence on the proposed supplier before recommending it, and to disclose relevant facts to the decision-makers that related to cost, benefit and risk.⁹⁷ Mr Lewis did so but only to a limited degree. He discussed the project with Waymill and "felt confident they could do the works".⁹⁸ However, he took Waymill on its word that it had previously completed major comparable works without independently checking the veracity of such claims. He failed to disclose that the business was a small operator which would need to sub-contract further labour requirements.

[214] I consider that in recommending Waymill as a preferred or recommended supplier Mr Lewis failed to conduct due diligence to a minimum acceptable level. This was a failure of duty.

[215] With respect to Green Air, Mr Lewis had knowledge of the business and previous experience with comparable work that Mr Weeks had performed under his oversight at the Mayfair Hotel. Mr Lewis did not disclose to Stamford on the CER that Mr Weeks was a self-employed operator but I am satisfied that he did make this known to Mr Knight.⁹⁹ Mr Lewis was not to know that personal issues (a future marital breakdown) would adversely impact Mr Week's capacity, once contracted, to perform the work in a timely manner. Leaving aside Mr Lewis's serious failure to disclose his personal dealings with Mr Weeks and other conflicts and potential conflicts of interest (considered above), on due diligence issues alone I do not consider that recommending Green Air was, of itself, a failure of duty.

[216] With respect to the novation allegation, the circumstances of the alleged unauthorised novations were not fully interrogated before me, nor company policy on novation. Mr Lewis denied the allegations. Mr Demetriou did not consider that work was novated to him by Mr Lewis without authorisation. I do not have sufficient evidence before me to conclude whether

Mr Lewis did, in fact, novate work to preferred suppliers without authorisation. I make no finding on that matter.

[217] I conclude that, in instigating the CER process, Mr Lewis twice failed, in part, to make reasonable inquiries into and advise Stamford of the nature and credentials of at least one supplier recommended for works, Waymill. Those who relied on his proposal (the other signatories to the CER) as well as those considering the CER needed to be informed of relevant facts that Mr Lewis should have acquired but failed to do so.

[218] While it was not Mr Lewis's role to delve deeply into ASIC or other checks on corporate status or liquidity he needed to provide at least a line of sight for senior management about the type of entities he was recommending. I reject the evidence of Mr Lewis and accept the evidence of Mr Knight and Mr Harrington that this was an element of his job. In preparing and signing a CER his responsibility was to inform management of matters that created or mitigated risk, such as whether a tenderer had diverse internal capacity or was a 'one man band' or whether claims made by those quoting checked out. His approach, in part, lacked that rigour.

[219] To the limited extent that Mr Lewis did communicate such information, it was only informal to an immediate manager or colleague, not the decision-makers. The need for three signatories on a CER operated as a check and balance. Others (such as the General Manager or Financial Controller) were in a position to ask such questions of Mr Lewis or independently conduct inquiries. However they were not the instigators or primary architects of a CER. Mr Lewis was. Operationally, it was his responsibility to present a proposed CER that was in the best interests of the business.

[220] This was a performance failure. It was not misconduct. In the two instances in issue (concerning Waymill) an adequate line of sight was not provided by Mr Lewis. Those failures warranted counselling and clearer guidance on his responsibilities. In their own right they did not warrant termination. However, as failures of duty, they were capable of forming part of a collective of reasons that constituted a valid reason.

Failure to conduct due diligence when recommending scope of works

[221] This allegation concerns the recommendation Mr Lewis made in the CER for the Air-conditioning Project that 100 units be replaced.

[222] Stamford contend that only a small handful of units in fact required replacement and that the scale and cost of the works it contracted on the advice of Mr Lewis put it to unnecessary cost and operational disruption.

[223] Although the advice provided by Mr Lewis for the replacement of 100 air-conditioning units was, based on Mr Diaz de Rivera's evidence, open to serious question the differences of view in part concern business strategy and approach. On one view (that of Mr Lewis) the history he inherited and efficiencies of scale and consistency in customer experience warranted replacement at the level he recommended and that other managers had also been part of that history.¹⁰⁰ On the alternate view, the need was not so great and only a handful of the 100 units were in actual disrepair. At that time Mr Lewis believed and had given Mr Knight the impression that the units were as old as the hotel, whereas in fact they were not.¹⁰¹

[224] These differences in approach (between a modest investment to rectify an immediate problem compared to a larger longer term preventative investment based on a view that underlying issues were causing a larger scale risk) do not necessarily reflect a failure of duty. They could equally reflect differences in strategic approach to capital investment.

[225] Whilst there is some evidence to suggest that Mr Lewis took the easier way out by recommending replacement of 100 units and, without adequate checking, gave the impression that 100 units were in disrepair, he inherited a complicated history (of water flow and poor past maintenance) which raised questions about the risk profile of existing units.

[226] Whilst there is room for reasonable opinions to differ about the adequacy of Mr Lewis's judgment in recommending replacement of 100 units, I conclude that his recommendation was not without some operational and strategic basis. I am not satisfied, given the history of water flow and air-conditioning issues he inherited, that he clearly failed in his duty in this regard so as to warrant disciplinary sanction.

Inflated progress payment to Mr Weeks

[227] This allegation concerns a large progress payment made early in the works to Green Air on the BMS Project in circumstances where a payment of that size was substantially greater than the contracted progress payment required to be made and nowhere near the quantum of works that had been completed.

[228] The payment was a sum of \$52,800 on an invoice dated 11 April 2018.¹⁰² Although the employer's allegation at the time of dismissal was that this was a progress payment of 80% of the contract value, it was acknowledged at the hearing that the correct figure was approximately 25%.¹⁰³ Even at this level though, 25% of works had not been completed. It was an inflated demand.

[229] Mr Lewis knew or ought to have known, given his concerns about the slow progress being made by Mr Weeks, that the payment was in excess of the contracted requirement. His original CER seeking approval for the project had made his responsibility for progress payments clear; payments were only to be made "after sign off and approval of works completed and checked by the Chief Engineer".¹⁰⁴

[230] However responsibility for this excessive payment did not rest solely with Mr Lewis. Ms Collins was the Financial Controller. Ultimately it was her department that made the payment. Stamford's policy required both Mr Lewis as Chief Engineer and Ms Collins as Financial Controller to authorise the payment. Exhibit R11 is evidence of the fact that each initialled the invoice.¹⁰⁵ However the evidence as to how that occurred is in dispute. Ms Collins says that it was Mr Lewis who first signed and she countersigned. Mr Lewis says that it was Ms Collins who first signed and made the payment and then only after the event sought his signature.

[231] On this issue I prefer, on balance, the evidence of Mr Lewis. It is corroborated by Mr Nicholls. On this point, the evidence of Ms Collins was somewhat vague. Mr Nicholls said that Mr Lewis had raised with him the fact that Ms Collins had made the progress payment before securing his agreement. Mr Nicholls said that he then spoke to each of them. He said that he was shown the invoice which at that time did not have Mr Lewis's initials on it, but

payment had been made. He said that he was “absolutely sure” of that fact.¹⁰⁶ I accept Mr Nicholls evidence on this point in preference to the more general evidence of Ms Collins. It was instinctive and plausible and consistent with his then role as acting General Manager.

[232] Mr Lewis could have done more to prevent a payment in excess of the quantum of works completed. Mr Week’s inflated invoice had been emailed to both himself and Ms Collins. Aside from raising the issue with Mr Nicholls after payment had been made, he took no steps before payment was made to ensure that Stamford did not make payment above the contracted level.

[233] However, having found that payment was made by the Financial Controller before Mr Lewis was asked to sign, and whilst with the benefit of hindsight Mr Lewis did not intervene in a timely manner, I do not conclude that Mr Lewis failed in his contractual duty in a material way. This allegation is not made out.

Conclusion on valid reason

[234] Based upon my findings, the allegations of demanding and receiving kickbacks, of theft and of negligently recommending an excessive scope of works on the Air-conditioning Project are not made out and thus do not individually or collectively form a valid reason for dismissal.

[235] I have found that Mr Lewis improperly altered a tenderer’s quote on the Air-conditioning Project and that this falsification was serious misconduct and a valid reason for dismissal in its own right. I have also found that the act of including the altered quote in the CER and VQS for that project was negligent.

[236] I have found that Mr Lewis’s failed to disclose conflicts and potential conflicts of interest and that this was a serious failure of duty. Having regard to his position and seniority, it too was a valid reason for dismissal in its own right.

[237] I have found that Mr Lewis’s conduct in providing copies of competitor quotes or details of prices quoted by competitors to his preferred suppliers was a failure of duty and, having regard to his indifference to the consequences of such conduct, also a valid reason for dismissal.

[238] I have found that Mr Lewis failed in meeting required standards of performance by virtue of failing to conduct due diligence to a minimum acceptable level in recommending Waymill as a preferred or recommended supplier. I have concluded that whilst such failure was a less serious breach warranting sanction but not dismissal it, collectively with other conduct, formed a valid reason for dismissal.

[239] These were multiple failures, all significant but some more serious than others, which directly arose from Mr Lewis’s responsibilities as Chief Engineer and head of department. They directly breached his duty of fidelity and duty to exercise due care and diligence. Each directly eroded the necessary trust and confidence that underpinned his role in the management and oversight of the procurement process at the Stamford.

[240] The multiple findings of serious misconduct and this conclusion weigh strongly against a finding of unfair dismissal.

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

[241] Mr Lewis was notified of the reason for dismissal at the conclusion of the meeting with Mr Donald on 14 June 2019. This was confirmed in writing by Mr Donald when he handed the letter of termination to Mr Lewis. That letter expressly advised Mr Lewis that Stamford considered that he had “materially breached the terms of your Agreement” and then went on to set out a series of alleged breaches of duty which the employer considered sustained.

[242] In these circumstances, Mr Lewis was notified of the reason for dismissal.

[243] This is a conclusion that weighs marginally against a finding of unfair dismissal.

Opportunity to respond (section 387(c))

[244] The evidence before me is that Mr Lewis was provided an opportunity to respond to some of the allegations against him, but not all.

[245] The following allegations were put to Mr Lewis by letter 3 June 2019:

- Allegation of failure of due diligence in not auditing whether 100 air-conditioning units were required to be replaced: put to Mr Lewis by letter 3 June 2019; and
- Allegation of having falsified the Johnson Controls quote: put to Mr Lewis by letter 3 June 2019 and at the 4 and 14 June 2019 meetings.

[246] Mr Lewis responded to these allegations in writing (by letter prior to the 4 June 2019 meeting) and then again (by way of recording his disagreement) by letter after receiving Stamford’s letter of outcome dated 5 June 2019.

[247] Mr Lewis written response to the allegations was lengthy and considered.

[248] However, Mr Lewis was not, prior to dismissal provided an opportunity to respond to the other allegations, in part (but not entirely) because the investigation into his conduct was a continuing one and some of the allegations advanced by Stamford at the hearing before me came to its knowledge only after dismissal and during the subsequent investigations (by company officers and then by EY).¹⁰⁷

[249] Whilst Stamford cannot be criticised for not putting to Mr Lewis allegations of misconduct of which it was then unaware, it made its decision to dismiss with the knowledge of certain matters which it did not put to Mr Lewis, despite having formed a belief that Mr Lewis committed serious misconduct pertaining to such matters.

[250] In particular, the termination letter (prepared on 13 June 2019 but dated 14 June 2019) included a number of new allegations:

- That Mr Lewis had received secret commissions from Mr Weeks;
- That Mr Lewis had facilitated an inflated progress payment to Mr Weeks in disregard of the payment schedule of the works contract;

- That Mr Lewis failed to disclose that Mr Weeks was a ‘one man outfit’; and
- That Mr Lewis had a personal conflict of interest with Mr Weeks that he had failed to disclose to Stamford.

[251] These were allegations which Stamford had only just in the preceding days become aware. It was continuing its investigations into the matters. At that stage (14 June 2019) Stamford had not secured a sworn statement from Mr Weeks.

[252] Whilst I make allowance for the fact that the investigation involved a moving matrix of issues as the company delved deeper into what it considered irregular procurement practices by its Chief Engineer, this only partially explains Stamford’s failure to put these allegations to Mr Lewis. The reality is that notwithstanding this moving feast, Stamford chose to use these further four allegations as the trigger for its decision to terminate without having put those allegations to Mr Lewis.

[253] In so doing, Stamford denied Mr Lewis procedural fairness concerning those particular allegations.

[254] However, the termination was not based solely on those allegations. Stamford’s termination letter repeated the allegations it had earlier (the preceding week) put to Mr Lewis and to which he had responded. It found those sustained on 5 June and had informed Mr Lewis.

[255] That fact however raises a related anomaly in Stamford’s decision-making process. Stamford formed a view on 5 June 2019 that the initial allegations put to Mr Lewis were sustained but warranted a first and final warning and the permanent removal of procurement duties. Nine days later it handed Mr Lewis a termination letter with additional new allegations (which it considered sustained) but concerning which it had not heard his version. The inference is, and I find, that it was the new allegations that were the tipping point for the decision to dismiss. The earlier allegations, whilst relevant, were not the sole grounds for the employer’s loss of trust and confidence in its Chief Engineer. Were this the case, it would have terminated on 5 June 2019.

[256] The partial denial of procedural fairness to Mr Lewis is a factor that somewhat weighs in favour of a finding of unfair dismissal.

Opportunity for support person (section 387(d))

[257] Mr Lewis alleges that he was unreasonably denied a support person in the course of the disciplinary process.

[258] Three meetings were held between Mr Lewis and Stamford: the allegation meeting (4 June), the outcome meeting (5 June) and the dismissal meeting (14 June).

[259] It is not in dispute that prior to the allegation meeting and the outcome meeting Stamford formally (in writing) “encouraged” Mr Lewis to “bring a support person or witness to the meeting”, with the role of the support person being outlined in those notifications.

[260] Mr Lewis chose to not attend the outcomes meeting on 5 June or the dismissal meeting with a support person.

[261] At neither of those meetings was he refused, reasonably or unreasonably, a support person.

[262] In dispute however is the allegations meeting on 4 June 2019.

[263] The meeting had been scheduled for 4.00pm. Mr Lewis says that he informed Mr Knight earlier that day that he intended to bring the former acting General Manager Mr Nicholls as a support person. Mr Lewis thought that Mr Nicholls could explain certain matters about the background to the air-conditioning contract. Mr Knight did not consider that to be the particular role of a support person but didn't demur. During the day, Mr Nicholls advised Mr Lewis that he would do so but could not attend until after 5.00pm.

[264] The versions of events between Mr Knight and Mr Lewis as to what then transpired differs. I make the following findings, preferring generally the evidence of Mr Knight.

[265] At the appointed time of the meeting (4.00pm) Mr Lewis told Mr Knight that Mr Nicholls was not able to attend until after 5.00pm. Mr Lewis asked Mr Knight if the meeting could be delayed by an hour. Mr Knight expressed the opinion that he thought it better for the meeting to proceed and that if there was follow up on issues that Mr Nicholls could assist then he (Mr Knight) would call Mr Nicholls. Mr Lewis was somewhat reluctant to proceed but, already stressed by the allegations letter, formed the view that he too wanted to get it over and done with.¹⁰⁸ I find that Mr Lewis agreed, albeit with some reluctance, to proceed at 4.00pm on the basis that it was best for the matter to be dealt with and that his support person Mr Nicholls would be contacted after the meeting by Mr Knight if required.

[266] Having made this finding, it does not follow that Stamford unreasonably refused a support person at the allegations meeting on 4 June 2019. Although Mr Lewis was under the pressure of the moment, he formed the view that he wished to proceed. Not having his support person present was his second best option, but he did not force Stamford to the point of proceeding in the absence of his support person and in the face of his objection.

[267] Whilst I consider that it was unreasonable for Stamford not to agree to defer the meeting by an hour to allow Mr Nicholls to attend, Mr Lewis agreed to proceed albeit reluctantly at the appointed time.

[268] I conclude that Stamford did not, in a strict sense, unreasonably refuse Mr Lewis a support person.

[269] However I nonetheless take into account the events that did occur, that is, that Mr Lewis was put in a position of responding to the allegations in his own right, that the absence of Mr Nicholls as his support person was not his preferred course and that Mr Knight did not consider it necessary to follow up with Mr Nicholls after the meeting. Had Mr Knight done so, the information Mr Nicholls may have provided (if it were the same as his evidence to the Commission) would have been of some but limited value. Stamford would have been informed that Mr Lewis had inherited an historic problem with air-conditioning reliability and that this was relevant to his recommendation that 100 units be replaced.

[270] The failure to delay the 4 June 2019 meeting by an hour to enable Mr Nicholls to attend is, whilst not an unreasonable refusal to deny a support person, a consideration that weighs marginally in favour of a finding of unfair dismissal.

Warnings concerning performance (section 387(e))

[271] This matter primarily concerns allegations of misconduct. As such, prior warnings about performance are not directly relevant. An employee, particularly one of the seniority of Mr Lewis, does not require warnings to act in a manner consistent with their duty of fidelity.

[272] Certain performance issues also arise in this matter. Those performance matters concerned due diligence in providing adequate information about recommended tenderers, about care in attaching quotes to a CER and attention to the nature of progress payments.

[273] Mr Lewis had not received warnings or counselling on these or any matters concerning his procurement responsibilities. He knew of and had access to Stamford's relevant policies but did not use them as a resource. The only warning he received was the one on 5 June 2019, which was part of the sequence of events leading to his dismissal.

[274] Whilst Mr Lewis's conduct or performance had not previously come to the attention of Stamford in the sense of causing concern or requiring disciplinary action, the nature of his position entrusted him with discretion to exercise judgment and to do so with due diligence. Mr Lewis held himself out as capable of performing the job and had done similar work with his preceding employer.

[275] This is a neutral consideration in this matter.

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

[276] Stamford is a company within the broader Stamford Group which is a large pan-national business in the hospitality sector, based in Singapore.

[277] It has Australian based human resource support and, as part of the Stamford Land Corporation, access to legal advice and related services. Its size and internal capability provide no basis for the employer to provide other than substantive and procedural fairness to its employees.

[278] This is a neutral consideration in this matter

Other matters (section 387(h))

Harshness: Conduct of other employees

[279] Mr Lewis submits that his dismissal was harsh because, with respect to the Air-conditioning Project, he was "doing as instructed" by other managers in recommending the scope of works (100 units).

[280] There is in part a factual basis for this submission. I have found that the recommendation made by Mr Lewis was not without some operational and strategic basis. I

have concluded that, given the history of water flow and air-conditioning issues he inherited, Mr Lewis did not clearly fail in his duty in this regard.

[281] Although Stamford formed a different view, I am not reviewing the fairness of Stamford's decision. I am considering afresh whether the alleged failures occurred and whether the dismissal was, in objective terms, harsh, unjust or unreasonable. Not having found a valid reason to dismiss on this ground, it does not form part of my assessment of whether Mr Lewis's dismissal was unfair. However, nor does it displace the valid reasons which I have found.

[282] Mr Lewis also says that as two other managers signed the CER on the Air-conditioning Project (Mr Knight and Mr Harrington) then all three persons should have been investigated, not him alone.

[283] I do not accept this submission. Whilst each of the signatories to a CER/VQS owed Stamford a duty of care, the seriousness of Mr Lewis's misconduct is not diminished by a duty held by others. I have found that Mr Lewis was entrusted with particular responsibility over procurement, including sourcing quotes and making recommendations to the other signatories (and to more senior management) on a preferred supplier. Whilst the recommendations Mr Lewis made may not have been a surprise to Mr Knight, and whilst I accept that Mr Lewis had discussions with Mr Knight and other managers during the procurement process, Mr Knight was General Manager. As such, Mr Knight was entitled to rely on the conduct and recommendations of his head of department with primary responsibility for the day-to-day conduct of these matters. That was Mr Lewis.

[284] In a related submission Mr Lewis says that Mr Knight, having signed the CER along with Mr Lewis (and Mr Harrington) should not have been the manager who put to Mr Lewis allegations of mismanagement concerning the Air-conditioning Project. He says that Mr Knight was conflicted and covering his own back.

[285] This submission goes to procedural fairness. Mr Knight was the most senior Australian based employee at the Stamford Adelaide. While it may have been open to Stamford to have the allegations letter put by a senior officer from a related business (such as Stamford Land Corporation), at the time of putting the allegations Stamford were unaware that Mr Lewis would, as part of his defence, claim that Mr Knight was a party to the alleged failures of duty. In any event, the decision to dismiss and the dismissal interview was not made by Mr Knight. The events of the final days concerned Mr Donald and officers in Singapore, not Mr Knight.

[286] I do not conclude that Mr Lewis's dismissal was harsh by virtue of the allegations being first put to him by Mr Knight.

[287] Mr Lewis also says that, with respect to the progress payment to Mr Weeks, the conduct of Ms Collins caused the inflated payment, that she too had private work performed by Mr Weeks (a matter also asserted by Mr Weeks but disputed by Ms Collins) and that she should also have been sacked.

[288] There is, in part, a factual basis for this submission but the conclusion urged is not open to me. I have found that Ms Collins authorised the progress payment to Mr Weeks. At the very least, Mr Weeks attended her private property at her request to look at a job.¹⁰⁹

Authorising the progress payment before Mr Week's invoice was countersigned by the relevant head of department (Mr Lewis) was a breach of procedure by Ms Collins. However, it does not follow that the sanction applied to Mr Lewis ought to have applied to Ms Collins. Aside from the issue of the progress payment, there is nothing in the evidence that suggests failures of duty of the type committed by Mr Lewis.

[289] Whilst I have not found a material failure of duty by Mr Lewis with respect to his role in the progress payment, I have found other conduct to constitute a valid reasons in its own right or collectively. I have not received evidence as to the employment consequences (if any) for Ms Collins, other than that she subsequently transferred interstate and later left Stamford's employ.¹¹⁰ In these circumstances, the dismissal is not harsh having regard to the conduct of or employment consequences for Ms Collins.

[290] More generally, this claim of harshness relied upon by Mr Lewis fails to compare like with like. The allegations against Mr Lewis were multiple and (with the exception of Ms Collins) no other comparable conduct by other managers was alleged or emerges on the evidence before me. In those circumstances, given that no comparable factual matrix of conduct exists it is not possible to conclude that the employer inconsistently applied its policies or disciplinary sanction.

[291] Whilst there are circumstances where inconsistent conduct by an employer (such as the inconsistent application of policy or disciplinary sanction) may be a ground on which to find that a dismissal is harsh, the facts of this matter do not lend themselves to such a conclusion. In the absence of Stamford having treated Mr Lewis in an inconsistent manner, his submission seeks to spread the net of blame in order to minimise his failures of duty. Such an approach may muddy the waters but cannot be countenanced. Where an employee commits acts of misconduct or failures of duty that constitute valid reasons for dismissal then it is not unreasonable for that employee to be held to account for their conduct and an appropriate sanction applied based on their employment rights, obligations and circumstances.

[292] The dismissal was not harsh on this ground.

Harshness: Private arrangements between friends

[293] Mr Lewis claims that his personal dealings with Mr Weeks were private matters borne out of his concern for Mr Weeks and that dismissal was harsh on this ground.

[294] I do not agree.

[295] Private though they may have been, this friendship was nurtured in the workplace. The private agreements between them were discussed between the two whilst Mr Lewis was at work. Mr Lewis was, at that very time, recommending Mr Weeks for sizeable work contracts.

[296] It is well-established that 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.¹¹¹ In this matter, those direct connections existed between Mr Lewis and Mr Weeks.

[297] Mr Lewis claims that he advanced the personal loan to Mr Weeks out of concern for a friend.

[298] In some instances, where an employee acts out of concern for a ‘friend’ and derives no personal gain from their actions these are not matters which diminish the validity of the reasons for dismissal but may be matters relevant to mitigation.¹¹² For self-evident reasons though, there are necessary limits to a claim of friendship as a ground of mitigation. Doing the wrong thing even for the right reason does not set aside a person’s obligation to do the right thing.¹¹³

[299] In this matter, I have found that Mr Lewis derived benefits from the private arrangements. He took possession of a motor vehicle which he did not pay for. He had his personal loan repaid, thus having funds to go on holidays. He had an air-conditioner installed on his private property without paying for the labour.

[300] The conflicts of interest and potential conflicts of interest not only constituted a valid reason for dismissal, but the personal and contextual matters surrounding the existence of those conflicts did not render the dismissal harsh.

Conclusion

[301] This matter concerns summary dismissal for serious misconduct.

[302] As noted, my role is not to review whether the employer had a reasonable basis for its decision but to consider whether, on the evidence before me, the dismissal of Mr Lewis was harsh, unjust or unreasonable.

[303] The onus of proof in establishing that a dismissal was harsh, unjust or unreasonable rests on an applicant, in this case Mr Lewis.

[304] However, in cases such as this, the employer carries an evidentiary burden of proof to establish that the misconduct which they allege did in fact occur. I have made findings of fact having regard to the evidentiary onus borne by the employer. Those findings of fact have been based on the requisite standard of proof.

[305] The ambit of the phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd*¹¹⁴ as follows:

“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[306] 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*.¹¹⁵

“**[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’.”

[307] I have concluded that there were valid reasons for dismissal based on serious breaches of duty and in particular Mr Lewis’s alteration of a tenderer’s quote, failure to disclose conflicts and potential conflicts of interest and his conduct in providing copies of competitor quotes or details of prices quoted by competitors to his preferred suppliers.

[308] I have concluded that this conduct individually, and collectively with other breaches, established a well-founded loss by the employer of trust and confidence in Mr Lewis working in a manner consistent with his duty of fidelity and with the requisite degree of care and diligence having regard to the position and responsibilities with which he was entrusted.

[309] In weighing these factors, I take into account the observations of a Full Bench of the Commission in *Parmalat Food Products Pty Ltd v Wililo*:¹¹⁶

“The existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair. The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open.”

[310] In this passage both the importance of a valid reason and procedural fairness are emphasised.

[311] Mr Lewis was denied, in part, procedural fairness. Reasonable criticism can be made of Stamford that the misconduct which triggered its decision to dismiss was not put to Mr Lewis for response. In this sense the dismissal was pre-meditated as the decision had been made on 13 June 2019 and the meeting of 14 June 2019 was somewhat of a formality. Reasonable criticism can also be levelled at the employer for not having agreed to delay the earlier 4 June 2019 allegations meeting by one hour to allow a support person to be present.

[312] However, these omissions, whilst material, did not constitute an overall denial of procedural fairness. Mr Lewis had earlier allegations put to him (including the falsification allegation which I have found sustained) and was placed under suspension. He reluctantly

agreed to proceed without his support person and was on notice that the investigations into his conduct were ongoing.

[313] I weigh these procedural failures against the other factors I take into account, including the multiple and serious failures of duty by Mr Lewis. Whilst some of the most serious of the allegations made against Mr Lewis have not been sustained (kickbacks and theft), the falsification allegation has been sustained and others are serious in the context of an employer/employee relationship where Mr Lewis was the head of the engineering department and entrusted significant procurement responsibilities.

[314] I also take into account the approach set out by a full bench of this Commission in *Federation Training v Sheehan*:¹¹⁷

“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.”

[315] In all the circumstances, I do not conclude that the procedural failings by Stamford were of such a fundamental nature so as to render the dismissal harsh, unjust or unreasonable having regard to the serious misconduct and performance failures.

[316] In these circumstances the dismissal was neither unjust nor unreasonable. There was a sound, defensible and well-founded reason. The sanction was not disproportionate to the misconduct.

[317] I have considered whether the dismissal was harsh in the context of alleged involvement or treatment of other employees, and whether it was harsh for reasons of the conflicts of interest that arose being private matters and between friends. I have concluded that dismissal was not harsh on either ground.

[318] As the dismissal was not unfair, I am not required to consider issues of remedy.

[319] For these reasons and in conjunction with the publication of this decision I issue an Order that the application be dismissed.



DEPUTY PRESIDENT

Appearances:

A. Both, *with permission*, and S. Lewis, *for the Applicant*

N. Healy and D. Payard, *with permission, for the Respondent*

Hearing details:

2019.

Adelaide.

28, 29 and 30 October and 19 November.

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¹ On 30 October 2019, by consent, I granted permission to Mr Lewis to amend his application to substitute SGA (1994) Pty Ltd as the named Respondent for the formerly named Stamford Grand Adelaide Pty Ltd

² Email 'Chambers – Anderson DP' 25 September 2019 10.13am

³ Applicant's Submission on Remedy (by email) 26 November 2019; Respondent's Submission on Remedy 3 December 2019

⁴ Mr Nicholls audio transcript 30 October 2019 10.33am – 10.35am

⁵ PN 798

⁶ PN 2361

⁷ Mr Lewis PN 321

⁸ Mr Lewis PN 275

⁹ A tender process of at least three quotes was required for non-urgent capital works; operational expenditure for urgent or maintenance works under \$5,000 did not require a tender process and was contracted the at the discretion of the Chief Engineer: evidence of Paul Harrington audio transcript 30 October 2019 3.38pm

¹⁰ Mr Lewis PN 323 and PN 962; R4 paragraph 10; evidence of Paul Harrington audio transcript 30 October 2019 3.24pm; Mr Knight PN 1938

¹¹ Mr Harrington audio transcript 30 October 2019 3.27pm

¹² Mr Lewis PN 300 - 305

¹³ R1 Attachment TK1

¹⁴ CER 16.2.2018 at R1 Attachment TK1

¹⁵ R1 TK1

¹⁶ R2

¹⁷ R9 Attachment LH2

¹⁸ R9 Attachment LH3

¹⁹ A13

²⁰ A15

²¹ A2

²² R11 paragraph 32

²³ A16

²⁴ R11 paragraph 38 DD3

²⁵ R11 paragraph 39 DD4

²⁶ R11 paragraph 41 DD5

²⁷ A12

²⁸ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]

²⁹ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373.

³⁰ *Ibid*

³¹ except where the Small Business Fair Dismissal Code applies

³² *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213 [24]

³³ *Edwards v Guidice* (1999) 94 FCR 561 [6]-[7]

³⁴ *Budd v Dampier Salt Ltd* (2007) 166 IR 407 at [14] - [16]

³⁵ *Briginshaw v Briginshaw* (1938) 60 CLR 336

³⁶ *Ibid* per Dixon J

³⁷ For example, the telephone conversation between Mr Harrington and Mr Ainstrope on 14 June 2019: R9 Statement of Paul Harrington paragraphs 47 – 49 and audio transcript 30 October 2019 3.36pm and 3.47pm

³⁸ *Shepherd v Felt Textiles of Australia Ltd* [1931] HCA 21; *Tate v 4WD & Outdoor Supacentre Pty Ltd T/A 4WD Supacentre* [2015] FWC 626 at 86; *Lane v Arrowcrest Group Pty Ltd* (1990) 27 FCR 427

³⁹ Mr Lewis PN 265

⁴⁰ Mr Weeks PN 2214 – 2218; PN 2232 - 2233

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- ⁴¹ Mr Weeks PN 2617 – 2623; PN 2634 - 2639
- ⁴² A17; A18; R6; R7
- ⁴³ A21
- ⁴⁴ Mr Lewis PN 807 and 823
- ⁴⁵ Mr Lewis PN 216
- ⁴⁶ Mr Weeks PN 2285
- ⁴⁷ A17
- ⁴⁸ Mr Lewis PN 1558
- ⁴⁹ Mr Lewis PN 172
- ⁵⁰ R6
- ⁵¹ Mr Weeks PN 2607
- ⁵² Mr Weeks PN 2625 - 2633
- ⁵³ R5 LW3
- ⁵⁴ Quote as submitted for Temerzone units R11 DD5 (ii); Quote as attached to CER and VQS R11 DD5 (iv)
- ⁵⁵ R11 DD5 (iii); Mr Lewis PN 1332
- ⁵⁶ Mr Lewis PN 1228, PN 1233, PN 1239 and PN 1275 - 1276
- ⁵⁷ Mr Lewis PN 1323 - 1324
- ⁵⁸ Mr Lewis PN 1307; PN 1239
- ⁵⁹ A3 Letter Simon Lewis to Gerard final paragraph; Mr Lewis PN 1240 - 1241
- ⁶⁰ A3 Letter Simon Lewis to Gerard final paragraph
- ⁶¹ Mr Nicholls audio transcript 30 October 2019 10.23am
- ⁶² Mr Demetriou audio transcript 29 October 2019 12.26pm to 12.32pm
- ⁶³ Mr Lewis PN 1013
- ⁶⁴ Mr Lewis PN 1480
- ⁶⁵ Ms Collins’s evidence was that she approached Mr Lewis about the possibility of Mr Weeks doing private work on her property, and that at her instigation and with the knowledge of Mr Lewis, Mr Weeks attended and inspected the job on her private residence, but did not ultimately do the work: Ms Collins PN 1697, 1825 and 1895
- ⁶⁶ Mr Lewis PN 337
- ⁶⁷ Mr Lewis PN 138
- ⁶⁸ Mr Lewis PN 216
- ⁶⁹ Mr Lewis PN 1534
- ⁷⁰ Mr Lewis PN 1588
- ⁷¹ R5 LW3
- ⁷² Mr Lewis PN 1534 - 1543
- ⁷³ Mr Lewis PN 401 and PN 836 - 837
- ⁷⁴ Mr Lewis PN 1477
- ⁷⁵ Mr Nicholls audio transcript 30 October 2019 10.09am
- ⁷⁶ A21 text messages 30 April 2018
- ⁷⁷ Mr Lewis PN 1021
- ⁷⁸ Mr Nicholls audio transcript 30 October 2019 10.08am and 10.18am
- ⁷⁹ R11 paragraph 42(a) DD6 Purchasing Policy Clause VI A 4(a) to (f)
- ⁸⁰ R11 paragraph 42(b) DD7 Relationships at Work Policy Clause I paragraph 2
- ⁸¹ R11 paragraph 42(b) DD7 Relationships at Work Policy Clause V paragraph 3
- ⁸² R11 paragraph 42(b) DD7 Relationships at Work Policy Clause III
- ⁸³ R11 paragraph 42(b) DD7 Relationships at Work Policy Clause V paragraph 4
- ⁸⁴ Mr Lewis failed to disclose to the General Manager that succeeded Mr Nicholls (Mr Knight), even informally, his personal arrangements with Mr Weeks: Mr Knight PN 1994
- ⁸⁵ R11 paragraph 42(b) DD7 Relationships at Work Policy Clause V paragraph 10
- ⁸⁶ R11 paragraph 42(a) DD6 Purchasing Policy Clause VI A 4(c)
- ⁸⁷ Mr Lewis PN 1628
- ⁸⁸ Mr Demetriou audio transcript 29 October 2019 12.26pm to 12.36pm
- ⁸⁹ Mr Knight PN 2017
- ⁹⁰ R11 paragraph 42(a) DD6 Purchasing Policy Clause I
- ⁹¹ Mr Lewis PN 222 and PN 986
- ⁹² Mr Lewis PN 1620 and PN 1640
- ⁹³ Mr Lewis PN 226 and 1628; Mr Knight PN 1989
- ⁹⁴ Mr Knight PN 1979 – 1982; PN 2058 - 2059

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- ⁹⁵ Mr Diaz de Rivera audio transcript 30 October 2019 2:40pm, 2.55pm and 2.58pm
- ⁹⁶ Waymill trading as Reliable Air Conditioning for the Air-conditioning Project (CER 18.10.2018) and Waymill for the Cooling Towers Project (CER 26.02.2019)
- ⁹⁷ R9 paragraph 10; audio transcript 30 October 2019 3.25pm
- ⁹⁸ Mr Lewis PN 1196
- ⁹⁹ Mr Lewis PN 160; Mr Knight PN 2051
- ¹⁰⁰ Mr Lewis PN 76
- ¹⁰¹ Mr Knight PN 1954 – 1957; PN 1962 - 1968
- ¹⁰² R11DD5 Invoice Weeks Family Trust 11.04.2018 (page 176 of 318)
- ¹⁰³ PN 1765 - 1769
- ¹⁰⁴ CER 16.2.2018 at Exhibit TK1, page 1
- ¹⁰⁵ R11 DD5 Invoice Weeks Family Trust 11.04.2018 (page 176 of 318)
- ¹⁰⁶ Mr Nicholls audio transcript 30 October 2019 10.28 – 10.30am
- ¹⁰⁷ Mr Knight PN 2040
- ¹⁰⁸ Mr Lewis PN 1397 – 1398; PN 1401 – 1405; Mr Knight PN 2001
- ¹⁰⁹ Ms Collins PN 1697, 1825 and 1895
- ¹¹⁰ Mrs Collins PN 1856 - 1860
- ¹¹¹ *Rose v Telstra Corporation Limited* [1998] AIRC 1592; *McManus v Scott-Charlton* [1996] FCA 1820 at 56
- ¹¹² *Kore v Chief Executive Department of the Premier and Cabinet* [2017] SAIR 3 at 83
- ¹¹³ *Andrawos v My Budget Pty Ltd* [2018] FWC 4288 at 241 and 248
- ¹¹⁴ [1995] HCA 24; (1995) 185 CLR 410 at 465 per McHugh and Gummow JJ
- ¹¹⁵ [2013] FWCFB 6191
- ¹¹⁶ [2011] FWAFB 7498 at 20
- ¹¹⁷ [2018] FWCFB 1679 at 55