DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Stephen Quigley
v
Belfast Sinks.com.au Pty Ltd
(U2019/3527)

DEPUTY PRESIDENT BEAUMONT PERTH, 8 JANUARY 2020

Application for an unfair dismissal remedy

[1] On 28 March 2018, Mr Quigley made an application to the Fair Work Commission (**Commission**) under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**) for a remedy in respect of his dismissal (the **Application**).

[2] It is observed that by the time the matter proceeded to hearing, over six months had passed since the Application was made. This delay arose because of the poor health of Mr Shaw, Director of the employer, Belfast Sinks.com.au Pty Ltd (**Belfast Sinks**). However, by late December 2019, Mr Shaw was fit to participate in the hearing.

[3] It was uncontentious that at the relevant time Belfast Sinks was a small business employer. It asserted it had complied with the Small Business Fair Dismissal Code (the **Code**) and therefore objected to the Application.

[4] For reasons that will become clear, I am not satisfied Belfast Sinks complied with the Code, and, therefore, I was obliged to consider whether Mr Quigley's dismissal was unfair. Having taken into account each of the matters specified in s 387 of the Act, I have concluded Mr Quigley's dismissal was unjust, unreasonable, and harsh. Belfast Sinks is therefore ordered to pay to Mr Quigley an amount of $5895.48. The compensation is to be paid within 14 days from the date of the accompanying order[1] (as issued simultaneously with this decision).

[5] My reasons for the decision follow.

Background

[6] Mr Quigley commenced employment with Belfast Sinks on 6 December 2017 as the Business Unit Sales Manager.[2] He states he was provided with an employment contract on 19 December 2018, and while Mr Shaw drew attention to the point that as Director he had not

[1] PR715711.

[2] Witness Statement of Stephen Quigley (**Quigley Statement**).

signed the employment contract, it was conceded a representative of Belfast Sinks had. I do not consider that anything turns on this point.

[7] Mr Quigley worked on a full-time basis. It appeared from the evidence that his hours of work were generally 7.30am – 3.30pm/4.00pm, Monday to Friday. Mr Quigley attended the work premises of Belfast Sinks to perform his duties.

[8] According to Mr Quigley, on 8 February 2019, he sent an email to Mr Shaw requesting a block of four days holiday from 5 to 8 March 2019, to coincide with pre-booked accommodation in Yalingup, a coastal rural community in Western Australia.[3] The request covered additional days and noted that Mr Quigley's parents were visiting from overseas. Mr Quigley stated that he spoke to Mr Shaw later that day about the request and, while Mr Shaw acknowledged it, Mr Shaw noted he had not yet read the email thoroughly.[4]

[9] Mr Shaw gave evidence that initially Mr Quigley had requested a period of annual leave between 1 March 2019 and 10 March 2019.[5] The request was later reduced to 5 to 8 March 2019 but, because there was a public holiday, it meant that Mr Quigley would be away from work for five days.[6]

[10] On 18 February 2019, there was email correspondence between Mr Quigley and Mr Shaw about the leave request.[7] Included in the first email from Mr Shaw to Mr Quigley was 'Amanda' (Ms Vickers), a Manager at Belfast Sinks. Sent at 9:02pm, Mr Shaw outlined in the email that having received holiday requests from both Mr Quigley and Ms Vickers, no holiday requests had been approved 'at this stage'.[8] Mr Shaw noted that he was awaiting a conversation with both Mr Quigley and Ms Vickers about who wanted what leave and when, and he observed that while working in a small business had its benefits, it also had its downsides.[9] Mr Shaw detailed issues percolating in the business, including a decreasing staff count and stated that having a 'one man band for the most part of March is not something the business can sustain presently'.[10] Mr Shaw observed that it was not sustainable, realistic or fair to have a week off with the present staffing and asked the email recipients to look at long weekends or half weeks.[11]

[11] Mr Quigley responded on 19 February 2019 by email, time stamped at 9:11am. The email whilst acknowledging that Mr Shaw had raised '[F]air points' that were 'fully appreciated' stated, 'I need 5th, 6th, 7th, 8th March and also 15th March on it's [sic] own. I cannot be flexible on these days. I can bring my laptop down south and log in from a café if something needs attention…'. Mr Quigley went on to express that 'the rarity of my parents [sic] visit cannot be understated'. Mr Shaw responded by email to Mr Quigley, noting his request was not 'in line with the parameters stated. At this stage I can not [sic] approve for the reasons stated inn [sic] prior e-mail'.

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[3] Ibid.

[4] Ibid.

[5] Employer Response Form F3.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Mr Quigley gave evidence that on 19 February 2019, he spoke to Mr Shaw on the phone about the leave request. It should be said that during this period Mr Shaw purported to be resident in a Middle Eastern country having recently had back surgery overseas. Mr Quigley stated that during the phone call he informed Mr Shaw that his hands were tied and that his absence would not impact the business as Mr Shaw had suggested. Mr Quigley's evidence was that Mr Shaw threatened him with an ultimatum stating that if Mr Quigley did not agree to take the leave on Mr Shaw's terms only, then he expected Mr Quigley to hand in his notice. Mr Quigley stated that he hung up the phone on Mr Shaw.

[13] Mr Quigley stated that Mr Shaw called him back immediately and 'scolded me for hanging up' on him and 'told me never to do so again'.[12] In response, Mr Quigley said to Mr Shaw that he 'thought his treatment was unacceptable and I did not expect or deserve such treatment and said that I had a lot of love for the business and for him and put a lot of effort in at work, and if he expected me to continue such efforts then I did not expect such treatment'.[13]

[14] Having decided that he did not wish to talk to Mr Shaw further in case he again said something he regretted, Mr Quigley stated that he informed Mr Shaw he was going to hang up the phone with the intention of speaking on another day under calmer circumstances.[14] Post phone call, Mr Quigley went into the warehouse and explained to his colleague, Mr Domingue, what had just happened.[15] Mr Quigley stated that he essentially 'poured his guts out' to Mr Domingue.

[15] Mr Domingue gave evidence that he had heard Mr Quigley talking really loudly on the phone and then Mr Quigley approached Mr Domingue exclaiming he was really 'Piss [sic] off i [sic] want to leave right now and stop working'. Mr Domingue gave evidence that Mr Quigley was very upset and both he and Ms Vickers told him to calm down because there were customers.[16]

[16] Not long after the second call, Ms Vickers approached Mr Quigley and informed him that Mr Shaw was back on the telephone. Mr Quigley's evidence was that Mr Shaw told him he should just calm down and go home. Mr Quigley confirmed to Mr Shaw that that was his intention and the phone call ended.[17]

[17] On 21 February 2019, Ms Vickers informed Mr Quigley that Mr Shaw was on the telephone and he wanted Mr Quigley to come into the office for a conference call, and that Ms Vickers was to be a witness.

[18] Mr Quigley gave evidence that during the conference call Mr Shaw stated to him that he believed that Mr Quigley intended to take unauthorised leave and that to do so would amount to gross misconduct, leaving Mr Shaw no choice but to terminate Mr Quigley's employment immediately. However, direct evidence shows that in the meeting on 21 February 2019, Mr Shaw permitted Mr Quigley to take the requested period of 5 to 8 March

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[12] Quigley Statement.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Witness Statement of Mr Domingue.

[17] Quigley Statement.

2019 off as unpaid leave. Mr Quigley said Mr Shaw stated to him, he was essential to the business and the only person that could cover Mr Quigley's role was Mr Maher in Brisbane. Mr Shaw communicated that he would have to fly Mr Maher over. Mr Quigley stated that he was given an ultimatum, which was that the only way he could avoid termination for the alleged gross misconduct was to take authorised unpaid leave to cover the costs of flying Mr Maher to Perth to cover Mr Quigley's role.

[19] Whilst he considered the situation unfair, Mr Quigley emailed Mr Shaw the next day informing him of his decision to accept the unpaid authorised leave option. Mr Quigley stated in the email '…I must state emphatically that I believe my request for leave to be reasonable. However, I begrudgingly accept your offer to take unpaid leave 5th, 6th, 7th and 8th of February'. Mr Shaw responded on 22 February 2019, thanking Mr Quigley for his email, and noting that he looked forward to speaking with Mr Quigley the next week.

[20] Mr Shaw's evidence was that on 1 March 2019 he returned to the Perth office for the first time since having back surgery in New York in January 2019. According to Mr Shaw, the objective of the meeting with Mr Quigley was to discuss and counsel Mr Quigley regarding the recent week's affairs with a view to finding some common ground. Mr Shaw stated he had returned from overseas to determine if there was a relationship to be salvaged with Mr Quigley. In effect, he was looking to see if Mr Quigley had an 'ounce of remorse for his actions'. Mr Shaw's evidence was that part of the meeting would include a discussion of the email sent by Mr Quigley in which he stated he would accept unpaid leave 'begrudgingly', and appeared to have a 'general tone'. At hearing, Mr Shaw conceded he did not inform Mr Quigley of the purpose or objective of the meeting.

[21] The meeting commenced cordially according to Mr Shaw, and Mr Quigley offered some sort of acknowledgement that the holidays had been booked by his wife at the end of 2018, some three months before requesting time off. When asked why he had not made the request in effect sooner, Mr Quigley suggested that time had got away from him.

[22] It is evident from Mr Shaw's account that as the meeting progressed, he did a substantial amount of talking. In short, Mr Shaw covered:

a) he had declined Ms Vickers' request for leave in circumstances where she too had relatives visiting from overseas as the business could not have a zero staff count;

b) an alternative leave solution had been offered – taking long weekends;

c) Mr Quigley's request had been made with minimal notice (3 weeks' notice);

d) allowing Mr Quigley to take the leave would have significantly impacted the operations of the business;

e) Mr Shaw had travelled from overseas, post back surgery, to provide coverage, as flying Mr Maher over from Brisbane was not logical or reasonable;

f) the email from Mr Quigley in which he stated he 'begrudgingly' accepted the unpaid leave did not acknowledge the monumental attempts being made to avoid Mr Quigley taking leave that had been refused – which could have led to instant dismissal;

g) the email from Mr Quigley had a tone of contempt and disgust; and

h) whether Mr Quigley wanted to work for Belfast Sinks and that Mr Shaw had interpreted from the email dated 22 February 2019 that Mr Quigley was only working

for the company to earn money to support his family, which was not a fair exchange to Mr Shaw.

[23] Having covered these points with Mr Quigley, Mr Shaw gave evidence that Mr Quigley became animated and started to shout. Mr Quigley disagrees this was the case. Mr Shaw's evidence was that he:

> concluded saying Steve, we are both adults and I have experienced significant ill-health in recent years, and one thing I have learnt is that life is too short to spend it with people you do not want to, or pursue directions or activities that ultimately take you away from your passions. Let us part as gentleman and acknowledge that this relationship is over, and you are to pursue your passions and I can find a replacement that will share mine.

[24] Mr Shaw gave evidence that he informed Mr Quigley that he had one weeks' leave and when he returned, he would serve two weeks' notice in which he would explain the systems to Mr Shaw that had been put in place. Mr Quigley was said to have asked whether he would be paid the full two weeks if the handover was completed in less time, to which Mr Shaw responded '… yes you are entitled to two weeks.'

[25] The parties agreed that Mr Quigley would return to work on 11 March 2019. A meeting was held on 11 March 2019 to discuss the handover. It was Mr Shaw's evidence that at the meeting Mr Quigley crossed his arms and reacted quite abruptly when Mr Shaw suggested some work for Mr Quigley to do. While Mr Shaw had anticipated the work would take a certain period, Mr Quigley was said to have expressed that it would take 4-6 weeks and he was not interested in doing the task as it was not part of what a handover should be.

[26] What followed was a disagreement between Mr Shaw and Mr Quigley about the period of notice. Mr Shaw advised Mr Quigley it was a two week notice period, and Mr Quigley stated that his employment contract stated four weeks. Mr Shaw asked Mr Quigley if he had a copy of his employment contract with him, to which Mr Quigley replied he did not. A disagreement thereafter followed, but Mr Shaw said that he informed Mr Quigley that if his employment contract stated four weeks, which he did not think that it did, he was welcome to work the four weeks.

[27] Mr Quigley stated that initially Mr Shaw refused to give any written notice stating that Mr Quigley was trying to manipulate him to provide something that Mr Quigley could use against him. Mr Quigley said that Mr Shaw then gave him an ultimatum of working two weeks' notice or instant dismissal for gross misconduct with no pay. Feeling very uncomfortable, in what Mr Quigley described as an aggressive and hostile situation, and seeing no other option, he left the office to research his rights. As he was leaving, he was asked for his key to the show room, which he said he handed to Mr Shaw (Mr Shaw disagrees this occurred).

[28] On 12 March 2019, Mr Quigley received an email from Mr Shaw containing a phone camera picture of a signed written letter of termination. The reasons for dismissal included '[M]iss conduct [sic], insubordination, General Misconduct, Gross Misconduct', and:

> [R]effusing [sic] to comply with rules that govern companies and employees relating to holiday requests, stating that you would be taking holidays in spite of them being

refused on grounds that were stated as being reasonable by employer – crating [sic] a situation that would and did result in financial loss to the company
Stating to the owner that you worked for the owners [sic] business in spite of your feelings for him
Slamming Phones Down on the managing director during discussions relating to holiday requests
Refusing to speak to the managing director there after until found in warehouse by Amanda Vickers and being engaged by a speaker phone to advice [sic] you were suspended for the rest of the day.

Initial matters

[29] Section 396 of the Act provides that, before considering the merits of an application for unfair dismissal remedy order, the Commission must determine some other initial matters which include:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and

(d) whether the dismissal was a case of genuine redundancy.

[30] In the circumstances of this matter, the pertinent initial matter is that of Code compliance.

Small Business Fair Dismissal Code

[31] The Act provides that a person has not been unfairly dismissed where the dismissal is consistent with the Code. It is useful to set out s 388(2) of the Act:

388 The Small Business Fair Dismissal Code

(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.

(2) A person's dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[32] The Code sets out:

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently

serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

[33] The party objecting to jurisdiction assumes the evidential onus of making out their case. It follows that Belfast Sinks must provide sufficient evidence to establish its case concerning its jurisdictional position.

[34] If Mr Quigley's dismissal was consistent with the Code, it cannot be considered to be unfair within the meaning of the Act. However, if Mr Quigley's dismissal was inconsistent with the Code, then it is the case that the objection premised on compliance with the Code falls away and my attention turns to the consideration of s 387 of the Act to determine if the dismissal was unfair.

Agreed matters

[35] I am satisfied on the evidence before me that Mr Quigley is a person protected from unfair dismissal in respect to having completed the minimum employment period, has earnt less than the high-income threshold, was dismissed (not by way of genuine redundancy), and made his Application in the requisite statutory period.

Consideration

Small Business Employer and Code compliance

Summary Dismissal

[36] The 'Summary Dismissal' section of the Code clearly applies to dismissals that have 'immediate effect' as that term is understood by reference to the decision in *Ms Li Li Chen v Australian Catering Solutions Pty Ltd T/A Hearty Health*,[18] and are not dismissals on notice.[19]

[37] On 1 March 2019, Mr Shaw informed Mr Quigley that he had one week's leave and when he returned, he would serve two weeks' notice. At the time Mr Shaw notified Mr Quigley of his dismissal, he had decided that Mr Quigley's attendance at work was required to undertake a handover and implement a new system within the workplace. Such evidence is not suggestive that the relationship had become so fractious that the dismissal should take immediate effect, or that Mr Quigley's conduct was so egregious that he was to depart the workplace immediately – with no notice given.

[38] In *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services*[20] (**Ryman**) the Full Bench provided a useful synopsis of the proper approach to the construction and application of the Summary Dismissal aspect of the Code and its interaction with Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) (**Regulations**).

[39] In *Ryman* the Full Bench considered the meaning of 'summary dismissal' and said that it referred to a dismissal without notice arising from 'a breach of an essential term of the employment contract, a serious breach of a non-essential term or the contract, or conduct manifesting an intention not to be bound by the contract in the future on the part of the employee'.[21]

[40] However, it is not the case that, under the Code, the Commission must be satisfied that serious misconduct was the basis for the dismissal.[22] Rather, there needs to be a consideration whether, at the time of dismissal, the employer held a ***belief*** that the employee's conduct was sufficiently serious to justify immediate dismissal and one must also consider whether that belief was based on ***reasonable grounds***.[23] This element, which has been described as the second element,[24] incorporates the concept that the employer has carried out a reasonable investigation into the matter.[25] It is not necessary to determine whether the employer was correct in the belief that it held.[26] Whether the employer had 'reasonable grounds' for the relevant belief is of course to be determined objectively.[27]

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[18] [2017] FWC 3930, [62]-[64].

[19] *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264, [36].

[20] [2015] FWCFB 5264.

[21] Ibid [27].

[22] Ibid [37] – [38]; *Grandbridge Limited v Mrs Diane Wiburd* [2017] FWCFB 6732, [28];

[23] *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359.

[24] Ibid [29].

[25] Ibid [29] cited in *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264 and referred to in *Grandbridge Limited v Mrs Diane Wiburd* [2017] FWCFB 6732, [39].

[26] Ibid.

[27] Ibid.

[41] The focus on 'serious misconduct' must be taken as identifying the subject matter and it appears to be accepted that this term gleans its meaning from s 12 of the Act and thereafter Regulation 1.07 of the *Fair Work Regulations 2009* (Cth).[28]

[42] It was evident that Mr Quigley's ongoing employment hinged on what he had to say in the meeting on 1 March 2019. Mr Shaw reported that he was keen to see whether the employment relationship was salvageable, and that depended on whether Mr Quigley demonstrated 'an ounce of remorse for his actions' in that meeting. While Mr Shaw understood the objective of the meeting, he conceded Mr Quigley did not. Therefore, in the meeting Mr Quigley was completely unaware his continued employment was very much dependent on a display of remorse and demonstration of gratitude toward Mr Shaw for having made 'monumental attempts' to avoid him taking unauthorised leave. Of course, Mr Shaw had formed the view that if Mr Quigley had taken the leave when unauthorised to do so, this would have warranted 'an instant dismissal', and perhaps on this point Mr Shaw is right.

[43] However, whether the employer had 'reasonable grounds' for the relevant belief is to be determined objectively.[29] The complicating factor thereafter appears to have been that Mr Shaw seemingly retracted his approval of taking authorised unpaid leave because Mr Quigley had accepted the unpaid leave 'begrudgingly' and demonstrated no remorse. The evidence shows that Mr Shaw had, in addition, taken umbrage to Mr Quigley's email dated 22 February 2019, regarding the tone of the email, and reference to 'I can ill afford to take unpaid leave but the booking is paid for, I can afford less to have a period out of work looking for new employ'. Mr Shaw gave the following evidence:

> Steve are you committed to the job upon your returned [sic] or are you going to simply as the latter implies return and take the wage until you find another position.
>
> As if the latter is the case, we should part as gentlemen and move forward as there was no joy in elongating and putting effort into a relationship that was already concluded.
>
> Steve paused and thought, with an expression of – ah yes how do I respond to this as that's pretty much was [sic] I was saying and intending.
>
> I pressed again saying Steve there is little point working together if you do not want to be here, and I full understand your need to earn money for your family and indeed it is clear from your letter that the only reason you are here is that you need to earn money to support your family. But that is not a fair exchange for me, and ultimately not for you
>
> …

[44] Mr Shaw's monolog continued until he arrived at a conclusion that both he and Mr Quigley should part ways as gentleman and he acknowledged that the relationship was over. The evidence shows that at no time was Mr Quigley provided with an opportunity to rebut that which Mr Shaw was asserting. While Mr Shaw has imposed upon Mr Quigley his own thoughts as to what was going through Mr Quigley's mind, it cannot be said that there

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[28] *Grandbridge Limited v Mrs Diane Wiburd* [2017] FWCFB 6732 [28]; *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264, [37].

[29] Ibid.

was a reasonable enquiry or investigation into the same. All there was, was the sound of Mr Shaw's voice.

[45] I am unable to conclude that on 1 March 2019, the employer held a belief that Mr Quigley's conduct was sufficiently serious to justify immediate dismissal noting that belief must be based on ***reasonable grounds***, which I do not consider is the case.[30]

[46] I have considered that there was a disagreement over the notice period as to whether two weeks or four weeks was required, as well as observing that the termination letter spoke of an 'agreed termination notice period' of '[T]wo weeks paid in return for services', and that Mr Quigley departed the business on 11 March 2019 and did not return – notwithstanding he stated he was going home to research his employment entitlements noting the hostile work environment. These factors do not persuade me that the dismissal was by way of summary dismissal.

[47] If the dismissal is not by way of 'Summary Dismissal' under the Code, and in this matter the facts show that to be the case, then the 'Other Dismissal' part of the Code is triggered. This requires consideration of the following:

a) did Belfast Sinks give Mr Quigley a reason for dismissal;

b) was the reason a valid reason having regard to Mr Quigley's conduct or capacity;

c) was Mr Quigley warned that he risked being dismissed if there was no improvement; and

d) did the Belfast Sinks provide Mr Quigley with an opportunity to respond to the warning and give him a reasonable chance to rectify the problem(s), having regard to his response.[31]

[48] In applying these requirements, I must also have regard to the procedural matters highlighted within the Code.

Did Belfast Sinks give Mr Quigley a reason for dismissal?

[49] During the discussion on 1 March 2019, Mr Shaw informed Mr Quigley that they were to part ways as gentleman and acknowledged the relationship was over. This followed a discussion about Mr Quigley's request for annual leave and why it was declined, the constraints faced by the business, Mr Quigley's suggestion regarding the use of a website which was considered by Mr Shaw as unfeasible, the tone of Mr Quigley's email dated 22 February 2019 and the use of the word 'begrudgingly', and Mr Quigley's perceived commitment to the business.

[50] I consider that the effect of the discussion was that Mr Shaw was personally affronted by Mr Quigley's lack of contrition and gratitude in the meeting on 1 March 2019, and considered Mr Quigley's motives for remaining in the workplace unaligned to his own. The reason therefore given at the meeting on 1 March 2019, was simply that the employment relationship was over as Mr Shaw did not believe that Mr Quigley had the requisite intent of remaining in the business for the 'right' reasons.

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[30] *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359.

[31] *Danute Kristina Grigonis v Adelaide Coffee Company Pty Ltd* [2011] FWA 1586, [55].

Was the reason a valid reason having regard to the applicant's conduct or capacity?

[51] However, having considered the evidence in this matter, I consider the reason communicated to Mr Quigley on 1 March 2019 for his dismissal was not a valid reason. While Mr Shaw may have had an expectation that Mr Quigley would conduct himself differently in the meeting on 1 March 2019 and demonstrate contrition, the purpose of that meeting was never made clear to Mr Quigley. Mr Quigley entered the meeting under the belief that he was authorised to take unpaid leave. While a lack of contrition or remorse is often considered when examining mitigating circumstances, there is nothing to preclude its absence as founding a valid reason for dismissal. However, based on the evidence before me this is not such a case.

[52] Mr Shaw made assumptions about Mr Quigley's commitment to the business without having first given him the opportunity to respond to that which was asserted. There is a conflict between the parties as to whether Mr Quigley shouted in the meeting 'how dare I suggest he was not committed to his work colleges [sic]' and 'he was there every day taking "shit" for me to support his colleges [sic]…' However, in respect to this disputed point it is difficult to ascertain who was telling the truth. Having considered Mr Shaw's lengthy monologue, it would not have surprised me if Mr Quigley's frustration had been piqued. As it is, however, Mr Quigley's outburst in this meeting does not appear to have been relied upon as a reason for dismissal.

Was Mr Quigley warned that he risked being dismissed if there was no improvement?

[53] The Code expresses a preference that warnings are given in writing although it is not a requirement. However, the effect of the Code is that an employer will be required to demonstrate the relevant warning has in fact been given, and this may be shown by way of direct evidence. On that basis, an assessment of the evidence pertaining to the issue is necessary.

[54] In the teleconference on 21 February 2019, Mr Shaw informed Mr Quigley if he did not attend work when his holiday had been refused it would be gross misconduct and result in immediate termination of employment. Mr Shaw suggested that the only way to avoid such an outcome would be find an agreeable solution. These statements ring true. The minutes of the teleconference on 21 February 2019, were provided as part of Mr Quigley's evidence and were uncontroversial.

[55] Those same minutes showed the solution arrived at was the taking of unpaid leave by Mr Quigley for the period in early March. While Mr Quigley stated he would need to think about it, the evidence points to Belfast Sinks having reached a point of resolution regarding the annual leave request.

[56] Quite rightly, Mr Shaw informed Mr Quigley that irrespective of the outcome of the meeting it would be noted that hanging up on the boss twice, slamming phones down and further refusal to answer or speak to the boss, combined with the overall tone of language used on the Wednesday, was unacceptable on any front and would result in at least a written warning that would stay on his record for two years. Mr Shaw conceded that no such written warning was provided to Mr Quigley before he departed on 11 March 2019.

[57] While a written warning was not provided, I consider Mr Shaw unequivocally warned Mr Quigley his conduct was unacceptable, thereby placing Mr Quigley on notice of the point. However, the conclusion cannot be drawn whether directly or by inference, based on the evidence before me, that the communication constituted a warning to Mr Quigley that if there was no improvement in his conduct, he risked dismissal.

[58] Therefore, on balance I find Mr Quigley was not relevantly warned his employment was in jeopardy as a result of his behaviour prior to the discussion on 1 March 2019 that led to his dismissal.

Did Belfast Sinks provide Mr Quigley with an opportunity to respond to the warning and give him a reasonable chance to rectify the problem, having regard to his response?

[59] Having participated in the teleconference on 1 March 2019, Mr Quigley was aware that the behaviours demonstrated on 19 February 2019 were unacceptable. However, given the next interaction with Mr Shaw was on 1 March 2019, a meeting in which he was directed that he and Belfast Sinks would be parting ways, it can hardly be said that there was an opportunity for Mr Quigley to respond to the warning communicated on 22 February 2019.

[60] I am not satisfied in the circumstances that Mr Quigley was afforded a reasonable chance to rectify the problems given the outcome of the teleconference on 22 February and what occurred in the subsequent meeting on 1 March 2019.

Conclusion

[61] In light of my above findings, I have concluded that the Code has not been complied with. Therefore, it is unnecessary to consider procedural matters that may mean the dismissal was not consistent with the Code. However, on this point I observe that, to a large degree, the procedural matters raised by the Code have been considered above. In terms of the opportunity to be represented, no such opportunity was provided. It was Mr Shaw's own evidence that the meeting on 1 March 2019 had not been planned with dismissal in mind.

Unfair dismissal

[62] Having concluded that Belfast Sinks has not succeeded with its jurisdictional objection, consideration turns to whether the dismissal of Mr Quigley was harsh, unjust or unreasonable as those terms are understood by reference to s 387 of the Act.

Valid reason for the dismissal – s 387(a)

[63] When determining if a dismissal was unfair the Commission must take into account whether there was a valid reason for dismissal relating to the employee's capacity or conduct.

[64] Where the reason for termination of employment relates to an employee's capacity or conduct, it is not the Commission's function to stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be

made by the Commission. It is for the Commission to assess whether the employer had a valid reason connected with the employee's capacity or conduct.[32]

[65] The reasons considered are the employer's 'reason(s)'.[33] The Full Bench in *B, C, and D v Australia Postal Corporation T/as Australia Post*[34] (**Australian Postal Corporation**) stated:

> [34]... In a misconduct case, the Commission is concerned with whether the misconduct in fact occurred, not with whether the employer has reasonable grounds to believe that it occurred (eg. *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201, *Sherman v Peabody Coal Ltd* (1998) 88 IR 408; *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1).
>
> [35] Subject to that, as indicated by Northrop J in *Selvachandran*, "valid reason" is assessed from the perspective of the *employer* and by reference to the acts or omissions that constitute the alleged misconduct on which the employer relied, considered in isolation from the broader context in which they occurred. It is the reason of the employer, assessed from the perspective of the employer, that must be a "valid reason" where "valid" has its ordinary meaning of "sound, defensible or well founded". As Northrop J noted, the requirement for a valid reason "should not impose a severe barrier to the right of an employer to dismiss an employee".
>
> [36] A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal[35].

[66] Therefore, the question of whether the alleged conduct took place and what it involved is to be determined by the Commission based on the evidence in the matter before it.

[67] The valid reason need not be the reason given to the employee at the time of the dismissal,[36] and the reason should not be 'capricious, fanciful, spiteful or prejudiced'.[37] It is the case that the provisions must be applied in a practical, common sense way to ensure that the employer and employee are treated fairly.[38]

Consideration

[68] The demise of the employment relationship between Mr Quigley and Belfast Sinks arose over a dispute about annual leave. There is no question that Mr Quigley had an entitlement to such leave, and the Act clearly stipulates that paid annual leave may be taken

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[32] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[33] *Owen Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033, [25].

[34] [2013] FWCFB 6191, [34].

[35] Ibid [34] – [36].

[36] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 377-8.

[37] Ibid.

[38] Ibid as cited in *Potter v WorkCover Corporation* (2004) 133 IR 458 and endorsed by the Full Bench in *Industrial Automation Group Pty Ltd T/A Industrial Automation* (2010) 202 IR 17, [36].

for a period agreed between an employee and his or her employer,[39] and that the employer must not unreasonably refuse to agree to a request by the employee.[40]

[69] However, based on the evidence before me, it is not Belfast Sinks that acted unreasonably regarding the denial of annual leave; it is Mr Quigley and his reaction to the denial. I am satisfied that Belfast Sinks is a small business employer, it has a small cohort of staff, another staff member had requested leave at the same time, the owner of the business, Mr Shaw, was overseas at the relevant time having had surgery, the request was made with minimal notice and Mr Quigley had already committed himself by purchasing accommodation in circumstances where approval for the leave had not been given. While Mr Shaw purported that the business was suffering financial difficulties, apart from his testimony there was no direct evidence to support that assertion. However, that does not deter me from concluding that the other factors traversed understandably placed Mr Shaw in a position where it was reasonable to decline the leave requested.

[70] Given the significance of the leave to Mr Quigley it was remiss of him to have given such late notice of the request. Until such time as leave is approved, it also appears foolhardy to assume personal arrangements can be made, liability incurred, and this will somehow have bearing on the reasonableness of a refusal, or request.

[71] Mr Quigley's dogged determination to take annual leave irrespective of having been informed that no holiday requests had been approved as of 18 February 2019, was evident in his email dated 19 February 2019, in which he stated, 'I need 5th, 6th, 7th, 8th March and also 15th of March on it's [sic] own. I cannot be flexible on these days'. The email was sent notwithstanding that Mr Shaw had informed Mr Quigley in his email dated 18 February 2019, that he would await a discussion with both him and Ms Vickers, but as it stood having a week off given the present staff situation was not sustainable and the two of them should look to taking long weekends or half weeks.

[72] On 19 February 2019, Mr Shaw emailed Mr Quigley informing him that the leave requested could not be approved as it was not in line with the parameters stated. It can be assumed that Mr Shaw was referring to the taking of half a week or a long weekend off. Telephone discussions also occurred on that day.

[73] In the first telephone discussion, Mr Quigley said that he stressed to Mr Shaw his hands were tied 'and that my absence should not impact the business as he had suggested as I am always on call on my mobile phone anyway…'. Mr Quigley continued that 'Andrew threatened me with an ultimatum saying that if I did not agree to take leave on his terms only, then he expected me to hand my notice in'. According to Mr Quigley he stated to Mr Shaw he 'didn't understand why this was such an issue and couldn't understand what he expected of me'. Mr Quigley's evidence was that at this point with Andrew (Mr Shaw) being wholly unreasonable, he hung up the phone in frustration.

[74] Mr Shaw called Mr Quigley back and according to Mr Quigley, scolded him for hanging up the phone. Mr Quigley's evidence was that he stated 'emphatically that I thought this treatment was unacceptable and I did not expect or deserve such treatment…I stated clearly and firmly that I did not wish to talk with him any further at this point due to the way I

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[39] *Fair Work Act 2009* (Cth) s 88(1).

[40] *Fair Work Act 2009* (Cth) s 88(2).

was feeling at that precise moment, that I felt I may say something regrettable and that I was going to hang up the phone with the intention of speaking on another day under calmer circumstance'. Mr Quigley said that he hung up the phone – again.

[75] Mr Domingue gave evidence that he had heard Mr Quigley talking really loudly on the phone, Mr Quigley approach him and told him how 'pissed off' he was and that when this occurred there were customers around. According to Mr Dominque, he and Ms Vickers told Mr Quigley to calm down because there were customers.[41] While Mr Quigley did not appear to agree that customers were within earshot, or that Mr Domingue had heard Mr Quigley whilst talking to Mr Shaw on the phone, I found Mr Domingue's evidence to be compelling. He was by all accounts independent regarding what had occurred, and he genuinely appeared to be giving, as best as he could (noting that English was his second language), an objective account of the circumstances of that day. I find that where there is disparity in the evidence of Mr Dominque and Mr Quigley, it is Mr Domingue's evidence which is to be preferred. His evidence was not plagued by heightened emotion as was observed when Mr Quigley and Mr Shaw gave their evidence, it playing out at times like a second rate soap opera with staring, eye rolling and rather dramatic head shaking.

[76] Mr Quigley's conduct in hanging up the phone on Mr Shaw twice, speaking to Mr Shaw in the manner that he did, instructing Mr Shaw that he was not flexible with annual leave dates (despite having only given three weeks' notice of the request) and thereafter venting to a colleague within the workplace to the point where he was instructed by two other staff members to 'calm down', constitutes workplace behaviour that is at odds with any generally-recognised notion of what is acceptable.

[77] In my view, Mr Quigley demonstrated an unwavering resolve that his request for annual leave was reasonable and he could not be dissuaded otherwise; because of this belief he engaged in conduct which was impulsive and puerile. That conduct when considered individually may have been considered minor indiscretions and on their own, an insufficient basis to constitute a valid reason for dismissal. However, each of the examples above cannot be disaggregated from a consistent pattern of behaviour which was confrontationist, argumentative and insubordinate.

[78] However, I hasten to add that hanging up the phone twice on a Director, notwithstanding you have informed them that you will be hanging up the phone on them, does not appear to be so minor.

[79] In *Parmalat Food Products Pty Ltd v Wililo*[42], the Full Bench held:

> The existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair. The fining of a valid reason is a very important consideration in establishing the fairness of a termination.

[80] In this case however, I have articulated that Mr Shaw saw fit to issue a verbal warning to Mr Quigley that the abovementioned conduct was unacceptable. Ultimately, Mr Quigley's employment came to an end because Mr Shaw did not perceive Mr Quigley was grateful for

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[41] Witness Statement of Mr Domingue.

[42] (2011) 207 IR 243 [24].

Mr Shaw having agreed to him taking unpaid leave, and Mr Quigley had not demonstrated contrition.

[81] Given Mr Quigley was none the wiser that his continued employment was conditional on the demonstration of contrition and gratitude, he had been addressed about the conduct which occurred on 19 February 2019, and the issue regarding the leave request appeared to have been resolved to Belfast Sinks' satisfaction in the teleconference of 21 February 2019, it cannot be concluded that there was a valid reason for Mr Quigley's dismissal.

[82] I am not satisfied in the circumstances of this case that the termination of Mr Quigley's employment was for a valid reason.

Section 387(b) - Notification of the valid reason and s 387(c) - an opportunity to respond

[83] The Commission must take into account whether notification of a valid reason for termination has been given to an employee protected from unfair dismissal before the decision is made,[43] and in explicit,[44] plain and clear terms. It is accepted that this is to be applied in a common-sense way to ensure the employee is treated fairly and should not be burdened with formality.[45]

Consideration

[84] It is evident from what I have written, Mr Quigley was not notified of a valid reason for dismissal and there was no opportunity accorded to Mr Quigley to respond.

Section 387(d) - Unreasonable refusal of a support person

[85] When considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

Consideration

[86] Given the circumstances of this case, there was no opportunity provided to Mr Quigley to request a support person, a factor which has been taken into account.

Section 387(e) - Warnings regarding unsatisfactory performance

[87] When considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, if the dismissal related to unsatisfactory performance by the person, the Commission must take into account whether the person had been warned about that unsatisfactory performance before the dismissal.

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[43] *Trimatic Management Services Pty Ltd v Daniel Bowley* [2013] FWCFB 5160; *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 151.

[44] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151; *Previsic v Australian Quarantine Inspection Services* Print Q3730.

[45] *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1, 14-15.

[88] Unsatisfactory performance is more likely to relate to the employee's capacity to do the job, than their conduct.[46]

Consideration

[89] The facts before me do not suggest that it was Mr Quigley's performance that was in issue. Ultimately, it was about a dispute concerning annual leave and the behaviours displayed by Mr Quigley because his leave request was declined. Therefore, I do not consider that this factor has bearing on whether Mr Quigley's dismissal was unfair.

Section 387(f)-(g) - Impact of the size of the respondent on procedures followed and absence of dedicated human resources management specialist/expertise on procedures followed

[90] When considering whether a dismissal was harsh, unjust or unreasonable, the Commission must take into account the degree to which: (a) the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and (b) 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.

Consideration

[91] Belfast Sinks is a small business employer and does not have a dedicated Employee Relations or Human Resources function. It was evident that Mr Shaw had limited expertise in managing employees or understanding what was required by him under the Act.

[92] I have previously observed that if a business decides to employ its workers, then this undoubtedly is coupled with a responsibility to know what is required of it by law, including the notice period that an employee is to serve. The onus does not rest on the employee to substantiate the period of notice required. There are resources available to assist employers in this respect, particularly those that are small in size.

[93] I have duly considered the size of Belfast Sinks and its absence of a dedicated Human Resources management specialist at the relevant time. However, I am of the view that Mr Quigley was not accorded any semblance of procedural fairness when it came to the meeting on 1 March 2019, in which he was notified he was dismissed. The size of Belfast Sinks and its lack of internal Human Resource expertise does not excuse denying Mr Quigley the opportunity to respond.

Section 387(h) - Other relevant matters

Proportionality

[94] The type of conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained by the High Court of Australia in *Byrne v Australian Airlines Ltd.*[47] McHugh and Gummow JJ explained as follows:

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[46] *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, 237.

[47] (1995) 185 CLR 410.

> It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.[48]

[95] In short, a dismissal may, depending on the overall circumstances, be considered to be harsh on the person due to the economic and personal consequences resulting from being dismissed. I have considered these factors.

[96] Mr Quigley had no forewarning that disciplinary action was imminent, and I am not convinced that what was communicated to him in the meeting on 22 February 2019, was the harbinger of dismissal. I do not consider that the dismissal was a proportionate response in circumstances where it was unclear to Mr Quigley what his offending conduct was in the meeting of 1 March 2019.

[97] By all accounts, it was open to Mr Quigley to have assumed that the matter concerning the annual leave dispute had been resolved, and he had been addressed regarding his conduct on 19 February 2019. While Mr Shaw was dissatisfied with the use of the word 'begrudgingly' in the email Mr Quigley sent on 22 February 2019, it was never made clear to Mr Quigley what the objective or the purpose of the meeting was on 1 March 2019. For that meeting to have culminated in Mr Quigley's dismissal – whether the parting of ways was said to have been undertaken on a gentlemanly basis, is a disproportionate response.

[98] Although Mr Quigley had been employed for a relatively short period, I am satisfied that Belfast Sinks missteps in the 'disciplinary' process, resulted in it acting upon a reason for dismissal that was not valid. Mr Quigley was never given an opportunity to respond to that which Mr Shaw alleged in the meeting on 1 March 2019 and while Mr Quigley's conduct regarding his response to the denial of his leave request was completely unacceptable, it does not relieve Belfast Sinks from the conclusion I have reached.

Conclusion

[99] I have taken into account each of the matters specified in s 387 of the Act. I am not satisfied that Belfast Sinks had a valid reason for Mr Quigley's dismissal and procedural fairness was not accorded. I have concluded Mr Quigley's dismissal was unjust, unreasonable, and harsh. I turn now to address whether an order with respect to remedy is warranted in the circumstances.

Remedy

[100] The Act provides the following with respect to remedy:

390 When the FWC may order remedy for unfair dismissal

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[48] Ibid 465.

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

[101] Subsection 390(3) of the Act underscores the primacy of reinstatement as a remedy for an unfair dismissal.

[102] A decision of the Commission to order a person's reinstatement is a discretionary decision,[49] exercisable if the Commission is satisfied the person was relevantly protected, the person was unfairly dismissed and the person has made a s 394 application.[50]

[103] A Commission decision to order the payment of compensation to a person is also a discretionary decision, but is only exercisable if, amongst other things, the Commission is satisfied reinstatement of the person is inappropriate and the FWC considers a compensation order is appropriate in all the circumstances of the case.[51]

[104] Section 392 of the Act sets out the criteria to which regard must be had in determining any amount of compensation ordered.

[105] In determining the amount of compensation to be ordered, the Act provides:

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

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[49] *Ellawala v Australian Postal Corporation*, Print S5109, [24].

[50] *Gloria Bowden v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey* [2013] FWCFB 431, [15].

[51] Ibid [16].

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

Consideration

Reinstatement

[106] Mr Quigley does not seek reinstatement and submitted he does not want to be re-employed by Belfast Sinks having found alternative employment some six months after being dismissed.

[107] In all of the circumstances, including those that contributed to the dismissal and were traversed, I am satisfied there would be little prospect of re-establishing a productive and cooperative relationship between Mr Shaw and Mr Quigley. The contempt the two had for each other at hearing was palpable and it would be a fair assessment to say that there is significant personal animosity between them. Given the evidence it cannot be said that reinstatement is appropriate or practical.

[108] I find an order for compensation is appropriate and will consider each of the criteria in s 392 of the Act to determine the quantum of the compensation.

Compensation

[109] The 'Sprigg Formula', derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul Licensed Festival Supermarket*[52] (**Sprigg**), is the well accepted approach for assessing the amount of compensation under ss 392(2) of the Act. The Full Bench in *Gloria Bowden v Ottrey Homes and Cobram and District Retirement Villages Inc (t/as Ottrey Lodge)*[53] (**Bowden**) adopted the *Sprigg Formula* in the context of determining compensation under the Act.

[110] In *Bowden* the approach was described in the following way:

> [33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:
>
> > '... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.'

[52] Print R0235, (1998) 88 IR 21.

[53] [2013] FWCFB 431.

> [34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the '*anticipated period of employment*'...[54]

[111] In *Haigh v Bradken Resources,*[55] the Full Bench reaffirmed the principles set out within *Sprigg*, and in particular the steps needed to be taken in assessing compensation. The first of those steps is to estimate the amount the employee would have received, or would have been likely to receive if the employment had not been terminated; the second step being to deduct moneys earned since termination; the third being to make deductions for contingencies; fourth, to calculate any impact of taxation; and fifth, to apply the legislative cap.[56]

[112] The Full Bench in *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Alan Humphries*[57] stated:

> The identification of this starting point amount 'necessarily involves assessments as to future events that will often be problematic'[58]. Once this first step has been undertaken, various adjustments are made in accordance with s.392 and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee's misconduct and the application of the cap of six months' pay. This approach is however subject to the overarching requirement to ensure that the level of compensation is in an amount that is considered appropriate having regard to all the circumstances of the case.

[113] The notion of 'taking into account' a matter (such as those described in s 392 of the Act) connotes a genuine consideration of the relevant provision and the apportionment of the appropriate weight in the circumstances.[59] In *Construction, Forestry, Mining and Energy Union v Hamberger and Another*,[60] Katzmann J pointed out that '[t]o take a matter into account means to evaluate it and give it due weight'[61] and that 'mere advertence will not be enough'.[62]

Remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed

Anticipated period of employment

[114] The Applicant has submitted that his earnings at the time of dismissal were based upon an hourly rate of $33.65 per hour and that he worked approximately 40 hrs per week. This equates to a weekly salary of $1,346.00 per week.

[115] There is no evidence before the Commission that Mr Quigley's performance had been called into question such that it resulted in performance management or that there was a past

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[54] See also *Ellawala v Australian Postal Corporation* Print S5109 [34].

[55] [2014] FWCFB 236.

[56] Ibid [10].

[57] [2016] FWCFB 7206 [17].

[58] *Smith, Arthur and Kimball, Brett v Moore Paragon Australia Ltd* PR942856 [32].

[59] *Ms Diane Lewis v Glendale RV Syndication Pty Ltd T/A Glendale Care Bundaberg* [2014] FWC 1086.

[60] (2011) 195 FCR 74.

[61] Ibid [103].

[62] Ibid.

history of misconduct. While Mr Shaw referred to having moved Mr Quigley into a different position at a point of time, there is no direct evidence to substantiate this was performance related.

[116] The question of the anticipated period of employment is a particularly difficult issue in this matter. On the one hand Mr Quigley may point to his expectation of indefinite ongoing employment by Belfast Sinks, whilst Mr Shaw clearly considered that the employment relationship was on tenuous ground prior to 1 March 2019, given his evidence regarding his return to Western Australia from overseas to deal with Mr Quigley.

[117] I have had regard to the evidence and am satisfied that Mr Quigley's response to the denial of his annual leave request was unacceptable. While he acknowledged in his email dated 19 February 2019 that Mr Shaw had raised '[F]air points and fully appreciated' the fact of the matter is that he did not fully appreciate the point as he then went on to state 'I cannot be flexible on these days.' Mr Quigley fundamentally lacked an understanding that on any objective basis Mr Shaw had not unreasonably refused to agree to the annual leave request.

[118] Where an employee demonstrates he is unreceptive to an alternative point of view – particularly when this point of view is that of his employer, and his employer has stepped through the reasons for the decision made, it can be concluded that the relationship will become fractious, if not already. In this case it had become fractious due in large part to the argumentative and uncompromising approach of Mr Quigley. I am of the view that the employment relationship would not have been long standing and would have seen Mr Quigley remaining in employment for 4 weeks of the maximum compensation period. As result I set the anticipated period of employment at 4 weeks.

Notice period

[119] Mr Quigley's dismissal took effect on 11 March 2019 having been notified of the termination verbally on 1 March 2019. However, a dispute about the period of leave to be served resulted in Mr Quigley departing the business on 11 March 2019 and not returning. He therefore did not serve out the notice period. I do not consider there to be a need for an adjustment regarding the notice period as Mr Quigley declined to serve it out.

The effect of the order on the viability of the employer's enterprise

[120] There was no direct evidence before me regarding the effect of the order on the viability of Belfast Sinks. While Mr Shaw referred to business difficulties giving rise to the decision to decline Mr Quigley's annual leave request, such evidence was insufficient to base a finding that the business was under such financial constraint that a deduction was warranted by way of contingency.

Length of the person's service with the employer

[121] Mr Quigley commenced employment with Belfast Sinks on 6 December 2017, his length of service was relatively short and is a neutral factor when considering whether an order for compensation should be made.

The efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal

[122] Mr Quigley submitted evidence of applications made on the website 'Seek' as evidence of the efforts undertaken to mitigate the loss suffered because of the dismissal. He stated that he had applied for 60 jobs primarily through that website. No other evidence to contradict Mr Quigley's evidence was led by Belfast Sinks. In the circumstances I am satisfied that Mr Quigley took steps to mitigate the loss suffered. Consequently, I make no deduction on account of any failure to mitigate.

The amount of remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[123] Mr Quigley gave no evidence of earnings for the relevant period.

Any amount of income reasonably likely to be earned during the period between the making of the order and the actual compensation

[124] I am satisfied that Mr Quigley has been able to secure employment given his preference not to be reinstated.

Misconduct and shock, distress or humiliation

[125] I do not consider there has been misconduct which would require me to reduce the amount of compensation; this is notwithstanding Mr Quigley's unacceptable response to his annual leave request being declined. However, I observe that Mr Quigley's conduct was considered in light of the anticipated period of employment.

[126] I do not include any component by way of compensation for shock, distress or humiliation caused by the manner of the dismissal.

Compensatory cap

[127] For the purpose of s 392(5) of the Act, I am satisfied the amount is $38,320. I have considered that under Mr Quigley's employment contract he was entitled to superannuation contributions at 9.5%.

Any other matter that the Commission considers relevant

[128] I have considered all of the circumstances of the case and there are no further matters that I consider relevant when arriving at the compensatory amount.

Conclusion and Orders

[129] After consideration of the foregoing issues, I find that Mr Quigley was dismissed and that it was unfair within the meaning of the Act.

[130] Reinstatement is not an appropriate remedy in this case and therefore I find that compensation is appropriate. The calculation for compensation is set out in the following table.

Compensation	**Calculation**	**Gross**	**Total Gross Amount (inclusive superannuation)**
Anticipated employment period	4 weeks x $1,346 = $5,384.00 + $511.48 (superannuation)	$5384.00	**$5895.48**
Notice period	$0.00	$0.00	$0.00
Deduct monies for misconduct	$0.00	$0.00	$0.00
Deduct monies earned since termination	$0.00	$0.00	$0.00
Deduction for contingencies	0%	$0.00	$0.00
Calculate any impact of taxation	To be taxed according to law		
Apply the compensation cap	Last six months amount of remuneration received by Mr Nicholl $34,996 + (9.5% superannuation $3324) = **$38321**		Cap applied
		TOTAL	**$5895.48**

[131] For the reasons I have given earlier, and on the basis of the calculations completed, I order that Belfast Sinks pay to Mr Quigley an amount of $5895.48. In determining the amount for the purpose of the order, I have taken into account all of the circumstances of the case, including the criteria set out in s 392(2) of the Act.

[132] The total amount does not exceed the compensation cap applying at the time of dismissal. The amount ordered to be paid must be subject to ordinary taxation.

[133] The compensation is to be paid within 14 days from the date of the accompanying order[63] (as issued simultaneously with this decision).

[63] PR715711.

DEPUTY PRESIDENT

Appearances:

S Quigley, applicant.

A Shaw for the respondent.

Hearing details:

2019.
Perth:
20 December.

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