



# DECISION

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

**Shane Mercer**

v

**Australia and New Zealand Banking Group Limited**  
(U2019/9646)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 23 JANUARY 2020

*Application for an unfair dismissal remedy – allegations of ‘call dumping’, staging a technical fault, and falsifying start times – allegations substantiated – valid reasons for dismissal – application dismissed*

[1] This decision concerns an application made by Mr Shane Mercer under s 394 of the *Fair Work Act 2009 (Cth)* (Act) for an unfair dismissal remedy. Mr Mercer commenced employment with Australia and New Zealand Banking Group Limited (ANZ) in 2004 and from 2011 he was employed as a customer due diligence specialist in the customer due diligence team (CDD). In this role he was required to answer telephone calls from customers and staff.

[2] On 7 August 2019, Mr Mercer was dismissed for misconduct, after the ANZ found three allegations against him substantiated. First, the bank determined that on 148 occasions from March to June 2019, Mr Mercer had ‘dumped calls’ by deliberately disconnecting the caller or remaining silent until the caller hung up. Mr Mercer had previously received a written warning for having dumped calls in 2017. Secondly, the bank found that on 23 July 2019, after the first allegation had been put to him, Mr Mercer staged a telephone fault in an effort to support his argument that the 148 calls might have been affected by technical problems. Thirdly, the bank determined that on eight occasions from January to March 2019, Mr Mercer had improperly altered the electronic record of the time at which he had commenced work, so as to reflect an earlier start time. Building access records showed that on the days in question, Mr Mercer had not yet entered the workplace at these times. Mr Mercer was dismissed with immediate effect. He received five weeks’ pay in lieu of notice of termination.

[3] Mr Mercer denies the first and second allegations and contends that the alteration of his start times was not improper because it was authorised. He says that the company did not have a valid reason for his dismissal because the allegations against him were not substantiated. He contends that the dismissal was in any event harsh, unjust or unreasonable.

[4] Section 396 of the Act requires that I decide four matters before considering the merits of Mr Mercer’s application. There is no dispute between the parties, and I am satisfied, of the following. First, Mr Mercer’s application was made within the 21-day period required by s

394(2) of the Act. Secondly, Mr Mercer was a person protected from unfair dismissal, as he earned less than the high-income threshold (s 382). Thirdly, the dismissal was not a case of genuine redundancy. Fourthly, ANZ is not a small business for the purposes of the Act, and therefore no question of compliance with the Small Business Fair Dismissal Code arises.

### ***Factual setting***

[5] A number of facts in this matter are in dispute, including, most prominently, whether or not Mr Mercer ‘dumped’ the 148 calls in question, whether he staged the telephone fault on 23 July 2019, and whether he was authorised to alter his start times. I will deal separately with each of these and other relevant disputed facts further below. Much of the background however is not contentious.

[6] ANZ’s CDD team takes inbound calls from its global customer due diligence help desk. On average it receives some 180 to 200 calls each day. The purpose of the global help desk is to answer queries relating to ANZ’s ‘Know Your Customer’ processes, which is concerned with confirming the identity of customers so that the bank knows with whom it is dealing. This work is a critical dimension of ANZ’s business and is responsive to legislative requirements. In March 2019, Ms Elise Slevin became the operations leader of the CDD team. Operators in the team, including Mr Mercer, reported to her.

[7] On 17 June 2019, Ms Slevin received an internal complaint about Mr Mercer’s handling of a call from an indigenous customer who had been having difficulties sourcing an identity document and could not access her funds. The complaint was that Mr Mercer had not been helpful and had not resolved the customer’s problem. Ms Slevin listened to the recording of Mr Mercer’s call with the customer by accessing the bank’s ‘NICE’ recording system. In the course of doing so, Ms Slevin noticed that a large number of Mr Mercer’s calls were of very short duration, many lasting less than 60 seconds. Ms Slevin randomly selected some of these calls and listened to them. On a number of calls, she could hear customers saying ‘hello’ before eventually hanging up, without any response from Mr Mercer.

[8] Between 17 and 26 June 2019, Ms Slevin reviewed some three months’ worth of calls taken by Mr Mercer. She found that a significant number of his calls were disconnected after a short period. In some calls, customers could be heard saying ‘hello’ with no response from Mr Mercer. Ms Slevin spoke to Mr Cook, who had previously been Mr Mercer’s manager. Mr Cook told her that in early 2018 he had given Mr Mercer a written warning about ‘dumping calls’, that is, deliberately disconnecting calls, or refraining from speaking on calls so that the customer would hang up. Mr Cook told her that Mr Mercer had denied the allegations and refused to sign the warning letter.

[9] Ms Slevin then looked into other aspects of Mr Mercer’s work. She examined Mr Mercer’s timekeeping in the bank’s electronic records. She saw that Mr Mercer had been manually amending his start times in the bank’s time-recording system, ‘ATOM’. She noticed that there had been a number of occasions where Mr Mercer had changed his recorded start time to a time that preceded his arrival at the workplace, as recorded by the building access records.

[10] On 15 July 2019, having returned from a period of leave, Mr Mercer attended a meeting with Ms Slevin. She told him about the complaint of 17 June 2019 concerning the indigenous customer. Mr Mercer acknowledged that he could have handled it better and Ms

Slevin considered that matter settled. Ms Slevin then told Mr Mercer that she had seen data on the ATOM system that showed he had altered his start times to a time before he had arrived at work. Mr Mercer said that those entries must have been a mistake. He also said that the person who had trained him on the ATOM system had told him that he could simply adjust his start times manually himself. Mr Mercer said that he always ensured that he worked at least eight hours per day, and that if he was late, he would work through his breaks.

[11] Ms Slevin then told Mr Mercer that she was concerned that a large number of the calls he had dealt with had been disconnected. She asked him for an explanation. He said that there must have been ‘tech issues.’ Ms Slevin asked whether the daily team member statistics, which recorded the number of calls taken by each member, were inaccurate in his case because of the large number of disconnected calls. He said that he did not pay much attention to the statistics and that he would not have deliberately disconnected calls or would only do so if he could not hear anyone on the line. Ms Slevin then asked Mr Mercer how he could expect to hear anyone on the phone if he did not speak. He responded that there must have been ‘tech issues’ and said that there were times when he could not hear callers. Ms Slevin asked Mr Mercer why he was not actively addressing any technical issues, especially in light of his previous warning about call dumping. Mr Mercer did not respond.

[12] Mr Mercer’s evidence was that, when asked about the disconnected calls by Ms Slevin, he told her that his ‘usual practice’ was to say ‘hello, hello, I can’t hear you, you will need to call back’, before disconnecting calls. His evidence was that he told Ms Slevin that there could be different reasons for calls being disconnected, including technical issues or the caller walking away from the phone when they had been put on hold.

[13] Mr Mercer also told Ms Slevin that calls might have ‘dropped in’ while he was away from his desk. The telephone system can be set to ‘automatic’ mode, which means that calls are put directly through to team members without them having to do anything to answer the call. The ‘manual’ mode requires calls to be answered, which can be done by clicking on a green button on the screen. Mr Mercer’s point was that, with his phone in ‘automatic mode’, he might have missed them, if he had stepped away from his desk.

[14] Immediately following his meeting with Ms Slevin on 15 July 2019, Mr Mercer returned to his desk and logged onto his phone. According to Mr Mercer’s evidence, on the very next two calls he received, Mr Mercer encountered a fault of the kind he had just been talking about in defence of the allegations against him. He had a live call, but he could not hear the customer on the end of the line. Mr Mercer quickly told Ms Slevin about this. She asked another team member, Mr Bhanu Puri, to look into the matter. According to Mr Mercer, Mr Puri made some adjustments and fixed the problem. Mr Puri’s evidence was that he noticed that Mr Mercer’s settings in the ‘AVAYA’ phone system were different to the default settings used by the CDD team. Mr Puri reset them to the default positions and Mr Mercer was again able to hear callers.

[15] The next day, all members of the team received an email message from a certain ‘Lilly Sages’, complaining about Ms Slevin’s behaviour and management. The email alleged that Ms Slevin had made rude and abusive remarks about team members, and that she had said that a certain ‘old man who thinks he is the best’ needed to retire. Mr Mercer’s evidence was that he thought that this was a reference to him. There is no ‘Lilly Sages’ employed at ANZ. It is not known who this person is or whether she is a real person. Mr Mercer speculated in his evidence that it might be somebody’s ‘nom de plume’.

**[16]** The next significant event occurred on 23 July 2019. Ms Slevin's evidence was that at around 2.38pm she approached her desk in the team's open plan. As soon as she sat down, Ms Slevin heard Mr Mercer, who was sitting opposite her, say very loudly: *'Hello, hello, I can't hear you. You will need to call the customer due diligence team back on the 1800 number'*. She found this strange because she had not heard Mr Mercer say this before and he was speaking more loudly than normal. Ms Slevin immediately accessed the NICE recording system. She saw that Mr Mercer had finished a call at 2.38.09, which had lasted 8 minutes, and that he had answered another call at 2.38.40, which went for six minutes. Ms Slevin attached to her statement a copy of Mr Mercer's call history. Ms Slevin believed that Mr Mercer had staged a short fault-affected call to support his response to the call dumping allegations. Mr Puri was sitting close to Mr Mercer at the time. Ms Slevin asked Mr Puri if he had heard what Mr Mercer said, and he replied that he had. Mr Puri gave evidence that he had heard Mr Mercer, and that Mr Mercer spoke the above words very loudly. Mr Mercer did not report any problem with his telephone on 23 July 2019.

**[17]** Ms Slevin spoke to Technology Assist to determine how many technical incidents Mr Mercer had reported over the past 12 months. Mr Edwin Low, an engineer in the technology group, gave Ms Slevin an extract of the incidents that Mr Mercer had logged with Technology Assist since August 2018. Of these, four were related to the AVAYA telephone system. These occurred on 2, 9, 17 and 22 May 2019. None concerned calls being disconnected. Nothing indicated that Mr Mercer could not hear customers on those calls. In the document sent to Ms Slevin by Mr Low, each of the four faults is marked with a priority of 'very low'. The brief descriptions next to each of them are, respectively: 'unable to connect', 'no call recording – Shane Mercer', 'AVAYA CMS – unable to log in', and 'uninstalled AVAYA one agent'. The status of each is marked 'closed'. The identity of the technical employee who 'resolved' the technical issue is identified in the document.

**[18]** On 30 July 2019, Mr Mercer attended a meeting with Ms Slevin and Mr Cook. Ms Slevin said that, in response to Mr Mercer's comment that the 'dumped calls' may have been caused by faults, she had enquired with the bank's Technology Assist department and been told that there were no known issues relating to the disconnection of calls, or callers being inaudible. Ms Slevin then put to Mr Mercer that he had staged the telephone fault on 23 July 2019. He said that he did not understand the allegation and asked how someone could pretend to take a call. Ms Slevin said that she had checked the records and that there had been no short calls to him at the time in question. Mr Mercer then said that he must have been on his mobile phone instead of the AVAYA phone on his computer, which would explain why there was no record of the call in the system, or that there must have been some other fault.

**[19]** On 5 August 2019, Mr Mercer received a letter of allegations from Ms Maria Serrano, the bank's customer service operations lead.<sup>1</sup> The letter required Mr Mercer to attend for a disciplinary meeting with Ms Serrano and Ms Nada Saoud from the employee relations department on 6 August 2019. His response was sought to the following four allegations:

- between 7 March 2019 and 25 June 2019, Mr Mercer had deliberately disconnected customer calls or refrained from speaking until customers disconnected the calls, on 148 occasions, and in doing so, falsely inflated his productivity (first allegation);

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<sup>1</sup> Witness statement of Maria Serrano, MS1

- on 15 July 2019, when Mr Mercer was asked about the first allegation, he was dishonest in his response when he repeatedly asserted that there ‘must have been tech issues’ (second allegation);
- at 2.38pm on 23 July 2019 Mr Mercer had staged a short fault-affected telephone call in order to substantiate his previous representation to Ms Slevin about his usual practice when unable to hear a customer on a telephone call (third allegation); and
- between 9 January 2019 and 18 March 2019, Mr Mercer deliberately altered his work start times in the ATOM system on 8 occasions, in circumstances where he did not have authority to do so (fourth allegation).

[20] The allegations letter was accompanied by attachments. The first was a document setting out a summary of the call data obtained from ANZ’s call recording system, NICE (Appendix 1). It listed each of the 148 calls that were the subject of the first allegation, identifying the date and time of the call, its duration, whether the caller could be heard saying hello, and whether the call was disconnected by Mr Mercer or the caller. This document was prepared by Ms Slevin, who listened to the calls and extracted the data from NICE. Her evidence, confirmed by Mr Forrester, was that the NICE system keeps a record of which party has disconnected a telephone call. Ms Slevin also said that the NICE system, from which she compiled the data, was easy to use. The second attachment to the allegations letter was an extract from Mr Mercer’s call history, showing all of the calls received by Mr Mercer between 9.00am and 2.45pm on 23 July 2019 (Appendix 2).

[21] At the meeting on 6 August 2019, Ms Serrano asked Mr Mercer whether he was comfortable to proceed without a support person, and Mr Mercer confirmed that he was. Ms Serrano asked Mr Mercer whether he wanted to listen to the calls that were the subject of the first allegation and set out in Appendix 1, but he declined. She then raised each of the four allegations with Mr Mercer and asked for his responses to them. Mr Mercer maintained that he had not dumped calls, been dishonest about his assertion that there must have been a technical fault, and that he had not staged the telephone fault on 23 July 2019. He said that he had been told by an ‘ATOM person’ who trained him that he could make changes to his start times, and that he had done so to reflect the fact that he had worked eight-hour days. Ms Serrano adjourned the meeting to consider Mr Mercer’s responses and make some further inquiries.

[22] Ms Serrano spoke to the Technology Assist department about the ‘staged call’. She was told that there had been no technology problem with the AVAYA system on 23 July 2019. Ms Serrano also spoke to the bank’s Forecasting Team about whether there had been any telephony changes affecting the CDD team. Mr Psychogios, business customer service lead, told her that he was not aware of any changes. He said that whether a call could ‘drop-in’ to a user depended on their personal settings.

[23] On 7 August 2019, Mr Mercer attended a further meeting with Ms Serrano and Ms Saoud. After further discussion, and a brief adjournment, Ms Serrano informed Mr Mercer that she considered the first, third and fourth allegations against him had been substantiated and that he had breached the ANZ’s Code of Conduct. Ms Serrano told Mr Mercer that his employment was terminated effective immediately. Mr Mercer subsequently received a letter of termination confirming that the three allegations against him had been substantiated and that his employment had been terminated. He received five weeks’ pay in lieu of notice.

## ***Findings***

[24] I make the following factual findings.

[25] First there is a question of how many calls Mr Mercer would usually answer each day. Mr Mercer's evidence was that he took between 45 to 50 calls a day. Ms Slevin said that the ANZ's statistics showed that the average number of calls taken by Mr Mercer in May, June and July 2019 was 15, 16, and 19 respectively. I accept Ms Slevin's evidence. It was clear and precise and based on the bank's statistical records. Mr Mercer did not offer any persuasive contradiction of it.

[26] Secondly, there is the question of the email from 'Lilly Sages'. I find that the imputations against Ms Slevin contained in the email are unsubstantiated. The allegations are hearsay. The accusations are uncorroborated and unconvincing. Ms Slevin denied them categorically and I believe her. She was a witness of truth. Her oral evidence, though brief, was clear, candid and credible. Her witness statement, to which she swore, was detailed and consistent. The timing of the email and its anonymous claims about Ms Slevin, appearing one day after she had raised serious allegations against Mr Mercer, is, to say the least, curious, particularly as Mr Mercer relied on this email in his case by identifying himself as the 'old man' allegedly maligned by Ms Slevin. However, I make no finding about who was the real author, or sponsor, of this email.

### *The 'call dumping' allegation*

[27] I find the 'call dumping' allegation against Mr Mercer to be substantiated. I find that between 7 March 2019 and 25 June 2019, Mr Mercer deliberately disconnected customer calls or refrained from speaking until customers hung up on 148 occasions. I accept the evidence of Ms Slevin that she listened to the audio recordings referred to in Appendix 1 to the witness statement of Ms Serrano, and that she compiled the data in this table from ANZ's electronic systems. A USB stick with all of these audio recordings was provided to the Commission. The audio files variously record silence and disconnection, or the caller saying 'hello', evidently seeking to elicit some response, without success. In some instances, the call remains live for up to 60 seconds prior to being disconnected. I accept Ms Slevin's evidence that the information drawn from Appendix 1 derives from the bank's systems, and in particular that those systems identify which participant disconnects a call. This was corroborated by Mr Forrester, an engineer with technical knowledge of the bank's systems.

[28] I reject Mr Mercer's suggestion that there must have been a technical fault. He did not raise concerns about technological problems in relation to any of the calls that appear in Appendix 1 to Ms Serrano's statement. I find it implausible that, if he had been receiving calls and could not hear the caller, he would not have reported the matter. Perhaps one or two aberrant instances might have gone unreported, but not the large number reflected in Appendix 1. In addition, if Mr Mercer had indeed been saying 'hello, hello I cannot hear you' or words to that effect, there is no explanation as to why this was not recorded by the NICE audio recording system.

[29] Mr Mercer said that he had not in fact been aware of any faults but contended that this did not mean that such faults did not exist. However, there is no evidence of any fault that relates to any of the 148 calls. Ms Slevin's evidence was that, in the period from August 2018

to July 2019, there were only four issues relating to the AVAYA telephone system that were reported to Technology Assist by Mr Mercer, these being on 2, 9, 17 and 22 May 2019. Of the 148 dumped calls in Appendix 1, the only date that corresponds with any of these four is 17 May 2019, where the fault recorded was ‘unable to log in’, which, Ms Slevin explained, meant that no calls could be received at this time. Moreover, Mr Forrester’s evidence was that any fault in the system would be likely to affect multiple operators, not just one.

**[30]** Mr Mercer’s evidence was that he usually had his phone in automatic mode, and that he may simply have walked away from his desk and therefore not heard the calls that were automatically coming through to his phone. But if this is what Mr Mercer did, it is not exculpatory. Rather, it simply confirms that he engaged in a slightly different kind of work-avoidant behaviour. If the phone is logged in, and in automatic mode, calls come straight through to the team member without having to be manually accepted. If the team member is away from his or her phone at this time, the calls will come through and not be attended to (they will however show up in the bank’s records as calls that have been dealt with by the relevant operator and count towards their productivity figures). I do not see any fundamental difference between an operator who ignores calls that he can hear, and an operator who ignores calls that he cannot hear because he has walked away from a phone left in automatic mode. The relevant component of the first allegation would still be substantiated, because he refrained from speaking (having walked off) until the customer hung up. And of course, Mr Mercer’s explanation that calls may have ‘dropped in’ while he was away from his desk cannot explain the many calls among the 148 that Mr Mercer disconnected.

**[31]** Mr Mercer contended that ANZ did not lead any evidence from an ‘AVAYA expert’ and that his hypothesis that there was a fault with that system had therefore not been fully explored. He said that none of the persons involved in his dismissal had consulted such an expert prior to dismissing him, and that ANZ managers were afraid that they would get answers that they did not want. But in fact, ANZ led evidence from Mr Forrester, an engineer with expertise in the bank’s systems, whose knowledge, particularly in relation to the AVAYA phone system, Mr Mercer acknowledged he would have to defer to. Mr Forrester said that he was not aware of any problem with AVAYA that causes an inbound telephone call to be received by an agent and then to be automatically disconnected after a short period, and that any such problem would be a significant issue and could cause substantial reputational damage to ANZ in terms of customer service. Mr Forrester also said that he was not aware of any problem with AVAYA that has resulted in a situation where callers can be heard on an audio-recording obtained from the NICE system, but the caller cannot be heard on the agent’s handset. He said that the call recordings from NICE accurately reflect what AVAYA received during the call.

**[32]** The bank acknowledged that there were technological problems on occasions. Ms Slevin noted that during May 2019 there were certain days when Mr Mercer could not log into the system to field calls because of problems with AVAYA. Mr Mercer said that there were many problems with AVAYA and that Mr Gordon had admitted as much. But Mr Gordon did not say there were ‘many’ such problems. Rather, he acknowledged that there were faults from time to time. This was also the evidence of Ms Slevin. But there were no faults that affected the 148 calls that were the subject of the first allegation.

**[33]** I briefly address some remaining contentions of Mr Mercer in relation to the call dumping allegation. First, he submitted that 148 calls in three months is a ‘trivial’ number, constituting only four percent of his calls. This was based on his contention that he would

answer up to 50 calls a day. He said that this could not have had any significant impact on his key performance indicators, and that it could not have been his motive to inflate his performance in this minor way. However, in fact Mr Mercer's daily average number of calls was much lower than this. Further, 148 is by no means an insignificant number. These calls counted towards his productivity statistics, when in fact he did not answer these calls.

**[34]** Mr Mercer asked why, if there were problems with his work dating back to March, this was not raised with him earlier. The answer is that ANZ was evidently not aware of his conduct until June.

**[35]** Mr Mercer said that, after the settings on his phone were changed on 15 July 2019, there were no more reports of any disconnected calls. He suggested that this is evidence of the 148 calls being affected by a fault. However, the absence of disconnected calls from 15 July is perfectly compatible with a conclusion that Mr Mercer dumped calls; he was scarcely going to continue doing so after the bank had raised the matter with him and could be presumed to be watching him closely.

**[36]** Mr Mercer offered another explanation for the 148 calls, namely that the callers might have left their phones unattended while they were on hold. But this does not plausibly account for the large number of calls disconnected by Mr Mercer, or those where the caller can clearly be heard saying 'hello, hello' and receiving no answer.

**[37]** Mr Mercer said in his evidence that he did not understand what the motivation would be for a person not to answer calls. In my view, this displayed an improbable naivety, akin to asking why a person would ever do the wrong thing. The obvious potential motivation for a team member not to answer calls would be to avoid doing work, an end that could just as easily be achieved by walking off with the phone left in automatic mode as by 'active' call dumping. This unlikely naivety was also reflected in Mr Mercer's statement to Ms Slevin on 30 July 2019 (recounted in her evidence, which I accept) that, in relation to the allegation that he had staged a telephone fault, he did not understand how someone could pretend to take a call. I do not accept that Mr Mercer did not understand how this could be done. It is easy for a person to understand how a telephone call might be staged, as we will see in a moment.

#### *Validity of the earlier warning*

**[38]** As the decision to dismiss Mr Mercer relied in part on the previous warning given to Mr Mercer in January 2018 about call dumping, it is appropriate that I make a finding about whether that warning was justified. In October 2017, Mr Cook noticed that Mr Mercer was answering fewer telephone calls than other members of the CDD team. He made this observation having examined Mr Mercer's call logs and listened to telephone calls as part of his management and coaching duties. Mr Cook's evidence was that around this time, another CDD manager, Ms Valda Wood, had told him that she had witnessed Mr Mercer receive a call and not say anything to the customer. He then asked Ms Victoria O'Leary, a CDD manager, to listen to some of Mr Mercer's live calls. She reported back to Ms Cook that on some calls Mr Mercer would answer a call but not say anything, and the call would be discontinued after a short period. Mr Cook listened to audio recordings of Mr Mercer's calls and confirmed what Ms O'Leary had said.

**[39]** Mr Cook's evidence was that he met with Mr Mercer on 3 November 2017 to discuss these matters. Mr Cook asked Mr Mercer whether he had been experiencing any technological



issues with his telephone, and Mr Mercer said no. Mr Cook then said that call data demonstrated that he was having very short calls and calls in quick succession. Mr Mercer then suggested that there might have been some technological problem. The data available to Mr Cook showed that there had been no reported technical issues on the dates in question. On 16 January 2018, Mr Cook met with Mr Mercer again. Mr Cook told Mr Mercer that there was evidence that he had refrained from providing services on 54 customer calls. In response, Mr Mercer again said that there may have been ‘technological issues.’

[40] Mr Cook said that at the conclusion of the meeting, he considered the allegation against Mr Mercer substantiated. He took into account that there had been no reported technological problems; that no other employees had reported such problems; that Mr Mercer had initially said there were no such problems; and that after the 3 November 2017 meeting, when Mr Mercer became aware that his calls were being monitored, Mr Mercer’s very short calls abruptly ceased. Mr Cook also took into account what Ms Wood and Ms O’Leary had told him. Mr Mercer was provided with a written warning dated 24 January 2018 which stated that ANZ had concluded that between 26 October 2017 and 2 November 2017 he had deliberately disconnected, or refrained from providing services on, 54 customer calls, and in doing so falsely inflated his productivity. The letter stated that if there were any further instances of unacceptable behaviour, further disciplinary action might be taken, including termination of employment. Mr Mercer declined to sign the written warning.

[41] Mr Mercer’s evidence was that he complained to Mr Cook’s manager, Mr Gordon, that the allegations against him were false, but that Mr Gordon told him there was nothing he could do, and that Mr Mercer should move on from it. Mr Mercer also brought an anti-bullying complaint against Mr Cook, which the bank investigated and found to be unsubstantiated.

[42] I accept Mr Cook’s evidence about his investigation of Mr Mercer’s telephone calls and his concern that Mr Mercer was deliberately not responding to calls in the relevant period. Mr Cook reviewed the data concerning Mr Mercer’s work, listened to audio recordings, considered Mr Mercer’s response, and formed what was in my view a logical and correct conclusion. I do not accept Mr Mercer’s suggestion that Mr Cook was ill-disposed towards him or had any ulterior motive for disciplining him. Mr Cook’s concerns were in my view well-founded and the written warning was justified. Mr Mercer’s call dumping in 2019 was therefore in contravention of a valid written warning.

*The ‘telephone fault’ of 23 July 2019*

[43] I find that on 23 July 2019, Mr Mercer staged a telephone fault. I find that he loudly spoke the words ‘hello, hello, I can’t hear you, you will need to call the customer due diligence team back on the 1800 number’, when in truth there was no call. ANZ has produced the telephone records of Mr Mercer’s calls that day. At the time Ms Slevin and Mr Puri heard Mr Mercer say these words, he was not on a call. The only calls he had around this time went for eight and six minutes respectively.

[44] Yet again Mr Mercer suggested that a technical fault might have occurred. This would have been a fault on two levels: one that caused Mr Mercer not to be able to hear the customer, and a further fault whereby the system did not record that Mr Mercer had received a short call. It is implausible that Mr Mercer, alone among his colleagues, should always be the unfortunate victim of a technological fault. There is no evidence of a fault. The system

recorded no short call at this time. The logical conclusion is that there was no call, and that Mr Mercer was deceptively seeking to convey to those around him, including his line manager, that he was experiencing a technical fault, in order to support his response to the first allegation. It was a crude hoax that was debunked by the bank's telephone records.

[45] It was in my view with guileful agility that Mr Mercer sought to conjure a way out of the evidentiary cul-de-sac in which he found himself: he said that he must have been on his mobile phone at the time, which would explain why the bank's records did not show him having received a short call at 2.38pm. However, Mr Puri gave evidence that he saw that Mr Mercer was not on his mobile phone at the time. How was it that Mr Puri could remember this phone call, Mr Mercer asked? Because, Mr Puri said, it was unusual for Mr Mercer to call out loudly 'hello, hello.' I accept Mr Puri's evidence. Further, Ms Slevin gave evidence that employees in the team do not have work-issued mobile phones. It is plain, and I find, that Mr Mercer was not on his mobile phone at the relevant time.

*Improperly altering start times*

[46] Mr Mercer does not contest the allegation that he manually altered his start-time in the bank's ATOM timekeeping system on eight occasions between 9 January and 18 March 2019. He contends however that he did nothing wrong by doing so. Mr Mercer says that it was his understanding that he was permitted to alter his start times as long as he worked his contracted hours, and that he amended his start times to ensure that they reflected these hours. He said that he always ensured that he made up for any lateness by working through his breaks and if necessary, overtime. Mr Mercer also said that the person who trained him on ATOM authorised him to alter his start times.

[47] I do not accept Mr Mercer's explanation that he was authorised to alter his start times. Mr Mercer did not identify the person who allegedly told him that he was permitted to do this. But even if he was authorised to change his times, I do not see any plausible or acceptable justification for his having changed the times in the way he did. Mr Mercer did not claim that he had been authorised to alter his start times so as to reflect a fiction. Mr Mercer did not just change his start times. He falsified them, indicating that he had started work at times when he had not even entered the building.

[48] Utterly unconvincing was Mr Mercer's statement that start times did not need to be exact anyway, because he worked in a professional environment and not a factory. If the start times did not need to be exact, why did Mr Mercer take the trouble to alter them?

[49] I find that Mr Mercer altered his start times on the eight occasions alleged, and that he did so without authorisation or justification.

*Was there a valid reason for dismissal (s 387(a))?*

[50] For a dismissal to be unfair, the Commission must be satisfied that it was harsh, unjust or unreasonable. In considering whether it is so satisfied, the Commission must take into account the matters specified in s 387. First, the Act requires the Commission to consider whether there was a valid reason for the dismissal related to the person's capacity or conduct. A valid reason is one that is sound, defensible and well-founded. The question that the Commission must address is whether there was a valid reason, in the sense both that it was a good or sufficient reason, and a substantiated reason.

[51] In cases relating to alleged misconduct, the Commission must make a finding on the evidence provided as to whether, on the balance of probabilities, the conduct occurred. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason. Where allegations of misconduct are made, the standard of proof in relation to whether the alleged conduct occurred is the balance of probabilities. However, as the High Court said in *Briginshaw*, the nature of the relevant issue necessarily affects the ‘process by which reasonable satisfaction is attained’<sup>2</sup> and where serious allegations are made, such satisfaction ‘should not be produced by inexact proofs, indefinite testimony, or indirect inferences’ or ‘circumstances pointing with a wavering finger to an affirmative conclusion’.<sup>3</sup>

[52] I have found each of the three allegations against Mr Mercer to be substantiated. Each is comfortably proved to the requisite civil standard of proof, applying the considerations in *Briginshaw*. Each was a serious matter involving deception and constituted a contravention of the ANZ’s Code of Conduct, which requires employees to work in a way that is ethical and professional, honest and transparent.<sup>4</sup>

[53] The call dumping involved Mr Mercer not doing his job yet giving the appearance that he was working as normal. The calls affected the bank’s records of his work and the appearance of his productivity. In addition, by not answering calls on 148 occasions, the bank’s customers went unserved. Mr Mercer had been warned about call dumping 18 months earlier. The staged telephone call represented to those around Mr Mercer, including his line manager, that there was substance to his suggestion that the dumped calls were attributable to a technical fault, when in fact this was not true. And the altered start times misrepresented the past, claiming time to have been worked which was not worked, and could not have been worked because Mr Mercer had not even arrived at the workplace at times when he claimed to have started work. Each of the proved allegations constitutes a valid reason for dismissal.

[54] I note that Mr Mercer made various submissions suggesting that the bank had some ulterior motive for dismissing him. He suggested that Ms Slevin did not like him. He said that his previous training responsibilities were taken away from him, and that newer staff members took over ‘complex matters’ for which he was usually responsible. He also said that Ms Slevin made changes to the CDD team to attempt to remove certain team members. However, Ms Slevin said, and I accept, that other than Mr Mercer, no members of the team were removed, and that Mr Mercer was not relegated to less important tasks. She also explained that she asked two team members to conduct the bulk of the training from December 2018 to June 2019 in order to ensure consistency, and that Mr Mercer, like other team members, had previously only conducted the training from time to time. Mr Mercer said that he was bullied by Mr Cook, however this claim was investigated by the bank. It found the claim to be unsubstantiated, as do I. None of Mr Mercer’s contentions about mistreatment by the bank, whether by Ms Slevin, Mr Cook, or anyone else, was supported by any compelling evidence.

[55] I do not consider that there is any basis to infer the presence of ulterior motives on the part of the bank. Instead, there is clear and convincing evidence that Mr Mercer dumped calls

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<sup>2</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at p 363

<sup>3</sup> *Ibid* per Dixon J at p 362, and Rich J at p350

<sup>4</sup> Witness statement of Maria Serrano, MS1

after having been warned not to do so, staged a telephone fault, and altered his start times without authority. These were the bank's reasons for dismissing Mr Mercer.

[56] Mr Mercer asked how the call dumping allegation could stand if the second allegation, by which he was said to have lied by asserting that there must have been technical faults at play, was found by the bank to be unsubstantiated. However, the bank simply did not consider it to be proved that Mr Mercer had been dishonest in raising the possibility of faults. This does not affect the legitimacy of the bank's conclusion that Mr Mercer had engaged in call dumping. In any event, it is for the Commission to determine whether the conduct in question occurred, and I have found that the conduct alleged in the first, third and fourth allegations did take place.

[57] In my opinion, each of the valid reasons would have been a sufficient basis to dismiss Mr Mercer. It is enough for the Commission to consider whether there is a single valid reason for dismissal. In this case there are three such reasons. It is of no consequence that a fourth allegation was raised and considered by the employer not to be substantiated.

***Notification of reasons for dismissal and opportunity to respond (ss 387(b) and (c))***

[58] In considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether an employee has been notified of the reasons for dismissal and afforded an opportunity to respond to any reason related to capacity or conduct.

[59] Mr Mercer was informed of the reasons for his dismissal at the meeting on 7 August 2019 at which his employment was terminated. He received particularised allegations of misconduct in writing and was invited to attend a meeting to discuss them. He attended a meeting on 6 August 2019 with representatives of the bank at which he provided his responses to the allegations. His responses were considered by ANZ prior to its decision to dismiss him. Mr Mercer was notified of the reasons for dismissal and afforded a reasonable opportunity to respond to them.

***Support person, warning about performance (ss 387(d) and (e))***

[60] The bank did not refuse to allow Mr Mercer to have a support person present to assist at any discussions relating to dismissal. In fact, Ms Serrano offered Mr Mercer the opportunity to have a support person present at the two meetings and Mr Mercer confirmed he was happy to proceed without one.

[61] If a dismissal relates to unsatisfactory performance, s 387 requires the Commission to consider whether the person has been warned about the unsatisfactory performance prior to dismissal. However, the valid reasons for dismissal I have found to exist in the present matter relate to conduct. In the circumstances it was not necessary for Mr Mercer to have been warned about the conduct for which he was dismissed.

***Size of the enterprise, human resources specialists etc. (ss 387(f) and (g))***

[62] The Commission is required to consider the degree to which the size of the employer's enterprise, and the degree to which the absence of dedicated human resources specialists or expertise in the enterprise, would be likely to impact on the procedures followed in effecting the dismissal (ss 387(f) and (g)).

[63] Plainly the company is a large organisation and has dedicated human resources specialists. However, these factors do not ‘raise the bar’ for a larger employer; rather, for smaller employers with little or no internal human resources capability, less might be expected in relation to procedural elements of a dismissal. In my view, these considerations do not carry weight in the analysis of whether the dismissal was unfair.

*Any other matters the Commission considers relevant (s 387(h))*

[64] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission is to take into account any other matters that it considers relevant. The proportionality of the dismissal to the conduct that is the subject of a valid reason is a matter to be considered in connection with s 387(h).

[65] Mr Mercer said that even if there was a valid reason for his dismissal, termination of employment was a disproportionate sanction to impose in relation to the conduct in question. I reject this submission. Each of the instances of misconduct was serious and a breach of the bank’s Code of Conduct. Call dumping had been the subject of an earlier warning. What is more, Mr Mercer did not acknowledge his misconduct, or express any remorse for or insight into his conduct. Dismissal was not a disproportionate response to the misconduct.

[66] Mr Mercer contended that his dismissal has had a significant effect on his personal and economic situation. He said that he had lost his sole source of income and would find it difficult to obtain suitable alternative employment after the dismissal. Mr Mercer said that he had a long history of employment at ANZ and had had a generally good record without incident save for the matters raised by the bank in 2017 and 2019, and that this should weigh in favour of a conclusion that his dismissal was unfair. I take these matters into account.

[67] Mr Mercer said that the procedure adopted by the bank in relation to the investigation of the allegations against him and in effectuating his dismissal were unfair. I disagree. The bank’s concerns about Mr Mercer’s conduct were carefully investigated. The allegations were clearly articulated. Mr Mercer had every opportunity to respond to them. He offered explanations that the bank considered, and rationally rejected. The process adopted by the bank was fair. The company reached a well-founded decision to dismiss him, which was proportionate to the conduct in question.

*Conclusion*

[68] Taking into account all of the circumstances and the matters in s 387, I consider that the dismissal of Mr Mercer was not harsh, unjust or unreasonable and that accordingly his dismissal was not unfair. Mr Mercer’s application for an unfair dismissal remedy is therefore dismissed.



DEPUTY PRESIDENT

*Appearances:*

*Mr S Mercer* for himself

*Mr M Minucci* of counsel for Australia and New Zealand Banking Group Limited

*Hearing details:*

2019

Melbourne

December 5

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