

[2020] FWC 3509 [Note: An appeal pursuant to s.604 (C2020/5768) was lodged against this decision - refer to Full Bench decision dated 16 September 2020 [\[2020\] FWCFB 4743](#)] for result of appeal.]



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Stanley Sully

v

CBMG North Pty Ltd

(U2019/13027)

DEPUTY PRESIDENT ASBURY

BRISBANE, 3 JULY 2020

Application for an unfair dismissal remedy.

[1] On 21 November 2019, Mr Stanley Sully (the Applicant) applied to the Fair Work Commission (the Commission) for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act) in respect of his employment by CBMG North Pty Ltd (the Respondent). The Respondent is in the business of selling motor vehicles and operates several sites across Brisbane.

[2] The Applicant worked for the Respondent from 8 November 2018 as a casual courtesy bus driver and internal delivery driver and was dismissed on 5 November 2019. The Applicant's duties as an internal delivery driver included transporting documents, parts, and mail between the Respondent's sites. This included 'books', a term which refers to user manuals for new vehicles which contain the keys for those vehicles. Other documents transported by the Applicant were customer applications for finance containing confidential financial information.

[3] The Applicant was dismissed for serious misconduct following an incident on 5 November 2019 when a Company vehicle he was driving was stolen from outside a house where the Applicant was residing while "housesitting". At the time the vehicle was stolen the Applicant had detoured during his delivery duties and had parked the vehicle at the house. The Applicant contends that his dismissal was unfair on the basis that it was disproportionate to his conduct. The Applicant seeks reinstatement.

[4] The matter was listed for a conciliation conference before a Fair Work Conciliator which did not resolve the dispute. The matter was then allocated to me for determination and Directions were issued for the filing of material. I decided to conduct a hearing on the basis that there were disputed issues of fact and I considered that this was the most appropriate way to resolve those issues, having regard to the views of the parties.

[5] Before considering whether the Applicant was unfairly dismissed it is necessary to deal with some preliminary matters. The application was made within the time required in s.394(2) of the Act. It is not in dispute that the Applicant is a person protected from unfair dismissal

consistent with s. 382 of the Act. The Respondent is not a small business employer and the dismissal was not a case of genuine redundancy.

[6] The matter was heard in Brisbane on 27 February 2020. At the hearing, Mr Sully represented himself. The Respondent is a member of the Motor Trades Association of Queensland, an organisation of employers and was represented by Ms Evangeline Kannis, Senior Workplace Relations Advisor. As provided in s. 596(4)(ii) permission was not required for the Respondent to be so represented.

[7] At the hearing, the Applicant gave evidence on his own behalf. To ensure that the Applicant was given an opportunity to present all relevant evidence, I allowed him to tender his outline of argument and statement of evidence on the basis that there was a degree of cross-over between those documents. I also allowed the Applicant to tender documents in a document list that he filed in the Commission.¹ Evidence for the Respondent was given by:

- Ms Carla Lewis, HR and Payroll Manager;²
- Mr Nicholas Finister-Hinton Service Manager;³ and
- Mr Craig Burgess, Managing Director.⁴

[8] Closing submissions were heard at a hearing on 1 April 2020.

LEGISLATIVE PROVISIONS CONCERNING UNFAIR DISMISSAL

[9] 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.”

[10] The employer bears the onus of establishing that there was a valid reason for a dismissal.⁵ A valid reason for dismissal is one that is “sound, defensible or well founded” and not “capricious, fanciful, spiteful or prejudiced.”⁶ The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,⁷ and the 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.⁸ The Commission is not limited to the reason given by the employer in considering whether there was a valid reason for the dismissal.⁹

[11] Where the reason for the dismissal is misconduct, the Commission must be objectively satisfied that the misconduct occurred. However, as Vice President Hatcher observed in *Bista v Glad Group Pty Ltd*¹⁰, the case law does not establish that a minor failing on the part of an employee could constitute a valid reason for dismissal simply because it was proven to have occurred. Dismissal on such a basis could not be sound, defensible or well founded.¹¹ His Honour also cited the majority judgement of Moore J in *Edwards v Giudice*¹² where it was held that:

“The reason would be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur or it did occur but did not justify termination. An employee may concede in arbitration that the conduct took place because, for example, it involved a trivial misdemeanour. In those circumstances the employee may elect to contest the termination in the arbitration on the basis that the conduct took place but it did not provide a valid reason and perhaps by relying on the other grounds in [the section].”¹³

[12] That judgement was relied on by Vice President Hatcher as authority for the proposition that, the consideration of whether there is a valid reason for dismissal requires, where the relevant conduct upon which the dismissal is proceeded is found to have occurred, an assessment of whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct.

[13] 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.¹⁴

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

EVIDENCE

Incident on 5 November 2019

[15] As part of his role as an internal delivery driver/courtesy bus driver, the Applicant was required to drive a Company vehicle – a Ford Utility – between its various premises including at Toowong and Bowen Hills. On 5 November 2019, the Applicant was driving the vehicle from Toowong to Bowen Hills and on his way decided to stop at a house he was “housesitting” at Bonython Street, Windsor. In his evidence to the Commission the Applicant said that he did not drive off route and that there was never a dedicated route ever explained or written down

anywhere and that he was never told he could not stop while he was driving.¹⁵ The Applicant also said that sometimes traffic conditions meant that he would take alternate routes to avoid congestion and that Windsor was not far off his normal route.

[16] The Applicant said that he did not go through Windsor on 5 November to avoid congestion, but rather, to pick up a pen from the house at Bonython Street.¹⁶ The Applicant said that he needed to pick up a pen from the house because the pen provided by the Respondent which he had with him in the vehicle, was unsuitable. In relation to the pen, the Applicant said that the pens provided by the Respondent were “two piece” pens and that they constantly got lost and that as he was driving he realised that the pen was not with the clipboard. The Applicant’s preferred pen is a “single piece with their own clip” and he decided to stop at the house to obtain such a pen.¹⁷

[17] The Applicant said in his statement to the Commission that when he got to the house he went inside, put the keys on the table downstairs, and went upstairs to find a pen. The Applicant said that within 5 – 7 minutes, he returned at approximately 12.36 pm, to find the vehicle gone. The Applicant gave the following evidence at the hearing:

“THE DEPUTY PRESIDENT: Yes, and what happened then?---Well, I've again alighted the vehicle. It has a private - what do you call it - a private gate, a personal gate I mean, yes, so I've alighted the vehicle with the keys in my hand, gone through the personal gate. There is a table downstairs - this is a two-storey house - I've put the keys on the table. I have then walked upstairs with my own keys, because they are two separate sets and I've gone into the property to look for the pens. Five minutes later, I've come back out to find the vehicle's gone.

Why is the address 1/22 Bonython Street if it's a house?---It's on a group title. It's a house, it's a detached house.

Right?---But it has two townhouses behind it.

All right. So you say you took the keys with you into the house and put them on the table?---That's correct.

So someone came into the house and took the keys?---Well, through the - yes, that's right, through the personal gate.”¹⁸

[18] The Applicant said that nothing else was taken from the house. The Applicant drove his own vehicle back to the Respondent’s premises at Bowen Hills, arriving at around 1.00 pm, and reported the theft of the vehicle to Mr Finister-Hinton. Tuesday 5 November 2019 was Melbourne Cup Day. At the request of Mr Finister-Hinton the Applicant completed a police report by telephone. The Applicant said that he went outside for few minutes and was called back by the Human Resources Manager and the Service Manager and was told that the matter was serious. He then left the premises. Later, that day the Applicant received an email advising that his employment had been terminated.

[19] Before leaving the Respondent’s premises on 5 November 2019, the Applicant completed two documents at the request of Mr Finister-Hinton: a damage report and an incident report. The Applicant said that he filled in the forms between 1.00 pm and 2.00 pm – prior to the start of the Melbourne Cup. The Applicant wrote the following statement on both forms in sections requesting a description of the incident:

“I returned from Mitsubishi Toowong at 12.30 pm 5/11/2019. I stopped in at my temporary address 1/22 Boynton Street Windsor. Parked in the driveway (with the keys in the ignition). I went into the property to retrieve an item. 5 minutes later I came out and the vehicle was gone.”

[20] The Applicant was shown the forms in cross-examination and agreed that he completed and signed them on 5 November and twice stated that he left the keys in the ignition of the vehicle.¹⁹ In response to a question about what he told the Police when he reported the incident, the Applicant said:

“To be honest I can’t recall. That’s why I’ve been trying to get the Police Report.”²⁰

[21] The Police Report was not in evidence. In his evidence to the Commission, the Applicant contended that the reports he completed on 5 November 2019 were incorrect, and that he did not leave the keys in the ignition of the vehicle but rather, took them inside the house and left them on a table in the hallway from which they were stolen. When asked why he had said in the reports that he had left the keys in the ignition, the Applicant said that he was in shock when he completed them. In support of his contention that he did not leave the keys in the ignition of the vehicle, the Applicant sent an email to Mr Finister-Hinton dated 8 November 2019 (three days after his dismissal) stating that:

“I note that the stop I made at 1/22 Bonython St Windsor on Tuesday 16th November (sic) was work related as I stopped to pick up a pen to fill out the log book. The pen that should remain in the vehicle was not there. Further, the keys were removed from the vehicle in the driveway and placed on a table downstairs at the property while I was attempting to find a pen. It has only been 3 days since the vehicle was stolen and there is a very good chance that it will be found soon. At no time was I informed that a stop of that nature was prohibited and the inference from Carla that my actions were ‘wilful and deliberate’ is plainly wrong. ...”²¹

[22] The Applicant also tendered an email sent to Ms Lewis at 4.33 pm on 5 November 2019 (the day of his dismissal) protesting his dismissal and stating:

“It was an unfortunate incident that happens too often. The police were in agreement. it was careless but you make it sound like I stole the vehicle. I am in shock over the theft and will do all I can to retrieve the vehicle.”

[23] The bundle of documents the Applicant filed in support of his application included an email he sent to a Police Officer at 10.21am on Thursday 21 November 2019 stating:

“Good morning Travis,
Stan Sully here.
Travis again thank you for your assistance in this ,matter.
I have already written to CBMG (ex employer) about a detail that I want to correct for the record.
In the police report I think I stated that I left the keys in the ignition of the vehicle in the driveway the day that it was stolen.
I was in shock at the time and had people talking to me in all directions. In fact , on recollection ,I removed the keys and placed them downstairs on a table at the property at Windsor and then went upstairs to find items (pens) required for filling in the log book.
I wanted to correct this as it is a serious matter.”

[24] The Applicant did not provide any explanation as to why it took until 21 November 2019 to contact the police to advise them that he now recalled the keys were on a table located on the premises. The Applicant also said in his oral evidence that he was unaware whether the persons charged with the theft of the vehicle were also facing charges for unlawfully entering the property, and conceded that he had not mentioned to the owners of the premises that the incident had occurred.²²

[25] Mr Finister-Hinton's evidence was that on 5 November 2019, the Applicant walked into his office and did not "look his normal self, as though something had gone wrong during the course of the morning". Mr Finister-Hinton said that the Applicant proceeded to advise him that he had stopped at the temporary address at Windsor where he was house-sitting and had left the work vehicle unsecured with the keys in the ignition in the driveway of the residence. Mr Finister-Hinton requested the Applicant make a police report and left the office while the Applicant did this.

[26] Mr Finister-Hinton and Ms Lewis then met with the Applicant to discuss the incident. Mr Finister-Hinton's evidence in the hearing was as follows:

"MS KANNIS: I wanted to go over the issue in point number 4 where Mr Sully proceeded to inform you that he'd made a stop at a temporary address and where he then goes - where then you go on to say that he advised you that the vehicle had been left unsecured, with keys in the ignition?---Correct.

It seems it's a very pertinent point to the case in this particular - in this application. So your recollection of that conversation is very, very clear?---It is very clear. I remember looking at my watch when Stan walked into my office, and obviously he looked like something had gone wrong. During that period of time he looked very flushed, a bit sweaty, not his normal self.

And how did that proceed?---And when I asked what was wrong he indicated the delivery ute had been stolen, and I said, "Well, have you informed the police?" "No." I said, "Well, okay, you need to run me through what happened", and that's when he said - first words were that he'd left the keys in the ignition.

Did he explain at all why he was at that particular property, being off route?---No. He just said he'd made a detour on the way back from Toowong back to Bowen Hills to - I believe what he said, get a pen. In doing so, when he exited the vehicle he left the keys in the ignition, the door open, and he said he went in the house for five minutes, came back out and the car was gone.

THE DEPUTY PRESIDENT: Sorry, door open?---Yes.

So you say he also said, "I left the keys in the ignition and the door open"?---That's my recollection, yes.

Did he mean - did he say "unlocked" or "open"?---Just open. Those were the words.

...

And in terms of your - the way that you perceived Mr Sully on that day was there anything in your mind that would make you doubt the accuracy of his damage report form or the insurance incident report form?---No.

THE DEPUTY PRESIDENT: So let's be clear. Mr Sully says he was in shock. He was really shocked and upset about it and that caused him to make statements that weren't correct about the keys being left in the ignition and your evidence - do you want to comment about that proposition?---I think you'd know whether you left the keys in the car or not.

And you're very clear he said it?---Absolutely. Very clear."²³

[27] The Applicant did not directly challenge Mr Finister-Hinton's evidence, but maintained that he did not admit to having left the door open and the vehicle unlocked with the keys in the ignition.²⁴ The Applicant accepted that his job description states that he was required to take reasonable care to secure things in the vehicle.²⁵ Ms Lewis stated in her evidence that the Applicant said he left the keys of the vehicle in the ignition and the vehicle "unsecured". Ms Lewis also said that she clarified with the Applicant that the keys were in the ignition and that the engine was not on. In relation to the Applicant's email of 8 November stating that the keys were not left in the ignition, Ms Lewis said that the Applicant had still failed to confirm that the vehicle was secured and locked. Under cross-examination the Applicant accepted that he was

asked by Ms Lewis whether the engine of the vehicle was left running and that he stated that he had not left the engine running.

Contents of the vehicle

[28] There was significant dispute between the parties as to the contents of the vehicle at the time it was stolen. After the theft on 5 November, Mr Sully wrote down a list of what he recalled was in the vehicle at the time and provided it to the Respondent. The Respondent tendered the list in its evidence.²⁶ The list was: two ratchet tiedown straps, one pair of gloves, one mobile phone, three mail bags including mail for 5 November, one special delivery box for Scenic Motors, one tarpaulin, and one book from Rocklea. Mr Sully explained that the “book” referred to the keys and manual to vehicles which were kept at Toowong. CBMG did not provide documentary evidence in the form of a list of the contents of the vehicle and the mail bags. Mr Sully accepted in response to questions from me that there could have been books (manuals for new vehicles which include the keys) and applications for finance containing confidential information about the Respondent’s customers.²⁷

[29] In his oral evidence to the Commission, Mr Burgess said that the vehicle was written off and was not returned, and that the deal packs and finance documentation in the vehicle were never recovered. In response to questions from me, Mr Burgess said that the vehicle was recovered by the police and the insurance company decided to write the vehicle off, and he did not think CBMG had physical possession of the vehicle after the theft.

[30] Also in response to questions from me, Mr Burgess said that the deal packs in the vehicle were all the private and confidential contracts of purchases of motor vehicles between the Respondent and clients who bought those vehicles which would have had details about their income and their bank accounts. Mr Burgess said that log books for other motor vehicles and three spare keys also went missing, which was a great concern because once somebody has a key the Respondent would have to totally recode the car and make new keys so that the missing key would not become usable. Mr Burgess said security around keys was so important that for every dealership at every premises there are key safes because all the cars could not be put away at night.

[31] In relation to why he decided to dismiss the Applicant, Mr Burgess had the following exchange with me:

“THE DEPUTY PRESIDENT: Okay, thanks. So, Mr Burgess, your decision was made on the basis of your assessment about what Mr Hinton told you?---Correct.

Yes, so you didn't speak directly to Mr Sully, you just considered what Mr Hinton told you?---That's correct.

And your understanding was that at the very least there were confidential documents in that vehicle?---That's correct, yes. There were other bits and pieces, but part of it was confidential documentation. That's accurate.

Pertaining to financial information about customers?---Yes.

You also had regard to the fact that the vehicle hadn't been secured, and in your view the key was in the ignition, as admitted by Mr Sully?---That's correct.”²⁸

[32] Mr Burgess also accepted that the Applicant stopping at his residence while undertaking deliveries was not the reason for his dismissal. The Applicant was dismissed because he left the vehicle in circumstances where it could be stolen and it contained confidential information about customers, vehicle manuals and keys.²⁹

[33] Mr Finister-Hinton said that it was usual for Mr Sully to be transporting a mail bag from each of the three locations he was driving between, and that these mail bags generally contain finance documents, deal packs, owners' manuals and keys. Mr Finister-Hinton said that when the vehicle was reported as stolen, he rang each site to ascertain what was in the bags and was quite sure that there were keys in the bags because the Respondent did not have keys for a number of cars that were due to be delivered. Mr Finister-Hinton also identified the list of items in the vehicle that he asked the Applicant to write down.³⁰

[34] The Applicant submitted that dismissal was a disproportionate response to his conduct and that other employees who engage in more serious misconduct were not dismissed. This misconduct, set out below, was a failure to register the vehicles that the Applicant was required to drive resulting in the registrations expiring, and an alleged sexual assault perpetrated against the Applicant by another employee (also dealt with below).

Allegations by the Applicant of differential treatment

[35] The Applicant alleged that his dismissal was unfair on the basis that the conduct he engaged in was not sufficiently serious to justify dismissal. The Applicant also alleged that other employees had committed offences as serious as his and were not dismissed. In this regard, the Applicant pointed to a failure of the Respondent to renew the registration on the courtesy bus and utility vehicle, resulting in him driving the vehicles for 12 days and 66 days respectively, in circumstances where the registration of those vehicles was not current. Mr Sully tendered an infringement notice he was given by Queensland Police while driving the utility on 3 June 2019.³¹

[36] The alleged offender cited in the infringement notice is the Respondent and the notice indicates that the offence is that the registration of the vehicle expired on 29 March 2019 – 66 days before the notice was issued.

[37] Mr Finister-Hinton was asked about the registration of the vehicles at the hearing and said that he was unaware that the vehicles were not registered when the infringement notice was issued. Mr Finister-Hinton said that the failure to register the vehicles was an administrative oversight and there was not a single person who could be held responsible. Mr Finister-Hinton said that once he became aware the vehicles were unregistered he registered them and had set a reminder in his calendar every year to renew the registration. It is also the view of Mr Finister-Hinton that the Applicant's conduct leading to the theft of the vehicle was conduct of a different kind.³²

[38] The Applicant also made some allegations about compliance with registration requirements by the Respondent. Mr Finister-Hinton said that when the lapsed registration on the vehicles was renewed there was no requirement to obtain a safety certificate or a roadworthy certificate because the ownership of the vehicle did not change.

[39] I also allowed the Applicant to recall Mr Burgess to cross-examine him on an incident involving a manager who had lost his licence as a result of driving under the influence of

alcohol. I made a suppression order under s. 594 of the Act on the basis that it was desirable to do so because of the confidential nature of the evidence concerning the personal circumstances of the employee concerned. Mr Burgess said that this was an unrelated incident and there was no basis for comparison with the conduct engaged in by the Applicant. That employee had not been required to drive a vehicle in the course of his employment and the loss of his licence was not considered a matter which required discipline and furthermore other steps were taken to the by the employee to the satisfaction of Mr Burgess which resolved the issue.

Other relevant matters

[40] The Respondent tendered evidence to establish that in the period of just under one year that the Applicant had been employed, he had accrued 9 demerit points within a six month period. In this regard the Respondent tendered five driving infringement notices incurred by the Applicant, in the period from 12 December 2018 to 12 June 2019. Four of those notices were for speeding and one for failing to stop at a red light. One of the speeding offences was for traveling at 72km per hour in a 50km per hour zone while the remainder were for speeding at 7km to 10km per hour over the limit. While the Respondent did not rely on these offences as a reason for the Applicant's dismissal, it was submitted that it is a reasonable assumption that any future traffic infringements (specifically speeding) would result in double demerit points within a 12 month period, and that if a person receives 12 points or more within a three-year period, the license would be suspended.

[41] The Applicant asserts that he had a meeting with Ms Lewis and Mr Finister-Hinton on 16 April 2019 about workplace health and safety concerns and his alleged sexual assault. The Applicant filed an email sent to Mr Hinton dated 4 April 2019 with the subject line "employment" making a number of complaints about safety matters including manual handling requirements and seeking an increase to his rate of pay.

[42] The Applicant also gave evidence about raising other issues in relation to his employment. The Applicant asserted that he had been underpaid his wages but agreed that he did not raise this issue prior to his dismissal. A further issue raised by the Applicant as being relevant to his dismissal, was an alleged sexual assault suffered by him in the workplace in or around late August or early September.³³ The incident occurred when the Applicant attended the workplace on a Saturday when he was not working. The Applicant said that a colleague put a rolled up catalogue between the Applicant's buttocks and later hit the Applicant in the testicles from the side with his hand.³⁴

[43] The Applicant said that he complained to Ms Lewis about the incident and expected that he would receive an acknowledgment that it had occurred, and a statement from the colleague that they would never do something like that again. The Applicant was not satisfied with the outcome of the investigation. In response to a question about what he asserted that the incident had to do with his dismissal, the Applicant said that he didn't know that, but that there were also workplace health and safety issues that were not adequately resolved, and may have resulted in the Applicant being seen as a trouble maker, and then along came the incident with the vehicle, and the Respondent "got rid of him".³⁵

Decision to terminate the Applicant's employment

[44] A meeting was held at approximately 1.15pm on 5 November 2019 after the Applicant had made his police report. The meeting was attended by the Applicant, Ms Lewis and Mr

Finister-Hinton. Ms Lewis' evidence is that she requested Mr Sully to complete the Company Damage Report Form and a Company Incident Report Form. Ms Lewis states she asked the Applicant to explain the events leading up to the theft of the vehicle, and that the Applicant had said he had parked the ute with the keys in the ignition in the driveway of the premises and the vehicle was unlocked, and when he returned within five minutes the vehicle was gone. The Applicant clarified that the keys were in the ignition but the engine was not on.

[45] Ms Lewis said that the Applicant also acknowledged and accepted that he had used the vehicle for personal reasons which were not part of his position duties. Ms Lewis said that she advised the Applicant, together with Mr Finister-Hinton, that he may be invoiced directly for the insurance excess in accordance with company policy. Ms Lewis' observation was that the Applicant did not react, was unapologetic and did not appear to be in shock.

[46] It is Ms Lewis' evidence that the Applicant was advised the matter was serious and that items contained in the vehicle were highly confidential, and that the Applicant would be stood down pending an investigation and would be contacted later in the day to advise as to a decision regarding his future employment, including that his employment could be terminated.

[47] The Applicant left the Respondent's premises after the running of the Melbourne Cup, which took place at 2.00 pm (Brisbane time) on 5 November 2019.

[48] Mr Finister-Hinton then contacted Mr Burgess and informed him of the Applicant's account of events; that the Applicant had accepted that he had used the ute for personal use without prior approval during work hours; and that the Applicant did not appear to show any remorse and had not apologised. Mr Finister-Hinton also said he told Mr Burgess about the contents of the ute and briefly mentioned that the Applicant had some driving infringements. Mr Burgess then advised Mr Finister-Hinton that he had decided to terminate the Applicant's employment immediately without notice.

[49] Ms Lewis stated that she attempted to contact the Applicant twice on his mobile telephone to "discuss the outcome of the investigation and the decision to terminate his employment". The Applicant did not answer the phone and Ms Lewis left a voicemail message on the first attempt, and there was no answer by the Applicant to the second attempt. Ms Lewis then contacted the Applicant's father to request he pass on a message to the Applicant, and that the Applicant's father subsequently told her he had emailed the Applicant asking him to call Ms Lewis.

[50] The Applicant's evidence is that his mobile phone was in the vehicle when it was stolen, and that the Respondent knew this because the Applicant had included his mobile phone on the list of items stolen with the vehicle. At the hearing, Ms Lewis said that while the list did state a mobile phone, it was never explicitly said that it was the Applicant's mobile phone.³⁶

[51] At 3.37 pm on 5 November 2019 Ms Lewis sent the Applicant an email in the following terms:

"Hi Stan,

I have been trying to contact you on your mobile number to advise the outcome as discussed during the meeting with Nick Hinton and myself today.

I have also contacted your next of kin and requested Peter to pass on a message to contact me as soon as possible.

Attached is the letter advising the outcome and termination of employment- effective immediately.

A hard copy of the letter has also been posted to the address provided to us as [Mr Sully's address].

If you require further information, please feel free to contact me on the below details.

Regards,
Carla Lewis
Human Resources and Payroll Manager"

[52] Attached to the email was a letter advising the Applicant that his employment was terminated for serious misconduct. That letter was in the following terms:

"Dear Stanley,

Termination of your employment

I am writing to you about the termination of your employment with CBMG North P/L effective immediately.

I refer to our meeting on 5th November 2019 which was attended by you, Nick Hinton Service Manager & myself Carla Lewis HR Manager. During the meeting we discussed the circumstances regarding the theft of the vehicle and you confirmed that the activity was not work related and had not obtained permission from your manager.

As discussed, the outcome of the meeting is that your conduct during the incident:

- was wilful and deliberate behaviour by you that is inconsistent with the continuation of your contract of employment.

We consider that your actions constitute serious misconduct warranting summary dismissal.

You will also be paid any outstanding pay up to and including your last day of employment.

We withhold our civil rights to claim the excess from any cost of insurance that could amount to a significant amount of money if the vehicle is not returned.

Yours sincerely,
Carla Lewis
HR & Payroll Manager"

Other employment

[53] Mr Sully gave evidence that he had not obtained other employment but had applied for unemployment benefits as of 26 February, some 13 weeks after he was dismissed. Mr Sully said that he had a small handyman business but had only done one job, earning \$700.³⁷ Mr Sully said he had made two applications for bus driving positions and that one had been rejected at the time of the hearing.³⁸ Mr Sully said the reason he had only applied for the two jobs was he had been suffering from depression because of the dismissal but he did not have any medical evidence to say that his condition prevented him from working.³⁹

SUBMISSIONS

[54] The Applicant said that his dismissal was harsh, unjust and unreasonable and disproportionate to his conduct. In this regard the Applicant said that on many occasions vehicles were left unlocked at the Toowong site with keys in them, as he had to move them to access the driveway into the parts division and regularly found keys in vehicles. The Applicant also said that nowhere in company policy does it state that approval is required to drive the vehicle to his private residence, and it was never mentioned verbally to him. The Applicant also alleged that his dismissal related to safety matters he had reported and a complaint he made about being sexually assaulted. Further the Applicant said that other employees of the Respondent had engaged in more serious misconduct than that alleged against him, and those employees were not dismissed.

[55] The Respondent submitted that the decision by Mr Sully to walk away and leave the vehicle unsecured as he went into the house at the time of the theft was a wilful and deliberate action which could not be condoned. CBMG rejected Mr Sully's explanation that he went to the house to find a pen to complete the log books and said this excuse was recently made. The Respondent also submitted that the Applicant had previously been instructed to complete the log book in the vehicle and that if he had done so, he would have noticed the missing pen before on the first leg of his run. The Respondent further submitted that the Applicant had informed other employees that he was moving house on the day the vehicle was stolen. I note that these matters were not put to the Applicant in cross-examination and that limited weight can be placed on them.

CONSIDERATION

s.387(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)

[56] I am satisfied and find that there was a valid reason for the Applicant's dismissal. In this regard, I accept – despite the lack of specific evidence about the contents of the stolen vehicle and in particular the contents of the mail bags – that the Applicant was carrying manuals and keys for vehicles which would have been inconvenient to replace. Further, I am satisfied that the Applicant was carrying confidential financial information relating to the Respondent's customers and that this was an extremely serious matter. I am satisfied that the Applicant knew that these were the items that he was transporting in the vehicle and that he was required to take reasonable care of those items and to ensure that they were safely transported.

[57] I have also concluded that it is more probable than not that the Applicant left the keys of the vehicle in the ignition when he went into the house at Bonython Street, and that this directly resulted in the vehicle being stolen. I have further concluded that the Applicant was not truthful when he changed his version of events and maintained that he took the keys inside with him and left them on a table.

[58] I did not find the Applicant's evidence about why he changed his version of events to be credible. The Applicant wrote and signed two contemporaneous reports where he stated that he left the keys in the ignition of the vehicle. Mr Finister-Hinton and Ms Lewis confirm that the Applicant said that this was the case in the meeting on 5 November 2019. Further, in the email sent to Ms Lewis by the Applicant on 5 November, which was the Applicant's first communication with the Respondent following the dismissal, the Applicant did not seek to

withdraw his earlier statements about leaving the keys in the ignition of the vehicle. Instead, the Applicant waited until 8 November to withdraw this statement. Further, the Applicant waited until 21 November – the day that he filed his unfair dismissal application – to email the Police officer to whom he had made the original complaint and withdraw his statement that he had left the keys in the ignition of the vehicle.

[59] After considering the Applicant’s contemporaneous statements about this matter, his subsequent denials and his oral evidence, I find it more probable than not that he did leave the keys in the ignition of the vehicle and that this increased the seriousness of his conduct as did his subsequent attempts to change his story on this point.

[60] The Applicant’s conduct was careless and negligent and exposed the Respondent to damage with its customers by compromising their private financial information. The Applicant knew the sensitivity of the material he was carrying in the vehicle and should not have left it in a driveway with the keys in the ignition. I am also of the view that although it was not relied on as a reason for dismissal, the Applicant’s driving record, in combination with the theft of the vehicle was a valid reason for dismissal.

(b) whether the person was notified of that reason

[61] Section 387(b) of the Act is included is part of a statutory framework by which the Commission is required to consider whether the dismissal of an employee is attended with substantive and procedural fairness. An important aspect of procedural fairness is that the reason for an employee’s dismissal is notified to the employee before the decision to dismiss the employee is taken. The plain meaning of the term “notified” is that information is provided in a formal manner. Notification of the reason for dismissal informs the subsequent matters required to be considered by the Commission in ss. 387(c) and (d) of the Act. As a Full Bench of the Commission observed in *Crozier v Palazzo Corporation Pty Ltd*:⁴⁰

“As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify the employee and give them an opportunity to respond after the decision to terminate their employment.”

[62] Sections 170CG(3)(b) and (c) of the former Workplace Relations Act were in similar terms to the present sections 387(c) and (d) of the present Act and respectively provided that for the purposes of arbitrating an application alleging that a dismissal was unfair the Commission must have regard to whether the employee was notified of a reason for termination of employment related to capacity or conduct and whether the employee was given an opportunity to respond to any such reason. As the Full Bench held in *Crozier*, ss. 170CG(3)(b) and (c) of the former Act were clearly related to the concept of procedural fairness.⁴¹ The same can be said in relation to sections 387(c) and (d) of the current Act.

[63] The Applicant was spoken to regarding the theft at a meeting on 5 November 2019 immediately following the theft of the vehicle and was advised he would be stood down pending the outcome of an investigation into the theft. The Applicant was advised that his employment may be terminated and that CBMG would contact him that afternoon after a decision had been made by Mr Burgess.

[64] The Applicant was only notified of the reasons for the termination of his employment in the letter sent by Ms Lewis advising him that his employment had been terminated. While the Applicant was generally aware of the subject matter of the reasons for dismissal, he was not notified of conclusions that had been drawn about his responses until he received the dismissal letter. Further, the letter setting out those reasons did not include a reference to having left the keys in the ignition of the car.

[65] It is not surprising that Ms Lewis' attempts to contact the Applicant on his mobile telephone to discuss the outcome of the investigation and the decision to terminate his employment, were unsuccessful, given the Applicant's mobile telephone was in the stolen vehicle.

[66] I do not accept Ms Lewis' evidence that she was unaware of this because the description of the mobile phone on the list of stolen items did not specifically state that the mobile telephone belonged to the Applicant. Further, the Applicant states that he told Ms Lewis and Mr Finister-Hinton that his mobile telephone was stolen with the vehicle.

[67] The Applicant was therefore not notified of the reason for his dismissal before the decision to dismiss him was made.

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[68] It is axiomatic that 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.

[69] The Respondent submits that Ms Lewis attempted to contact the Applicant by telephone on 5 November to discuss the outcome of its investigation and the decision to terminate his employment, and that he did not answer her call. The Respondent also emailed the Applicant's father who was his nominated next of kin, requesting that he advise the Applicant to make contact. Further, the Respondent said that in the termination email, the Applicant was offered an opportunity to make contact and discuss the situation.

[70] I do not accept that the Applicant was given a reasonable opportunity to respond to the allegations in relation to the termination of his employment. It is clear from the Respondent's evidence that the decision to dismiss the Applicant had been made and effected, before he was offered an opportunity to discuss the matter. Even if Ms Lewis had made contact with the Applicant before sending him the termination letter, it is clear that the purpose of the discussion would simply have been to inform the Applicant that his employment had been terminated rather than to provide him with an opportunity to respond to allegations before the decision to terminate was made.

[71] While I accept that there was some discussion before the Applicant was sent home, that discussion mostly involved questioning the Applicant and requiring him to complete reports rather than Mr Sully said that as his phone was in the vehicle when it was stolen, he was not able to receive the call. The Respondent made the decision to dismiss the Applicant in a 90 minute window after the running of the Melbourne Cup. The decision was made in circumstances where the Applicant had no opportunity to respond to the reasons for his

dismissal, because the only mechanism by which the Respondent chose to notify him of the reason, was a mobile telephone, which Ms Lewis and Mr Finister-Hinton knew was in a stolen vehicle.

(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

[72] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. This does not mean there is a requirement for an employee to be offered a support person by an employer – rather, there cannot be an unreasonable refusal where an employee requests a support person.

[73] There is no evidence that the Applicant requested a support person to be present at the meeting to deal with his potential dismissal on 5 December 2019. As a result, I am satisfied there was no unreasonable refusal on behalf of Respondent to allow the Applicant to have a support person present at that meeting.

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal

[74] The reason for the dismissal related to the theft of the vehicle and there was no unsatisfactory performance in this case. I do not consider this factor is relevant in this matter.

(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

[75] The Respondent has 192 employees within 7 sites spread over 3 states. No evidence was led, or submissions made, as to any impact the size of the Respondent’s enterprise would have had on the procedures followed in effecting the dismissal. I consider this a neutral factor.

(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

[76] Ms Carla Lewis was the Human Resource and Payroll Manager on site. No submissions were made as to any broader human resource management experience existed within the business. There was also no evidence that Ms Lewis lacked experience or expertise. I consider this a neutral factor.

(h) any other matters that the FWC considers relevant

[77] As Vice President Lawler observed in *Sexton v Pacific National (ACT) Pty Ltd*, the Commission should approach with caution claims of differential treatment in other cases, and should be satisfied that cases advanced as comparators, are in truth, properly comparable. In particular, the Commission must ensure that it is comparing “apples with apples”.⁴²

[78] I do not accept that the matters involving other employees raised by the Applicant are proper comparators with the conduct he engaged in. In this regard, I accept that the lapsed registration of the vehicles was an administrative oversight which could not be visited on an

individual and that the matter was rectified when it was brought to the attention of Mr Finister-Hinton. The fact that another employee was charged with driving under the influence of alcohol and lost his licence is also not a reasonable basis for excusing the Applicant's conduct, in circumstances where I am satisfied that the relevant employee was not required to drive in the course of his employment and that there were particular circumstances which the Respondent accepted as mitigating that conduct.

[79] In the present case, the Applicant's conduct went beyond an oversight and was negligent. The Applicant's conduct also had significant implications for the Respondent and the financial security of its customers. I do not accept that the Respondent took an opportunity to dismiss the Applicant because he had made a complaint alleging sexual assault or had raised safety issues. By 12 June 2019, the Applicant had been issued with five infringement notices, which could have justified his dismissal if the Respondent was motivated to exit him from its employment as a result of the safety issues being raised, which were proximate with the infringement notice.

[80] While there was some procedural unfairness with respect to the manner in which the dismissal was effected, particularly the failure to afford a proper opportunity for the Applicant to respond to the allegations, I do not accept that this was of such significance that the provision of an opportunity would have resulted in the Applicant remaining in employment. In my view the Applicant's entirely unconvincing attempts to change his story about the keys of the vehicle being left in the ignition, would also not have resulted in any change to the outcome. It is also the case that the Applicant was a casual employee and the Respondent was not obligated to pay him or provide him with work while it gave him such an opportunity. As a result, delay in the dismissal to provide the Applicant with a further opportunity to respond would not have ensured that the Applicant was paid during such period, and would not have changed the outcome.

CONCLUSION

[81] For these reasons I find that the Applicant's dismissal was not unfair. Having considered the matters in s. 387, I am satisfied that on balance, the dismissal was not harsh, unjust or unreasonable. Accordingly, I have decided to dismiss the application in U2019/13027. An Order to that effect will issue with this Decision.



DEPUTY PRESIDENT

Appearances:

Mr S Sully on his own behalf.

Ms E Kannis of the Motor Trades Association of Queensland for the Respondent.

Hearing details:

27 February and 1 April.

2020.

Brisbane.

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<PR720730>

¹ Exhibit A1 – Applicant’s statement of evidence; Exhibit A2 – Applicant’s outline of argument.

² Exhibit R1 – Statutory Declaration of Carla Lewis dated 11/2/20; Exhibit R2 Statutory Declaration of Carla Lewis dated 20/2/20.

³ Exhibit R4 Statutory Declaration of Nicholas Finister-Hinton

⁴ Exhibit R3 Statutory Declaration of Craig Burgess.

⁵ *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.

⁶ *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

⁷ *Rode v Burwood Mitsubishi* Print R4471 at [90] per Ross VP, Polites SDP, Foggo C.

⁸ *Miller v University of NSW* [2003] FCAFC 180 at pn 13, 14 August 2003, per Gray J.

⁹ *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.

¹⁰ [2016] FWC 3009.

¹¹ *Ibid* at [37].

¹² (1999) 94 FCR 561.

¹³ *Ibid* at 572.

¹⁴ *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.

¹⁵ Transcript at PN113 – 115

¹⁶ Transcript at PN174 – 178

¹⁷ Transcript at PN128.

¹⁸ Transcript at PN130 – 134

¹⁹ Transcript PN236 – 238, 279 – 280.

²⁰ Transcript PN282.

²¹ Exhibit A8, Email dated 8 November 2019

²² Transcript PN136 – 139.

²³ PN675 – 686

²⁴ PN745 – 746

²⁵ PN749

²⁶ Exhibit R6.

²⁷ Transcript at PN401

²⁸ PN600 – 604

²⁹ PN611 – 616

³⁰ Transcript PN707 – 714, Exhibit R6.

³¹ Exhibit A6.

³² PN 757 – 761

³³ Transcript PN290.

³⁴ Transcript PN303 -304.

³⁵ Transcript at PN312,

³⁶ Transcript PN562.

³⁷ Transcript at PN151

³⁸ Transcript at PN152

³⁹ Transcript at PN157

⁴⁰ (2000) 98 IR 151 at [73].

⁴¹ Ibid at 151 para [70].

⁴² PR931440 at [36].