DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Andrew Hafsteins
v
Correct Installs Pty Ltd
(U2019/10812)

DEPUTY PRESIDENT ASBURY BRISBANE, 25 MAY 2020

Application for an unfair dismissal remedy.

[1] Mr Andrew Hafsteins (the Applicant) applies under s.394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy in respect of his dismissal by Correct Installs Pty Ltd (the Respondent). The Respondent operates a business from an establishment in Murrarie, Queensland, which involves installing racking and storage systems for customers at their place of business. On 6 March 2017, the Applicant commenced casual employment with the Respondent as a skilled labourer. The Applicant was subsequently employed by the Respondent as a Second in Charge from 1 March 2018 to his dismissal on 5 September 2019.

[2] The Applicant was dismissed for what the Respondent described as repeated misconduct and for breaches of its workplace health and safety procedures and the Applicant's contract of employment. The Respondent also asserts that the Applicant was warned on multiple occasions, both verbally and in writing, about previous safety incidents and conduct issues. The Respondent initially objected to the application on the ground that it asserted the dismissal was consistent with the small business fair dismissal code.

[3] The Applicant contends that his dismissal was unfair on a number of grounds. Firstly, the Applicant asserts that the reason for his dismissal was so that the Respondent could avoid redundancy payments it would otherwise have been required to pay due to a downturn in its business. Secondly, the Applicant takes issue with whether he can properly be held responsible for a safety incident that resulted in the termination of his employment. Thirdly, the Applicant asserts that he was a safe and competent worker as he had not been involved in any breaches of company policy after being given a warning on 25 July 2019.

[4] The Respondent subsequently withdrew its objection on this ground. Section 396 of the Act requires that four specified matters must be decided before the merits of the application may be considered. There was no contest between the parties about any of those matters. I find that:

(a) the application was made within the period required by s.394(2);
(b) the Applicant was a person protected from unfair dismissal;

(c) the Respondent was not a "small business employer" as defined in s.23 of the FW Act; and
(d) the dismissal was not a case of genuine redundancy.

[5] As provided in s.387 of the Act, I decided to conduct a hearing on the basis that there were disputed issues of fact and I considered this to be the most appropriate means to resolve them. Directions were issued for the hearing, requiring the Applicant to file his material by 10 January 2020, the Respondent by 30 January 2020 and the Applicant's material in reply by 6 February 2020. The Applicant did not file material in reply by the date required in the Directions.

[6] The Applicant sought to file additional material at the hearing. I allowed the Applicant to tender that material notwithstanding that it was material that should have been filed with the Applicant's first tranche of material and was not properly reply material.

[7] At the hearing held 26 February 2020, the Applicant gave evidence on his own behalf. Evidence for the Respondent was given by Ms Veronica Althaus, HR Assistant, Mr Mark Althaus, Director of the Respondent and Mr Jason Walsh, Warehouse Manager & OHS Safety Advisor.

[8] Directions were issued in the hearing, requiring the Applicant to file final submissions by 11 March 2020, the Respondent to file final submissions by 18 March 2020 and listing the matter for a further hearing on 6 April 2020.

[9] I have considered all the evidence and submissions and summarise below that which is relevant to the issues for determination. Those issues are whether the Applicant was unfairly dismissed and if so whether he should have a remedy for his unfair dismissal.

EVIDENCE

[10] As previously noted, the Applicant commenced employment in a casual position on 6 March 2017 as a casual labourer and was appointed to the role of Second in Charge – a full time permanent position – on 1 March 2018. The Applicant was employed in this role until his dismissal. The employment contract in relation to the Second in Charge position, signed by the Applicant on 2 March 2018, was tendered by the Respondent. The contract contained a clause outlining the Applicant's duties, which included:[1]

- Comply with reasonable directions given to you by the Employer;
- At all times act faithfully, honestly and diligently;
- Ensure you are performing solely work related activities in work time;
- Exhibit a professional and courteous attitude when dealing with the Employer, its customers, employees, suppliers and other members of the public; and
- Act in the Employer's best interests at all time.

[11] The Applicant stated that although his position with the Respondent was Second in Charge, he was often required to perform a team leader role that involved more responsibilities, more duties and longer hours, however he did not receive higher pay for performing these higher duties.[2]

[12] The Respondent submitted that toolbox meetings were regularly conducted every three months to cover off any issues, such as work-related issues, safety-related issues and possible improvement by employees. If a serious incident occurred, a toolbox meeting is held immediately after with employees.[3] In his oral evidence, Mr Walsh said that there is a *pro forma* site safety audit which is required to be done by leading hands for every project. In early June 2019, the Respondent became aware of allegations about conduct and workplace health and safety breaches by the Applicant. Mr Walsh's evidence was that on 6 June 2019, he held a meeting with the Applicant to discuss the following allegations:

> (a) the Applicant damaged beams at a worksite;
> (b) the Applicant damaged a car while pulling a ute out of the Respondent's warehouse;
> (c) the Applicant damaged a shed while driving a ute;
> (d) the Applicant failed to fill out the log book to record usage of the company truck;
> (e) the Applicant failed to conduct plant checks in accordance with company policy;
> (f) the Applicant failed to sign a workplace statement acknowledging safety protocols at the workplace;
> (g) the Applicant drove an electric scissor lift out of the warehouse and the cord was still plugged in, posing a serious OHS risk to other staff. The Applicant failed to notify anyone of this incident and left the damaged electrical cord where another employee could use it; and
> (h) the Applicant failed to properly hitch a trailer while driving a vehicle on a public road, posing a serious risk to the public.

[13] Notes prepared by Mr Walsh for reference at the meeting were tendered by the Respondent. The notes indicate that Mr Walsh told the Applicant that he was not listening to simple instructions and was not reading instructions in relation to matters such as doing a "walk around" a trailer before driving a vehicle towing it. The notes also indicated that Mr Walsh asked the Applicant whether there were issues that he was not aware of and told the Applicant that he had "more issues and any other staff combined x 5". Mr Walsh said that the Applicant admitted to the allegations and was given a verbal warning and a copy of Mr Walsh's notes. The Applicant was told to review those notes every morning before starting work and to think about what he could do to improve his safety performance.

[14] In his evidence to the Commission the Applicant said in relation to these matters, that many of them had occurred months earlier and he had not been given sufficient follow-up training at the relevant time. In relation to separate incidents where the Applicant reversed a utility into a customer's shed and a customer's vehicle, the Applicant said that the utility required a special driver's licence when it was loaded above a certain capacity. The Applicant later said that while the vehicle may be able to be driven on a manual licence, it is not a car and is a larger, specialised vehicle. In response to a question from me, the Applicant stated that the vehicle was not loaded to this extent when these incidents occurred. The Applicant said:

> "…I did make those mistakes, but, you know, the Company never actually did anything about that in terms of , 'Hey we think you might need some more training' or 'We don't think you should be doing this'. There's a level of, not responsibility, but there's a level of, you know, all these situations have come to light and all they have done is issue warnings. …"[4]

[15] In response to the Applicant's allegations that he was not given sufficient follow-up training in relation to a number of these issues, Mr Walsh said that after the incident in which the Applicant failed to properly hitch the trailer, he and Mr Luke Althaus, the General Manager, went out with the Applicant and spent twenty minutes showing him how to check everything that could be a possible danger and advised him that he should do a complete "walk around" the trailer and truck before driving away. Mr Walsh said either the next day, or a few days later, the Applicant drove an electric scissor lift out of the warehouse while it

was still plugged in to its power supply.[5] The Applicant left the cord on the ground which was a danger to other employees. Mr Walsh also said that the truck referred to by the Applicant was only ever loaded to 40% of its capacity and no special licence was needed to operate it.

[16] In response to a question from me about why some of the matters discussed at the meeting on 6 June had not been raised with the Applicant at the time they occurred, Mr Walsh said that most of the instances were recent and that some occurred at Sydney sites and were not raised until people were back at the Brisbane site.

[17] Mr Walsh also said that on 10 July 2019 he realised that a Site Safety Audit had not been completed on a site on which the Applicant was the Leading Hand. This is a compulsory safety check and Mr Walsh stated that he raised it with the Applicant on 11 July 2019. Also on 11 July 2019, the Applicant returned the Company truck without completing the Driver Log Book and left a spirit level and tools in the vehicle in a manner that would cause a safety issue for the next driver. Mr Walsh stated that he spoke to the Applicant about these matters on 12 July 2019. On that day, the Applicant again returned a Company vehicle without filling in the Driver Log Book.

[18] The Applicant raised issues with Mr Walsh in cross-examination about alleged safety breaches involving another employee running power cords from a room through a doorway and using out of date tools. Mr Walsh said that he was not aware of these issues and the Applicant had not previously raised them. Mr Walsh also said that the Respondent has a checklist which the Applicant was required to complete before starting work which includes whether tools are out of date and require testing and tagging. Mr Walsh maintained that the Respondent has a strict policy that employees are not permitted to use tools that are outside the required date, and has an employee trained to test and tag tools. Mr Walsh said that he was not aware that the Applicant had informed anyone that his tools were out of date and there was no reason for the Applicant to have used such tools.

[19] The Applicant was permitted to tender an email dated 8 September 2019 sent to Ms Janis Love, Human Resources Officer, in which he made a complaint about Mr Walsh in relation to a load on a utility. The Applicant claimed that Mr Walsh tried to intimidate him after the Applicant "confronted" Mr Walsh about the length of the load and attempted to obtain Mr Walsh's view, as an Occupational Health and Safety Officer. The Applicant also claimed that during this interaction, Mr Walsh attempted to close the door in his face to get the Applicant to leave him alone, when the Applicant was making a simple request.

[20] Mr Walsh said in relation to this incident that he knew the length of the racking and the capacity of the vehicle and had documentation in relation to the transport. Mr Walsh said that he visually inspected the load through the window of his office and was happy with the load. Mr Walsh said that the Applicant was irate and aggressive, and he wanted the Applicant to leave his office and stop the verbal confrontation. Mr Walsh accepted that he walked towards the Applicant and closed the door of the office as the Applicant walked out but maintained that the Applicant was aggressive and that he asked the Applicant about ten times, to leave the office. Mr Walsh said that Ms Love spoke to him about the incident and that he nominated several witnesses who were also spoken to by Ms Love. Mr Walsh heard nothing further about the matter and believed it was resolved.

[21] Mr Walsh was also cross-examined about the verbal warning he gave the Applicant on 10 July in relation to not completing the vehicle log. In response to the proposition that another employee had driven the truck, Mr Walsh said that the Applicant had also driven it on the day in question and as leading hand, should have ensured that the other employee completed the log. In response to questions about the site safety audit on 10 July 2019, Mr Walsh said that he arrived on the site and asked the Applicant whether a contractor had signed a Safe Work Management System (SWMS) document and the Applicant could not answer the question. Mr Walsh said that the Applicant was aware, from toolbox training, that a SWMS in the form of a plant check, must be completed and signed every morning even if the same contractor employee was on the site the day before.

[22] On 25 June 2019, the Respondent issued a letter outlining six further allegations, and inviting the Applicant to attend a disciplinary meeting on the 26 June 2019 to discuss the allegations. The letter tendered by the Respondent is two-pages in length and sets out the allegations as follows:

> "i. It is alleged that you displayed inappropriate behaviour in the workplace. Specifically, between March 2019 and June 2019 you were operating a forklift without a valid Forklift Operator Licence. This is a breach of your employment contract in which you have failed to have and maintain the licence necessary to complete this task. Such conduct has the potential to impact the health and safety of a person, cause severe reputational damage to the Company and detrimentally impact the commercial relationship it has with its clients, as well as the trust and confidence in your employment relationship with the Company.
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> ii. It is alleged that on 17 June 2019 you engaged in unauthorised absence. Specifically, you failed to notify the Works Coordinator of your absence. This is in breach of Company policy to call a member of the office team if you are absent. Such conduct has the potential to adversely impact on the operational efficiency of the Company, as well as the trust and confidence in the employment relationship with the Company.
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> iii. It is alleged that on 19 June 2019 you came into work later than your rostered start time. Specifically, you were approximately 30 minutes late arriving on your work site. This is in breach of Clause 3.2 Lateness/Absenteeism in the Employee Handbook. Such conduct has the potential to adversely impact on the operational efficiency of the Company, as well as the trust and confidence in the employment relationship with the Company.
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> iv. It is alleged that on 14 June 2019 you displayed inappropriate behaviour in the workplace. Specifically, we received a complaint from a customer about the amount of time you spent using your phone whilst on a work site. This is in breach of Clause 8.4 Phones and other Devices in the Employee Handbook. Such conduct has the potential to adversely impact on the operational efficiency of the Company, cause reputational damage to the Company and detrimentally impact the commercial relationship it has with its clients, as well as the trust and confidence in your employment relationship with the Company.
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> v. It is alleged that on or around 14 June 2019, you acted inappropriately when liaising with a customer. Specifically, it is alleged that when discussing the job with the customer, you were speaking negatively about your colleague Samuel Hamlin and his performance on the job prior to you taking it over. This is in breach of Clause 9.1 Behaviour at Work in the Employee Handbook. Such conduct has the potential to adversely impact on the operational efficiency of the Company, cause reputational damage to the Company and detrimentally impact the commercial relationship it has with its clients, as well as the trust and confidence in your employment relationship with the Company.
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> vi. It is working alleged that you acted inappropriately when liasing with a customer' employee. Specifically, working on the most recent job at Caterpillar, you spoke to the customer's employer in a way that caused offence and resulted in him refusing to work with you causing commercial losses for the company. This is in breach of Clause 9.1 Behaviour at Work in the Employee Handbook. Such conduct has the potential to adversely impact on the operational efficiency of the Company, cause

> reputational damages to the Company and detrimentally impact the commercial relationship it has with its clients, as well as the trust and confidence in your employment relationship with the company."

[23] The letter also stated that the Applicant could bring a support person to the meeting should he choose to do so. On 12 July 2019, a letter was issued to the Applicant, setting out the Respondent's findings. Four of the six allegations were substantiated, with the Respondent withdrawing allegation i. on the basis that the Applicant was renewing his forklift license, and allegation iv. on the basis that he was on the phone for work-related purposes. Accordingly, the Respondent issued a formal written warning to the Applicant stating that his conduct was unacceptable and that any further misconduct may result in more serious disciplinary action, up to and including termination of the Applicant's employment.

[24] The Applicant disputed that Mr Mark Althaus was at the meeting on 26 June but did not otherwise dispute the matters set out in the warning letter.

[25] On 7 August 2019, the Respondent issued a further letter to the Applicant outlining four allegations. The Applicant was again invited to attend a meeting on 9 August 2019 for him to respond to the allegations and was invited to bring a support person. The letter set out the allegations as follows:

> "i. It is alleged that on 24 July 2019 you failed to attend your shift on time. Specifically, it is alleged that you did not arrive at work until after your nominated start time of 6.30am and when you did arrive, you were not ready to commence work until 7.34am. This is in breach of your Employment Contract and Clause 3.2 Lateness/Absenteeism in the Employee Handbook. Such conduct has the potential to adversely impact the operational efficiency of the company in service to our customer, as well as the trust and confidence in your employment relationship with the Company.
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> ii. It is alleged that on 24 July 2019 you did not perform your duties in a safe manner. Specifically, it is alleged that, while working in the scissor lift, you failed to maintain proper communication with other employees. Further, you acted in an aggressive manner when you failed to show due care and attention to both the company's and the client's equipment by slamming things down. This is in breach of your Contract of Employment, workplace health and safety obligations and Clause 9.1 Behaviour at Work in the Employee Handbook. Such conduct has the potential to cause serious injury or harm to others, cause severe reputational damage to the company and cause damage to both the Company's and the Customer's equipment.
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> iii. It is alleged that on 25 July 2019 you behaved in a disrespectful manner to the HR Manager. Specifically, it is alleged that during a call to discuss your pay query you hung up on the HR Manager before the call was completed. This is in breach of your Contract of Employment and Clause 9.1 Behaviour at Work in the Employee Handbook. Such conduct has the potential to damage the relationship between the Company and yourself and creates a hostile work environment.
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> iv. It is alleged that on 26 July 2019 you behaved in a disrespectful manner toward the company and did not perform your duties. Specifically, it is alleged that you told your Leading Hand on two occasions that you did not agree with the amount of time you were docked for being late to work on 24July and that you would be taking 10 minutes of time back from the company by not working. This is in breach of your Contract of Employment and the Employee Handbook. Such conduct has the potential to cause damage the employment relationship and create a disrespectful workplace."

[26] The Respondent tendered minutes from the meeting and the letter issued to the Applicant dated 13 August 2019 that set out the Respondent's findings. Allegations i. to iii. were found by the Respondent to be substantiated. The Respondent noted that allegation iv. was not found to be substantiated on the basis that the Respondent accepted that the Applicant made the comments as alleged but take the extra time. The Applicant was issued with a final written warning which stated that his conduct was unacceptable and that: "any further

misconduct whatsoever will result in further disciplinary action and may result in the termination of your employment". The final warning letter indicated that a review of the Applicant's performance would be conducted in September 2019.

[27] Under cross-examination about the meeting on 9 August 2019, Mr Althaus agreed that he did state to the Applicant that he was a "rationaliser" but rejected the proposition that he had ignored the Applicant's responses to the allegations. In response to the proposition that the Applicant was justifiably angry with Ms Love because she docked his pay for being late to work, and did so without warning, Mr Althaus said that all employees are aware that if they are late, their pay is docked in 15 minute increments. Mr Althaus also confirmed that overtime is paid in 15 minute increments, where less than 15 minutes is worked. Mr Althaus said that the issue the Applicant was warned about was hanging up on Ms Love during a discussion where he queried his pay being docked.

[28] In response to a question about whether the Applicant was properly trained to drive the vehicles and plant he was required to drive at work, Mr Althaus said that the Respondent keeps records of the licences and tickets its employees have and the dates on which these expire. Mr Althaus also maintained that there is a range of training that was provided to the Applicant in tool box meetings and practical training such as tying down loads, scissor lift and forklift operation. Mr Althaus confirmed that the truck the Applicant was driving when he reversed into a shed and a customer's vehicle, did not require a special licence.[6]

[29] The Applicant also put a proposition to the Mr Althaus during cross-examination to the effect that safety breaches had occurred due to the Respondent putting pressure on employees to get work done in a particular timeframe. Mr Althaus stated in response:

> Mr Althaus: Absolutely not, and I'm not aware of any incident regarding safety that happened on the Maddison project. I'm not saying that there wasn't one, but I'm not aware of any incident that happened on the Maddison project. I'm only aware of the incidents that I can see here as far as your performance is concerned in safety, and some incidents that I witnessed myself that is not documented here that I've spoken to you about in the past, and - - -
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> Mr Hafstein: I only - sorry?
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> Mr Althaus: I'll finish my answer because I believe your question is making out that there is an issue in our business, in our company, in relation to safety not being a priority and that is just an untruth, Andrew. That's not the truth at all. Safety is paramount and that's why we've - that appears to be why we're sitting here now, is because there's one individual here that can't accept that safety is important. [7]

[30] The Applicant put to Mr Althaus that inaction on the part of the Respondent's managers about testing and tagging the Applicant's tools, contradicted Mr Althaus' contention that safety is paramount. In this regard, the Applicant put to Mr Althaus that the Respondent's managers failed to ensure that the Applicant's tools were tested and tagged prior to the expiry date, ignored the Applicant's request for the tools to be tested and required the Applicant to use other tools. The Applicant and Mr Althaus had the following exchange in cross-examination:

> Mr Althaus: Andrew, you're not supposed to be using tools that have got expired dates and the bottom line is that there's enough tools there that are in date to be used. So, if you have to go and get some tools from somewhere else, then

	that's what you have to do. I suppose it raises just another question for you, in my opinion, as to why would you be using tools that are out of date?
Mr Hafstein:	I just said that I had to grab other tools just to make up for the lack of tools that I had?
Mr Althaus:	Okay
Mr Hafstein:	I couldn't charge them, I couldn't use them, you know, I even notified Athena, Jason and I believe I notified Luke on one occasions, but I'm just saying you've just said it's, you know, a big priority, but these little things that you have somebody certified to do, so you're not getting another company in to do it, it's all done in-house but it's something that's not managed very well, not considered - you've just said it there that I shouldn't be using them. I'm saying that it's ---
Deputy President:	Mr Hafstein, if you were sitting there saying, "I was forced to use tools that were out of date because the respondent was so slack" - - -
Mr Hafstein:	I'm ---
Deputy President:	But what you're actually is saying is, "I knew not to use out of date tools and I had to go and find other tools."
Mr Hafstein:	But he's just said that safety and OH&S is their number one, or one of their biggest priorities, but then, you know, one of the simple things that should be done is being ignored.
Deputy President:	Okay, all right. Do you want to respond to that, Mr Althaus?---
Mr Althaus:	It's never been ignored, Andrew, it's never been ignored. Those things are routine and they get done in routine times.

[31] In relation to the matters set out in the final warning, the Applicant stated that at the time that issues were raised about his workplace communication, he was attending specialist hospital appointments, as he was required to undergo surgery to have four wisdom teeth removed and suffered from haemophilia.[8]

[32] Subsequently, the Applicant was issued with a final written warning on 13 August 2019. Following this, the Applicant maintained that his on the job performance did not decline and that he was not involved in any safety incidents as he had been consciously making improvements in all aspects of his role. Further, the Applicant stated that he raised safety concerns with Mr Althaus on 29 July 2020 regarding an incident that involved a wrong sized scissor lift.

[33] On 4 September 2019, the Respondent issued a third letter to the Applicant, inviting him to attend a meeting on 5 September 2019, with a support person, to respond to the following allegation:

> "It is alleged that on 9 July 2019 you failed to uphold your work health and safety obligations during the course of your work duties. Specifically, it is alleged that you allowed the lead for hand tools to run across the ground in a high forklift traffic area. As a result, the customer blocked off the area whilst the work was being undertaken as they identified the situation to be of high risk. This was only brought to the attention of the Employer on 22 August 2019 following a formal complaint from a customer. This is in breach of your statutory duty to take reasonable care for your health and safety, and the health and safety of others. Such conduct has the potential to cause serious and imminent risk to the health and

> safety of yourself and other employees on site, cause severe reputational damage to the Company and detrimentally impact the commercial relationships it has with its customers."

[34] Mr Althaus and Ms Love conducted the meeting on behalf of the Respondent. Mr Minutes of the meeting were tendered. The minutes record that the Applicant was offered an opportunity to bring a support person to the meeting and had elected not to do so and to continue with the meeting without a support person. The minutes record that the Applicant stated that: "we had the leads out but didn't use them. It was out on the floor. We had no intention of using it. The lead was rolled up next the vacuum". A diagram drawn by the Applicant formed part of the minutes, indicating that the lead was rolled up.

[35] Under cross-examination, the Applicant conceded that he used the power lead across the walkway.[9] The Applicant also conceded that he stated that the lead was rolled up when this was not the case, but maintained that he was "on the defensive" because on that particular day, the test and tag period for his tools had expired and his tools were out of date.[10]

[36] On 5 September 2019, the Respondent terminated the Applicant's employment by telephone. A termination letter dated 5 September 2019 was provided to the Applicant, where the Respondent's findings to the allegation regarding the power lead were set out as follows:

> "When you were provided with information on the allegation on 4 September 2019, you admitted to speaking with the customer and you admitted that you thought it was ok to let the cord run on the ground (meaning forklifts could drive over the cord) as you advised this has been okay with previous job sites you have worked on.
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> In the meeting on 5 September 2019, you have admitted to speaking to the customer, but stated you did not remember the exact conversation, and advised management that the cord was rolled up next to the vacuum and at no stage was rolled out.
>
> We also have a statement from the customer confirming you did speak with them and you did run the cord on the ground.
>
> At the meeting you were reminded of the previous warnings you received on 10 July 2019 and a final written warning on 13 August 2019, as well as the safety issues that were raised with you in a meeting on 6 June 2019. These previous warnings were regarding failing to follow reasonable management instruction, lateness, inappropriate behaviour and for breaching safety procedures. You were reminded in your previous warning letter that any further breaches may result in action up to and including disciplinary
> and/or termination. You were asked in the meeting what you believed would be an appropriate outcome for this issue, and you have declined to comment."[11]

[37] The Applicant submitted that he was dismissed for misconduct over one workplace safety issue regarding a power lead on 9 July 2019.[12] In relation to the incident involving the power lead, the Applicant included in his written submission, text from an Incident Report that the Applicant completed on 9 July 2019 in relation to the incident. It states as follows:

> "After the new pallet rack was assembled and stood. We began to secure the pallet racking to the concrete floor. During the period this client came to inspect our work. He noticed the power lead running across the doorway. He spoke to me about how he thought that this was a safety hazard. I didn't believe that the power lead was hazard because all workers in the area had been notified of the work being completed and that the client mentioned that workers would only be using an alternate doorway to bring goods in and out of the warehouse. The client didn't want to take and unnecessary risks by unforeseen traffic in our work area. I agreed and the client then blocked off the doorway using a barricade. The project was completed with no other incident.

> At no point did any plant equipment use the nearby doorway or drive over the power lead. The power lead was in use for no longer than 30 minutes."[13]

[38] The Applicant maintained that he did not believe the power lead was a hazard as all workers in the area had been notified of the work being completed and that workers would be using an alternate doorway to bring goods in and out of the warehouse.

[39] In his written submissions, the Applicant emphasised that the alleged misconduct happened on the 9 July 2019 and that the client lodged the complaint on 22 August 2019, some 44 days after the project had been completed. The Applicant also took issue with the fact that the meeting to discuss the incident took place on 5 September 2019, and said that the delay was because Mr Althaus was on leave. The Applicant asserted that the meeting was unfair because he was not told the details of the customer concerned to enable him to make a proper response to the allegation.

[40] Mr Althaus was asked to explain the delay between 9 July 2019 when the incident allegedly occurred, and 22 August 2019, when the customer reported it. Mr Althaus said that the Respondent was not aware of the incident until the customer was requested to complete a survey document asking for a rating of the service that the Respondent provided when undertaking the job on 9 July. In response the customer representative made the following comment:

> "Installer team leader was not up to our standard when handling electrical leads. Lead for hand tools was run across the ground in a high forklift traffic area. He was quite happy for the forklift to drive over the lead. (This practice is not to our high level of safety on site). I briefly blocked off the area while the work were completed to insure everyone's safety. (sic)"

[41] Mr Althaus was also asked to explain his conclusion that the Applicant was not truthful in his account during the meeting. Mr Althaus said that the Applicant drew a diagram showing that the cord was rolled up and had not been used, and later in the meeting asked what difference it would make if the cord was spread out. The Applicant also admitted during the meeting that the cord was out, and the customer had done something about it. The Applicant agreed that he was asked during the meeting, how many times he thought a lead could be run over and said in response that he did not know.

[42] The Applicant also said that he was feeling under pressure during the meeting. In response to that proposition, Mr Althaus said there was no reason to lie and that he did not believe the Applicant was under pressure. Mr Althaus also said that he employed a lot of patience during the meeting because he wanted the truth. The Applicant had denied the complaint and Mr Althaus said he could not understand why a customer would make such a complaint. Mr Althaus said that he formed the view that the customer had no reason to lie about the incident and that someone was lying. Mr Althaus concluded that the Applicant had been untruthful about the incident and determined to dismiss the Applicant, on the basis of the 9 July incident and earlier warnings and the Applicant's repeated failures to improve his conduct and work performance.

[43] The Applicant stated that had been stood down from his employment between 2 September 2019 to 4 September 2019 due to a down-turn in business. The Applicant contacted Mr Luke Althaus and asked how long he was to be stood down for and whether he was being paid for being on stand down. According to the Applicant, Mr Luke Althaus stated

that he was not being paid for the period and that the company was looking at possible redundancies.[14] Later, the Company paid the Applicant for the stand down.

[44] In relation to the Applicant being stood down prior to his dismissal, the Respondent tendered evidence establishing that the Applicant's termination payment included payment for the days he was stood down. Mr Althaus said that such payment was made to assist the Applicant in light of the fact that his employment was terminated. The Applicant was paid his accrued entitlements and two weeks' wages in lieu of notice. In response to the Applicant's contention that the Respondent was attempting to avoid paying redundancy by dismissing him, Mr Althaus stated that another person had been employed in the Applicant's previous position.[15]

[45] In his closing submissions, the Applicant submitted that there was no valid reason for his dismissal, stating it was a regular occurrence to have power leads running across areas used by forklift. The Applicant submitted that he did not believe he had breached any of the Respondent's workplace policies or that he carried out his duties in an unsafe matter. The Applicant also submitted that during the disciplinary meeting on 5 September 2019, he made the mistake of being dishonest about the power lead because he was under pressure due to being stood down because of lack of work. The Applicant maintained that the Respondent used the 9 July incident to avoid paying him redundancy payments. Further, the Applicant claimed that the Respondent only paid him for the stand down period to cover deliberate deceit and exploitation on the basis that lack of work is not a valid reason to stand down full time staff.

[46] The Respondent denies that the Applicant was dismissed to avoid paying him redundancy. The Respondent submitted that the Applicant was dismissed due to repeated failures to follow lawful and reasonable directions and continual breaches of the Respondent's health and safety policies that ultimately posed too great a risk to the health and safety of the Applicant, the Respondent's employees and the Respondent's customer. Accordingly, the dismissal as not unfair.

LEGISLATIVE PROVISIONS CONCERNING UNFAIR DISMISSAL

[47] In deciding whether a dismissal was unfair on the grounds that it was harsh, unjust or unreasonable, the Commission is required to consider the criteria in s.387 of the Act, as follows:

> (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."

[48] The employer bears the onus of establishing that there was a valid reason for a dismissal.[16] A valid reason for dismissal is one that is "*sound, defensible or well founded*" and not "*capricious, fanciful, spiteful or prejudiced*."[17] The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,[18] and validity is judged by reference to the Tribunal's assessment of the factual circumstances as to what the employee is capable of doing or has done.[19]

[49] To determine whether there was a valid reason for a dismissal relating to conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred, on the basis of the evidence before the Commission. The test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct. Further, to constitute a valid reason for dismissal, the Commission must assess whether the conduct was of sufficient gravity or seriousness to justify dismissal as a sound, defensible or well-founded response.[20] In finding that there was a valid reason for dismissal, the Commission is not limited to the reason relied on by the employer.[21]

[50] The matters in s.387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust or unreasonable. A dismissal may be:

Harsh - because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;

Unjust - because the employee was not guilty of the misconduct on which the employer acted; and/or

Unreasonable - because it was decided on inferences that could not reasonably have been drawn from the material before the employer.[22]

[51] I turn now to consider the evidence and submissions in relation to the dismissal of the Applicant.

CONSIDERATION

Was there a valid reason for dismissal of the Applicant?

[52] I am satisfied and find that there was a valid reason for the Applicant's dismissal. The Applicant had been repeatedly warned – both verbally and in writing – about his attitude to workplace health and safety. The Respondent had appropriate workplace health and safety procedures which were articulated in the workplace. The Applicant failed to follow them on numerous occasions. The Applicant was trained sufficiently to carry out his duties as

required. Some of the Applicant's safety breaches were so fundamental that he should not have required training to prevent them. The conduct of the Applicant in running a power cord across a doorway through which forklifts could travel, is a case in point. If the Applicant needed training in order for him to understand that he should not drive a scissor lift out of a workshop while it was still plugged into a power source, then he received such training when he was shown how to walk around a truck and trailer before driving it, to ensure that it was safe to operate.

[53] The Applicant should have known that this process also applied to any mobile plant or equipment that he was required to operate. Had he undertaken such a check he would have noted that the scissor lift was connected to the power source before he operated it. Similarly, the Applicant should not have required training to prevent him from reversing a vehicle into a shed or another vehicle, particularly one owned by the Respondent's customer.

[54] Generally, I preferred the evidence of Mr Althaus and Mr Walsh over that of the Applicant. Both witnesses for the Respondent gave their evidence in a forthright manner and their evidence was convincing. I did not find the Applicant to be a credible witness and, as Mr Althaus put it, the Applicant had a tendency to rationalise his behaviour by attempting to establish failures in the Respondent's training or systems, when the Applicant was responsible for the many incidents about which he was warned.

[55] The evidence establishes that the Respondent's managers displayed great patience with the Applicant's numerous and serious safety breaches and persisted with attempting to rectify his attitude, before deciding to dismiss him. I also accept that the Applicant was dishonest in relation to his account about the incident on 9 July 2019 and that this was also a valid reason for dismissal.

[56] Further, I accept the Respondent's explanation for the delay between the incident on 9 July 2019 and the Applicant's dismissal. Such delay has no impact on the validity of the reason for dismissal. Further, I do not accept that there was any ulterior motive for the dismissal and that the Respondent was avoiding redundancy. The simple answer to this proposition is that the Respondent had every reason to dismiss the Applicant well before this step was taken, on the basis of the incidents raised with the Applicant on 6 June 2019.

Was the Applicant notified of the reason for his dismissal?

[57] It has been held that as a matter of logic an employee cannot have been given an opportunity to respond to any reason for dismissal based on capacity or conduct in circumstances where the employee is not notified of the reason. An employee must be given an opportunity to respond to the reason for dismissal before the decision to terminate is made.[23]

[58] The Respondent in this case went to great lengths to afford the Applicant procedural fairness. The Applicant was provided with a letter setting out the allegations about his conduct on 9 July 2019. I do not accept that the notification was deficient because it did not inform the Applicant of the identity of the customer who made the complaint. The Applicant had sufficient information to respond at the meeting.

[59] It is also clear that that the Applicant worked out the identity of the customer in any event, before he attended the meeting.

Was the Applicant given an opportunity to respond to the reason for his dismissal based on his conduct?

[60] The Applicant was provided with an opportunity to respond to the reason for his dismissal in the meeting on the 5 September 2019. I accept Mr Althaus' evidence that the meeting was thorough, and that the Applicant was requested to explain his version of events. The notes indicate that the Applicant was asked open questions and every attempt to elicit information from him was made.

Was there an unreasonable refusal by the Respondent to allow the Applicant to have a support person

[61] There is no positive obligation on an employer to offer an employee the opportunity to have a support person[24]. The inquiry in s. 387(c) is directed to whether any request was unreasonably refused. There is no evidence that the Respondent denied the Applicant the assistance of a support person at any discussion which may have occurred concerning his dismissal. To the contrary, the Respondent offered the Applicant an opportunity to have a support person present and confirmed that the Applicant did not wish to avail himself of that opportunity before proceeding with the meeting.

Was the Applicant warned about the unsatisfactory performance before the dismissal?

[62] I am satisfied that the Applicant was warned about his unsatisfactory performance before the dismissal. The warnings given to the Applicant contained significant detail. Before each warning was given, the Applicant was provided with allegations in writing and was given an opportunity to respond to those allegations before being issued with a warning. There is evidence that the Applicant's responses were considered on the basis that not all allegations were substantiated.

Did the size of the employer's enterprise impact on the procedures followed in effecting the dismissal of the Applicant?

[63] The Respondent is a relatively small Company albeit a Company with more than 15 employees. The Respondent dealt with the Applicant in a manner which in my view, was scrupulously fair. The size of the Respondent's enterprise is therefore not a matter upon which I have placed significant weight in considering whether the dismissal was unfair.

Did the absence of dedicated human resource management specialists or expertise in the enterprise impact on the procedures followed in effecting the Applicant's dismissal?

[64] The Respondent had a dedicated human resource manager who attended the disciplinary meetings and sent letters to the Applicant. It also appears that the Director's wife was involved in this matter and has some experience in human resource management. For the reasons set out above this is not a factor that weighs heavily in the balance in the present case.

Are there any other relevant factors?

[65] The Respondent paid the Applicant two weeks wages on termination of his employment. Even if there was any procedural unfairness (and in my view the procedure was

fair) given that there was also a valid reason for dismissal, the two week period covered by the payment would have provided a more than sufficient opportunity to rectify any such issue. The Applicant was given an opportunity to put relevant material before me at the hearing, despite his non-compliance with Directions, and has not provided any evidence that could lead to a finding that his dismissal was unfair.

[66] I do not accept that the stand down was related to the dismissal or that the Respondent dismissed the Applicant to avoid redundancy. As previously stated, there was a valid reason for the dismissal.

CONCLUSION

[67] For these reasons I am satisfied that the Applicant was not unfairly dismissed and that his dismissal was neither harsh, unjust nor unreasonable. I have therefore determined to dismiss his application for an unfair dismissal remedy. An Order to that effect will issue with this Decision.

DEPUTY PRESIDENT

Appearances:
Mr A Hafsteins appearing on his own behalf
Mr M Althaus on behalf of the Respondent

Hearing details:
2020

26 February

Brisbane

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[1] Exhibit R2.

[2] Exhibit A1.

[3] Transcript of proceedings, PN494.

[4] Transcript of proceedings PN505.

[5] Transcript of proceedings, PN643 – 646.

[6] Transcript of proceedings, PN494.

[7] Ibid, PN547-548.

[8] Ibid.

[9] Ibid, PN236.

[10] Ibid, PN254-256.

[11] Exhibit R2.

[12] Ibid.

[13] Ibid.

[14] Exhibit A1.

[15] Ibid, PN264.

[16] *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410 at 5; *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201 at 204.

[17] *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

[18] *Rode v Burwood Mitsubishi* Print R4471 at [90] per Ross VP, Polites SDP, Foggo C.

[19] *Miller v University of NSW* [2003] FCAFC 180 at pn 13, 14 August 2003, per Gray J.

[20] *Bista v Glad Group Pty Ltd* [2016] FWC 3009.

[21] *Heran Building Group Pty Ltd v Anneveldt* [2013] FWCFB 4744 at [15] per Acton, SDP, Sams DP and Hampton C citing *MM Cables (a Division of Metal Manufacturers Ltd v Zammit* AIRC (FB) S8106 17 July 2000.

[22] *Stewart v University of Melbourne* (U No 30073 of 1999 Print S2535) Per Ross VP citing *Byrne v Australian Airlines* (1995) 185 CLR 410 at 465-8 per McHugh and Gummow JJ.

[23] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport*, Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at para. 75, [(2000) 98 IR 137]

[24] Explanatory Memorandum to Fair Work Bill 2008 at para. 1542