



# DECISION

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

**Joshua Young**

v

**The Trustee for Cookers Trust (Cookers Bulk Oil Systems Pty Ltd)**  
(U2020/938)

COMMISSIONER MCKENNA

SYDNEY, 17 SEPTEMBER 2020

*Application for an unfair dismissal remedy.*

[1] Joshua Young (“the applicant”) has made an application, pursuant to s.394 of the *Fair Work Act 2009* (“the Act”), in which he seeks an unfair dismissal remedy concerning his dismissal by what was identified in the application form as “The Trustee for Cookers Trust”, but which has as its legal name “Cookers Bulk Oil Systems Pty Ltd” (“the respondent”). I amend the name of the respondent accordingly. The matter was heard by Kovacic DP and a decision was reserved; the file has been reallocated to me for determination following the untimely death of my colleague. The parties advised they did not object to the reallocation for determination.

[2] As to preliminary matters, there were no issues, and I otherwise find, that: the application was made within time; the applicant was a person protected from unfair dismissal; the respondent is not a small business, and so consideration of the *Small Business Fair Dismissal Code* does not relevantly arise; and the dismissal did not involve a case of genuine redundancy.

## Background

[3] The respondent is involved in the business of bulk (edible) oil delivery and its collection for recycling. The applicant was employed by the respondent as a bulk oil tanker driver from 9 May 2018 until the dismissal on 20 January 2020. The dismissal, with a payment in lieu of notice, arose against the general backdrop of a traffic-related incident on 15 January 2020, and the alleged actions of the applicant in relation to that incident; and the contents of a telephone call to a manager to report the incident. The applicant was driving a six-tonne vehicle at the time of the incident. Aspects of what occurred in the incident were captured on dashboard camera (“dashcam”) footage from another of the respondent’s trucks being driven by one of the applicant’s colleagues, which was not far behind the vehicle driven by the applicant.

[4] In the Form F2 – *Unfair dismissal application*, which was prepared by the applicant’s former representative, Unfair Dismissal Experts Pty Ltd, it was contended, among other matters, that the applicant’s actions “were proportionate to the circumstances, and that he was

forced to react and deal with a difficult and dangerous situation which he did not instigate”. Separately from the traffic incident, the applicant made a telephone call to his manager to report the incident, in which he made concerning comments about the incident and the driver of the red car, being comments which also involved high-level swearing – allegedly despite a request or requests from the manager that such language cease.

[5] The applicant contended there was no valid reason for the dismissal and, moreover, the dismissal was characterised by a lack of procedural fairness. The respondent contended the Commission should not accept these characterisations by the applicant. The Form F3 – *Employer response to unfair dismissal application* indicated the respondent’s characterisation of the reasons for the dismissal as being:

- “1. The use of abusive language toward the manager and continuation of it after he was directed to cease speaking in such a manner.
2. Erratic and aggressive driving standards with the potential to cause injury and damage.
3. Being a Safety risk to himself and the public.
4. Driving in a dangerous manner while in charge of a Cookers vehicle.
5. Failing to represent Cookers Bulk Oil System Pty Ltd in an appropriate manner.”

[6] The matters outlined in the applicant’s Form F2 and the respondent’s Form F3 essentially were the bases upon which the cases for each party were advanced in the subsequent hearing. More particularly, the applicant denied having driven in a way which was in any way unsafe and, while he admitted to swearing, denied he had been asked not to swear in the particular conversation with the manager.

[7] The parties filed and served various written materials in support of their cases. The matter proceeded to a hearing on 1 July 2020 in which witnesses were cross-examined and oral submissions were made.

### **The evidence**

[8] As to the traffic incident, the applicant’s evidence indicated matters including that on 15 January 2020 he was travelling in a company vehicle on a road where two lanes merge into one. A vehicle (“the red car”) sped-up beside him and cut him off, forcing him to brake heavily to avoid hitting the red car or, separately, a cyclist. The applicant’s first reaction was to beep his horn. The applicant made a right-hand turn where the driver of the red car continued driving erratically, and the driver cut-off the applicant two more times. There was an oversized truck which the applicant was trying to get around. Once again, the applicant was cut-off by the red car. After continuing down a roadway with normal traffic flow the applicant and the red car approached an intersection, and the applicant attempted to merge into the right-hand lane. As the applicant was indicating to the driver of the red car to move over, the red car “sped up in the right lane to block [the applicant] from moving over” and the driver started beeping his horn at the applicant. It became clear to the applicant the driver of the red car “wasn’t going to let [the applicant] in the right-hand lane so [he] remained in the centre lane of traffic”.

**[9]** When the traffic was stopped at traffic lights, the applicant was looking in his driver's side mirror when he saw the driver of the red car exit his vehicle with something in his hand, and, in what that applicant considered was a threatening manner, slammed his car door shut and approached the applicant's truck. The applicant exited his truck. The applicant indicated this was because he was feeling threatened by the other driver's actions and his body language, and was ready to defend himself. On the applicant's account, the driver of the red car proceeded to record the applicant and scream abuse at the applicant. Upon realising that the driver of the red car was not going to physically attack him, the applicant "hopped back in" his truck. Separately, the driver of the red car then proceeded to "harass" a "colleague", namely John Martin, who was driving the second truck, allegedly "abusing him and threatening him and taking photos of his licence plate". (Mr Martin provided a statutory declaration, on which he was cross-examined<sup>1</sup>, recounting, among other matters, his own version of the conduct of the driver of the red car.) At this point, the applicant thought he should take a photograph of the red car's number plate, which he did before getting back into his truck for a second time. The applicant and the driver of the red car then resumed driving their respective vehicles and went their separate ways without further incident.

**[10]** Under the respondent's policies, employees are to contact the relevant supervisor/manager to report work-related incidents. The applicant promptly telephoned Matthew Rowland, who is the Manager of the ACT/NSW Branch of the respondent's business, to inform him about the incident. The applicant said he was "still very shaken up" and "angry". The applicant then recounted his description of matters involving the driver of the red car to Mr Rowland. As recounted in the applicant's own evidence-in-chief, the conversation with Mr Rowland then continued in the following way (as written, and with asterisks in the original statement):

"Matthew [Rowland] then said "calm down mate so what else has happened?" I then said to Matthew "I want to cut that c\*\*t off just to spite him, the f\*\*king c\*\*t. I should've run him off the road in to a tram." He told me "you can't do that mate, so your response to him cutting you off is to cut him off?" I replied "yes, f\*\*k him he nearly made me hit a cyclist mate I am still shaken by it I am pissed off that he done that and then attacked me!" Matthew then said "so do you think running him in to a tram is the correct response?" I replied "I don't care, death to the c\*\*t." he said that "you can't react like that, to cut someone off out of spite." I said "I didn't cut him off I am just angry at the whole situation." He responded "you need to calm down mate go take 10 minutes have a smoke and calm down before you start making deliveries." I then told him "he got out of his car and took photos of mine and Johns' truck. So, you might get a phone call or a complaint, that's why I am ringing to let you know what's happened." He said "just calm down mate take a break and once you're calm carry on with your run." I said "no worries. Talk to you later, catch ya" And the call ended."

**[11]** At the time the applicant telephoned Mr Rowland, Mr Rowland was in a vehicle with his fiancée, Linda Lade, and their young child. They were driving to a childcare facility. Mr Rowland recounted matters in the following way in his evidence:

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<sup>1</sup> Mr Martin's statutory declaration was tendered in evidence as Exhibit 2. Mr Martin was a witness in the proceedings; he was cross-examined about the contents of Exhibit 2 and other matters (see transcript generally at circa PN279-PN400), notwithstanding the respondent's written submissions at paragraph 67 which incorrectly suggest he was not examined.

“4. ... At approximately 07:30 I received a phone call from Mr. Young. He said that he had been ‘cut off’ on Flemington Rd, Mitchell by a red ford territory that forced him to brake heavily and narrowly avoid a cyclist.

5. He said that he then cut the red ford territory off on North Bourne Avenue.

6. During the phone call he said that he had ‘cut the driver off out of spite’, that he was angry that he had nearly hit a cyclist, that ‘I wanted to smash his face and kill him’, ‘I wanted to push him into a tram’.

7. While making these comments he was clearly agitated and angry. He was constantly swearing using ‘F’ and ‘C’ words about the other driver.

8. I was somewhat taken aback by the vehemence of his, what I can only call a tirade. Early on I asked for him to stop swearing as my family was in the car, however he didn’t appear to take any notice as he continued swearing profusely.

9. I told him to pull over in a safe place and remove himself from the vehicle and take 15 minutes to try and calm himself down and when he felt he was calm enough to carry on with his day he should do so and I would check in during the morning to see how he was.”

**[12]** Ms Lade provided an initial written statement on 15 January 2020 (at the request of the respondent), and subsequently gave her own evidence in the proceedings about what she heard being said in the loudspeaker telephone conversation between the applicant and Mr Rowland. Key aspects of the evidence of Ms Lade were summarised in the respondent’s submissions in the following way, highlighting matters including that Mr Rowland had asked the applicant to watch his language as his family was in the car; that the applicant said that “he had cut off the same driver” after the near-miss with the cyclist; that the language used by the applicant was “full of F’s and C’s” even after Mr Rowland had advised the applicant to watch the language at the beginning of the conversation as his family was in the car; and that the driver had taken photographs of the truck and would likely go to the police over the incident. Ms Lade recounted that the applicant made some “extremely alarming comments”, identified as being: “[I] cut the driver off out of spite”; “I was angry, that I nearly hit an innocent cyclist”; “I wanted to smash his face in and kill him”; and “I wanted to push him into a tram”. In her evidence, Ms Lade said: “I am aware of road rage, but I have never heard anyone make such serious and dangerous comments about another driver.” For her own part (for she is not a party to the employment relationship), Ms Lade was “quite disturbed” by what was said by the applicant.

**[13]** As to what the applicant said, and considered in the context of the applicant’s evidence that swearing was part of the workplace culture, Mr Rowland’s evidence was:

“46. ... I acknowledge that from time to time people do swear in the workplace. However, the odd swear word is one thing, but swearing profusely with nearly every second word being either “F” or “C” in a completely other situation [sic]. I do not agree that the odd sear [sic] word is then allowing for open slather swearing when the person on the other end of the phone tells you that his family is present and to moderate your language. However, it was not only the swearing that was of concern. The vehemence of Mr. Young’s threat to the other driver was quite frightening.”

[14] At around 9.00am on the same day Mr Rowland received a telephone call from the driver of the red car, and listened to that person's account of matters. Mr Rowland then escalated matters by contacting senior managers and HR personnel for advice and/or instruction. In consequence, the applicant was placed on paid suspension pending an investigation. As part of that investigation, Mr Rowland asked the driver of the red car to send his allegations in writing. Mr Rowland also viewed the dashcam footage from the second truck driven by Mr Martin. (After viewing the dashcam footage, Mr Rowland spoke with Mr Martin about the footage that showed him interacting with the driver of the red car and showing potentially aggressive behaviour to the driver; Mr Rowland cautioned Mr Martin about this).

[15] The driver of the red car and by then a complainant set out in writing his characterisation of what had occurred in an email with a subject line which read "Life-Threatening Road Rage By Cooker's [sic] Driver". The complainant did not give evidence in the proceedings, and his name was redacted in an email which was in evidence (following upon his earlier request to the respondent concerning confidentiality). Given the complainant did not give evidence in the proceedings, what is said in his email has been evaluated and weighed by me accordingly. The complaint is recounted in this decision because its contents form part of the fabric against which the decision was made to dismiss the applicant.

[16] Shortly stated, the complainant recounted in his email his account and perceptions of what had occurred on 15 January 2020. Relevantly, the complainant "sensed" that the applicant was trying to follow him for about 3km and then engaged in driving which he considered to be frightening and life-threatening - in that the applicant, upon levelling with his car, (allegedly) deliberately and very noticeably swung his truck into the complainant's lane almost forcing him to crash. Immediately thereafter, the traffic stopped due to red lights at an intersection and the complainant "jumped out of the car" to take photographs with his telephone. As recounted by the complainant, the applicant immediately got out of his car and started to approach him until he saw the camera. According to the complainant, the applicant "then quickly covered his face and turned around and gave me the fuck finger signal and got back in the truck." The complainant also took photographs of the number plate of the second truck and the face of the driver and while doing so noticed a dashcam in the second truck. The complainant recounted how the driver of the second truck (Mr Martin) had immediately revved his engine and the truck jumped forward slightly, whereupon the complainant "threw [his] hands in the air in astonishment and asked the driver if he was going to run me down on the highway". The driver of the second truck responded by saying "Yes I Will!". Upon returning to his car, the complainant was informed by his wife that the applicant had approached the red car; his wife, the email continued, "who was already in a state of shock, said she felt very intimidated and fearful." The complainant also recounted that he turned off the highway soon after and immediately contacted the Police and, later, Mr Rowland (whom he spoke of in favourable terms in relation to his handling of the initial telephone complaint).

#### *Subsequent developments*

[17] Later that same day of 15 January 2020, the applicant was stood-down pending a meeting about the incident. The applicant was given a letter which read in part:

“This is to discuss the actions of yourself on Wednesday 15.01.2020.

During our conversation this morning at 07:30 regarding the alleged incident involving the red ford territory cutting you off on Flemington Road and the follow on incident where it is alleged you cut the red territory off on Northbourne Avenue.

Comments made by yourself –

1. I cut the driver off out of spite
2. I was angry, that I nearly hit an innocent cyclist
3. I wanted to smash his face and kill him
4. I wanted to push him into a tram

It is also alleged that the driving standards were of poor quality during these incidents.

We are standing you down on full pay for Thursday 15.01.2020 pending an investigation to the above listed allegations. ...”.

**[18]** Matters were put in motion to arrange a meeting with the applicant. The meeting initially was scheduled for 17 January 2020 but was rescheduled to 20 January 2020. Although the applicant wished to have Mr Martin attend the meeting as his witness/support person, the respondent did not consider this was appropriate given Mr Martin’s own involvement in matters and because he (Mr Martin) may be subject personally to disciplinary action. In consequence, another work colleague was enlisted for the purpose of being a witness/support person for the applicant. A meeting was conducted on 20 January 2020 involving the applicant, his support person and managerial employees - and (via Zoom) the respondent’s Human Resources Manager, Robin Gilmour.

**[19]** Matters were outlined to the applicant by the respondent’s management relevant to the complaint by the driver of the red car, the dashcam footage and the statement prepared by Ms Lade as to what she heard unfold in the applicant’s telephone conversation with Mr Rowland. The applicant was advised that the footage showed his truck swerving into the right-hand lane on two occasions; the applicant explained, in such respects, he was just trying to merge into the right-hand lane. When asked about his comments to kill and run the other driver off the road, the applicant responded: “Well I was angry because he just kept stopping me from getting into the lane”.

**[20]** One of the managers said in the meeting it seemed the applicant was using the truck to intimidate and potentially run the other driver off the road. The applicant replied: “Well he wouldn’t let me in and had pushed in front which nearly caused an accident earlier” - to which a manager indicated that the applicant’s actions were more likely to have caused a severe accident. The applicant agreed he had continued to swear in his telephone conversation with Mr Rowland, notwithstanding that Mr Rowland asked him to stop several times. According to the evidence in the respondent’s case, the applicant “acknowledged that he had said that he wanted to smash the other drivers face and kill him. He tried to justify his actions by saying that he was upset.” Mr Gilmour said of the meeting:

“20. It was my observation of the [sic] Mr. Young during the interview, that he felt he was justified in being aggressive and trying to intimidate the other driver. He did not appear to show any remorse for his actions. His attitude was it was the other driver’s

fault and he deserved to be run off the road. I was somewhat shocked at this attitude and glad I wasn't sharing the same roads as he, as I felt there was a good chance he could do the same to someone else, in similar circumstances where he felt slighted by another driver."

[21] The meeting was adjourned and discussions about matters were held among the managers who had participated in the meeting, as well as more senior managers. It was considered that the dashcam footage showed the truck swerving into the right-hand lane on two occasions, in what looked to the managers "to be quite aggressive action by Mr Young towards the driver of the red car." The managers discussed the complaint by the driver of the red car and found it to be a credible account, especially as it tallied with what was shown in the dashcam footage. A number of matters were also discussed between the managers, including concern for the wife of the driver of the red car given her close proximity to the company vehicle as it swerved right. Further matters that were discussed included that there was company badging on the vehicle (as it would have, for example, reflected badly on the company if an accident occurred) and the telephone discussion in which the applicant reported matters to Mr Rowland. Discussion also ensued about the lack of any previous disciplinary matters involving the applicant and his length of service (which, as noted earlier, had commenced in May 2018).

[22] Mr Rowland described the outcome of the managers' consideration of matters as follows:

"35. We were satisfied on the information before us that Mr. Young had deliberately driven in a dangerous manner out of anger at another driver. We were not satisfied that he had any credible excuse for doing so. We determined that this was in itself gross misconduct that could have caused a serious and possibly fatal road incident involving a Cookers vehicle.

36. We were also satisfied that Mr. Young in his phone conversation with me while I was in the car with Ms Lade had acted inappropriately in threatening the life of another driver and continuing a swearing tirade after being asked to stop several times. We determined that this was further misconduct.

37. On the basis of our discussions we were satisfied that it was appropriate to terminate Mr. Youngs [sic] employment for gross misconduct. The company could not condone nor risk this action happening again.

38. We decided to pay him in lieu of two weeks' notice, given it was just after Christmas.

39. After about a 30 minute break for our discussions both Mr. Young and Mr. Russell were called back to the office. Mr. Gilmour advised Mr. Young that his employment was being terminated for gross misconduct. I gave Mr. Young a termination letter."

[23] Following an adjournment in the meeting, the applicant was informed he was being dismissed with immediate effect; he was handed a letter advising of the following:

“Re: Termination of Employment

Dear Joshua,

Further to our previous meeting conducted earlier today in regard to incidents whilst carrying out your role as Driver with Cookers Bulk Oil Systems.

At this meeting we identified and investigated incidents that occurred on Wednesday 15 January 2020.

Specifically matters relating to:

- The use of abusive language toward your manager and continuation of it after you were asked to cease speaking in such a manner.
- Erratic and aggressive driving standards with the potential to cause injury and damage.
- Potentially being a Safety risk to yourself and the public.
- Driving in a dangerous manner while in charge of a Cookers vehicle.
- Failing to represent Cookers Bulk Oil System in a positive manner.

The company has considered your response to the incidents.

After due consideration I regret to advise you that we have decided to terminate your employment effective immediately due to Gross Misconduct and dangerous and inappropriate behaviour.

You are entitled to two weeks’ notice of termination of employment.

You are not required to work out your notice period.

Your employment entitlements, including any outstanding pay or leave entitlements will be paid to you once all property belonging to Cookers Oils is returned.

I wish you well for the future.”

**[24]** For his part, the applicant did not consider he had driven dangerously or illegally. The applicant’s evidence was that he conducts himself professionally with customers and the general public. It was also the position of the applicant that swearing is part of the culture of the respondent’s workplace and his evidence was that he has never been told not to swear (and, indeed, Mr Rowland and others swear at work). To the extent the applicant used swear words in reporting the incident to Mr Rowland, the applicant said he “was venting [his] frustration at the incident occurring just moments prior” at a time when he was “shaken and angry”. The applicant elaborated upon matters in his evidence, explaining at “... swearing is in my vocabulary, mate, it’s just how I communicate.”

[25] The applicant strongly believes that the respondent wanted to dismiss him for some time for having raised safety-related issues and for reasons related to carer's responsibilities, and used the incident on 15 January 2020 as a pretext to get rid of him. The applicant also considers his position had been advertised prior to the dismissal (and prior to the incident with the red car).

**Criteria for considering harshness etc.**

*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)*

[26] Having regard to the evidence<sup>2</sup> (including the dashcam footage, at the places described in transcript) and submissions, I am satisfied the respondent had valid conduct-related reasons for the dismissal directly related to wilful and deliberate gross misconduct. While there were differences in the evidence, there is enough even from the applicant's own evidence to lead me to conclude that the applicant was indeed very angry at the driver of the red car and conducted himself inappropriately in the course of his driving duties in his employment with the respondent.

[27] The applicant's own evidence was that he had been cut-off by the driver of the red car and this, in turn, resulted in a cyclist potentially being endangered by the applicant. There is nothing to contradict the applicant's evidence in such respects and I accept it. Moreover, there was evidence of Mr Martin, in which he described the driver of the red car as having cut-off the applicant and other drivers, and having been involved in "maniacal driving"; Mr Martin was resolute in his cross-examination that, on the basis of what he observed, the driver of the red car was a "crazed driver". That the driver of the red car cut-off the applicant with the result he may have hit a cyclist did not mean that the applicant's own responses were appropriate in his employment, let alone "proportionate". As the respondent submitted, and I accept on the balance of probabilities occurred: "Following this claimed cut off, the Applicant drove his vehicle to catch up with the other car and twice he deliberately verged his truck into that car's lane, forcing the other driver to take evasive action" and this was "deliberate and wilful unsafe action by the Applicant". I also have outlined earlier in this decision aspects of Mr Rowland's evidence and that of Ms Lade's statement as to what the applicant himself recounted to them a very short time after the incident. Even on the applicant's own account, he was then still angry and had stated he had wanted to run the driver of the red car off the road – which is, it cannot go unremarked, effectively what the driver of the red car alleged the applicant had done in his driving/swerving.

[28] It is apposite to note my acceptance of the characterisation in that part of the respondent's submissions which read:

"59. As they stopped at the lights, the driver of the red car got out and took a photo of the truck. The Applicant got out of his truck and approached the other driver. When he saw that he was being photographed, he covered his face and gave the driver of the red car the finger."

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<sup>2</sup> The file record of the transcript is partly incomplete. The opening segment of the hearing (about 15 minutes) was not recorded/transcribed due, apparently, to an audio malfunction.

[29] Separately from the driving issues, the incontrovertible evidence of the dashcam footage of the applicant, having exited his Cookers' vehicle and giving the driver of the red car "the finger", otherwise belies the applicant's contentions which were to the effect that his conduct in relation to the driver of the red car was benign, appropriate and professional. The applicant employed by the respondent in a role which included professional driving responsibilities and yet the applicant admitted in his own evidence to comments including: "I want to cut that c\*\*t off just to spite him, the f\*\*king c\*\*t." and "I should've run him off the road in to a tram." The balance of the applicant's own evidence when told by Mr Rowland: "[Y]ou can't do that mate, so your response to him cutting you off is to cut him off?" I replied "yes, f\*\*k him he nearly made me hit a cyclist mate I am still shaken by it I am pissed off that he done that and then attacked me!" Matthew then said "so do you think running him in to a tram is the correct response?" I replied "I don't care, death to the c\*\*t." he said that "you can't react like that, to cut someone off out of spite." ...". Even accepting the applicant's evidence that swearing is part of his vocabulary, what was said nonetheless displays troublingly-underpinned reaction by the applicant to a road incident, and the respondent's concerns in such respects were, I accept, well-founded.

*Whether the person was notified of that reason*

[30] The applicant was notified of the matters and he was given an opportunity to respond in the meeting on 20 January 2020.

[31] Separately from the pre-dismissal meeting, the applicant was later notified of the reasons for his termination in a letter dated 20 January 2020.

*Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person*

[32] The applicant was given an opportunity to respond to the respondent's conduct-related concerns about matters, albeit he was not, for instance, actually shown the email from the complainant or the dashcam footage.

*Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal*

[33] There was no unreasonable refusal by the employer to allow the applicant to have a support person present to assist at any discussions relating to dismissal. True it is that the applicant was not allowed to have his preferred witness/support person, namely Mr Martin – but that was not unreasonable as the applicant's preferred witness/support person was the person who had been in the second truck with the dashcam and who himself may have been the subject of disciplinary action (and in fact received a caution from Mr Rowland consequent upon his preliminary viewing on 15 January 2020 of the dashcam footage). In the circumstances, it was reasonable for the respondent to, in effect, veto Mr Martin as the applicant's witness/support person in lieu of a different person of the applicant's choosing. As the respondent's submissions noted, while the particular support person was not the applicant's first choice, given that at the time Mr Martin may have also been the subject of investigation, it was not unreasonable for the respondent to decline the applicant's request that Mr Martin be his support person in a matter in which Mr Martin had his own separate and discrete involvement (for example, in "inching" his truck closely towards the driver of the red car as he was taking photographs).

*If the dismissal related to unsatisfactory performance by the person-whether the person had been warned about that unsatisfactory performance before the dismissal*

[34] The dismissal related to an effectively stand-alone set of circumstances on 15 January 2020. Otherwise, the applicant had no adverse history of warnings or the like; and this was a matter which, the evidence indicated, was discussed by the respondent's decision-makers before the applicant was advised of the dismissal.

*The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal/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*

[35] At the time of the dismissal, the respondent employed about 190 employees. The respondent has in-house HR personnel, including a Human Resources Manager. That manager, Mr Gilmour, was involved in matters on and from 15 January 2020. Among other matters, Mr Gilmour provided certain advice to Mr Rowland and also personally contacted the complainant (who requested that his name be redacted from the emailed complaint due to concerns he expressed). Mr Gilmour was also involved in the meeting which preceded the decision to dismiss, and Mr Rowland typed-out the letter advising of the termination of employment under Mr Gilmour's direction. Apart, perhaps, from the fact the applicant was not shown the dashcam footage and the complainant's email, the procedures did not seem to visit an unfairness on the applicant.

*Any other matters that the Commission considers relevant*

[36] Despite what the applicant contended, I do not accept that the applicant's position had been advertised prior to the dismissal, with a view to replacing him, and nor do I accept that the dismissal itself was premediated. Similarly, I do not accept that the circumstances surrounding the incident on 15 January 2020 were, or were used as, a pretext for dismissal in response to safety-related issues previously raised by the applicant or that the dismissal arose directly or indirectly from issues related to carer's responsibilities. Lastly, the applicant denied that he had been asked to stop swearing in his conversation with Mr Rowland on 15 January 2020. That denial seems improbable, given the evidence that there was a young child in the car at the time and the evidence was that the applicant had been asked to stop swearing because Mr Rowland had his family in his car. The applicant suggested his words had been "twisted in this instance to make them sound worse than they are"; but, respectfully to the applicant, even his own account of the words used speaks for itself.

## **Conclusion**

[37] The respondent had a valid reason for the dismissal and followed an appropriate procedure in the prelude to the dismissal. I am not satisfied that the applicant has established a case for the intervention of the Commission on the basis that his dismissal was allegedly unfair. An order dismissing the application will issue in conjunction with this decision.

COMMISSIONER

*Appearances:*

*J Young*, applicant, on his own behalf.

*A Dalton*, of Australian Industry Group on behalf of the respondent.

*Hearing details* (before Kovacic DP):

2020.

Canberra (by telephone/video):

July 1.

(and on the papers before McKenna C).

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