

[2020] FWC 5332

The attached document replaces the document previously issued with the above code on 20 October 2020.

Typographic errors at [236] and [324] amended.

Associate to Deputy President Anderson

Dated 23 October 2020



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Clair Petersen

v

**Kizuri Capital Pty Ltd, Maycorp Pty Ltd and Cricklewood Capital Pty Ltd
T/A Allpet Products
(U2020/6126)**

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 20 OCTOBER 2020

Application for an unfair dismissal remedy – family business manufacturing and wholesaling pet products - salesperson operating remotely – performance-based dismissal – performance deficiencies – context – COVID-19 – overall, warning warranted but no valid reason for dismissal – procedural unfairness – compensation ordered

[1] On 4 May 2020 Clair Petersen (the Applicant or Ms Petersen) applied to the Commission under section 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy. She was dismissed on 14 April 2020 by her then employer, Allpet Products (Allpet or the employer). At the date of dismissal she was employed as a Field Sales Executive.

[2] Allpet is a Western Australian-based business owned and operated by three entities: Maycorp Pty Ltd (as trustee for the Craig Richards Trust), Cricklewood Capital Pty Ltd and Kizuri Capital Pty Ltd (as trustee for the Jemucada Family Trust).¹

[3] Ms Petersen, who resides in South Australia, claims her dismissal was harsh, unjust or unreasonable. She seeks an order for compensation.

[4] Allpet oppose the application. It contends that Ms Petersen's dismissal was not unfair and no issue of remedy arises.

[5] Conciliation was conducted on 3 June 2020. The matter did not resolve. A subsequent opportunity for Member Assisted Conciliation was not pursued by the parties.

[6] I issued directions on 10 June 2020 and further directions 24 July 2020 at which time I issued a confidentiality order concerning certain business records.²

[7] By consent, I granted permission for both Ms Petersen and Allpet to be legally represented.³

¹ Respondent's name amended by leave 24 August 2020

² Order 24 July 2020

[8] Permission was granted for Allpet's counsel and witnesses to appear remotely by video conference in light of COVID-19-related border closures between Western Australia and South Australia.⁴

[9] In advance of the hearing, I received materials from both Ms Petersen and Allpet.

[10] On 21 August 2020, on Ms Petersen's application made shortly prior to hearing, I made a production order requiring disclosure of complete email chains between the Ms Petersen and her immediate manager Ms Rafferty (the 'Rafferty emails').⁵ Hundreds of emails (covering 215 pages) were located and produced by Allpet at short notice.

[11] I heard the matter (in person) on 24 and 25 August and 14, 21 and 29 September 2020.

[12] Ms Petersen gave oral evidence on two witness statements filed in her name.⁶

[13] A co-owner and director Murray Hall (Mr Hall) gave oral evidence on three witness statements filed in his name.⁷

[14] No other witnesses gave evidence. I deal later with submissions made by Ms Petersen concerning the failure of the employer to call other persons.

[15] As the matter concerned Ms Petersen's conduct and performance across a substantial period of employment, the evidence was of considerable breadth. Though some facts are agreed, most of the critical findings are in dispute. On some disputed facts issues of credit are relevant.

[16] The written and oral evidence of both witnesses was direct, relevant and substantial. Through each had different recall of certain events, each were generally credible and their evidence broadly reliable.

[17] The differences in evidence are largely not the product of credit. They are more-so the product of variations in recall of details and, at times, strongly different characterisation of the same facts.

[18] Where there are factual differences requiring determination, I make findings on an issue-by-issue basis. I do so having regard to plausibility, consistency under cross examination and demeanour in the witness box. Importantly, and at times crucially given the volume of material before me, I have regard to corroborative documentary evidence (if any) that informs content and context.

[19] Ms Petersen gave evidence carefully and generally with composure. She was attentive to questions and made some concessions where necessary. However, her evidence veered into excessive generalisation and lengthy answers. Occasionally she was overly defensive and vague.

³ Decision 14 July 2020

⁴ Further Directions 24 July 2020

⁵ The production order required reasonable search and production of the Rafferty emails (bundle, AP106), if located; the Commission did not order production of other documents sought by Ms Petersen

⁶ Statements Ms Petersen CP59 13 July 2020 and CP60 18 August 2020

⁷ Statements Mr Hall AP107 10 August 2020, AP108 23 August 2020 and AP109 13 September 2020

[20] Mr Hall was a conscientious witness whose evidence was straightforward and relevant. He was not combative and generally made appropriate concessions though some inconsistencies emerged between his written statements and oral evidence.

[21] Both witnesses presented certain views as fact which are more appropriately characterised as opinion and assumption. In a matter such as this (a performance based dismissal) that is not surprising. The reason for dismissal itself was reflective of an overall opinion formed by the employer.

[22] The Commission is not bound by the rules of evidence but they are a sound guide to fact-finding. Notwithstanding the employer's submission⁸, I do not discard from the record or render inadmissible those parts of witness statements or oral evidence that contain opinion or assumption. To do so would be inappropriate in a matter such as this where the line between fact and opinion is blurred. I have regard to the opinions formed and assumptions made by both witnesses but on a limited basis only. I treat them as an extension of submissions made and capable of providing context to facts otherwise established. As with hearsay evidence, I give considerably less weight to opinion and assumption than primary evidence or inferences properly drawn from that evidence.

[23] I have anonymised customer names as there is no public interest in their disclosure. Appendix 1 provides a legend referencing customer names as anonymised and in its unredacted form has been made available to the parties.

[24] I have also redacted specific sales figures or related financial data in light of the confidentiality order applying.

The Facts

[25] It would have been helpful to fact-finding to have received evidence from Allpet's National Sales Manager Ms Rafferty, given that she was Ms Petersen's immediate manager. Ms Rafferty's evidence would have supplemented evidence of her many emails sent to and received from Ms Petersen, her offers to ease Ms Petersen's workload and what role (if any) Ms Rafferty had in relation to the decision to dismiss given the email correspondence between her and Ms Petersen in the final days of Ms Petersen's employment. In a performance-based dismissal it is unusual that the relevant employee's immediate manager not be called.

[26] It is not however necessary to make an adverse inference against Allpet of the *Jones v Dunkel*⁹ kind in order to undertake the necessary fact-finding and determine this matter. Allpet called the decision-maker, Mr Hall, who was the director in charge of the relevant business activity (sales). A *Jones v Dunkel* inference, were it made, does not enable facts not otherwise open to be found to be so found. It simply has the effect of creating an inference that evidence of a certain witness would not have been helpful to the party that did not call the witness.¹⁰ I need not draw that inference as Ms Rafferty's emails are in evidence and the direct evidence of Ms Petersen and Mr Hall is more than adequate to make relevant findings of fact on both the Rafferty emails and on other matters.

⁸ Respondent's Objection to Evidence of Applicant (undated)

⁹ (1959) 101 CLR 298

¹⁰ *Tamayo v AlSCO Linen Service Pty Ltd* (1997) Print P1859 as cited in *Hyde v Serco Australia Pty Limited* [2018] FWCFB 3989 at [102]

[27] Similarly, and to a lesser degree it would have been useful to fact-finding on specific issues to have evidence from Allpet's General Manager Mr Lawrence and co-owner and director Mrs Hall. Mr Lawrence was directly involved in the 31 March 2020 performance meeting, a fortnight prior to dismissal. Mrs Hall was directly involved in producing information to her husband over Easter 2020 that triggered his decision to dismiss.

[28] However, the evidence of Mr Hall with respect to his professional interactions with his wife generally and over Easter 2020 in particular and the evidence of Ms Petersen and Mr Hall concerning the 31 March 2020 meeting is sufficient to undertake relevant and reliable fact-finding on both these issues.

[29] I make the following findings.

Allpet's operations

[30] Allpet is a family-owned business manufacturing, marketing and distributing pet products to Australian and New Zealand speciality pet retailers. In Australia it operates nationally with primary focus on Western Australia, Victoria, New South Wales, South Australia and Queensland. Its clients include retail chains, vets, independent stores and even hardware stores selling pet products. It is a well-established business, having operated for thirty-seven years.

[31] Its owners are working directors. At the time of dismissal, Mr Hall was a director who oversaw Sales and Administration. Other directors included Mr Hall's wife Danielle Hall (who was also Brand Manager and managed human resources) and Craig Richards.

[32] Also relevant to these proceedings are two executives: Damien Lawrence (General Manager) and Amanda Rafferty (National Sales Manager).

[33] Allpet is a business of relatively small scale, but not a small business as defined by the FW Act. At relevant times, it employed approximately 32 persons. It is based in Perth, Western Australia.

[34] Relevantly, its sales activities outside Western Australia are conducted remotely by field sales executives. At relevant times, it employed three such persons: one resident in New South Wales (covering that State), one resident in Victoria (covering that State and for a period of time, Tasmania) and one resident in South Australia (covering that State and at various other times, Tasmania, Northern Territory or Queensland).

Ms Petersen's employment

[35] Ms Petersen commenced working for Allpet on 12 March 2018 as a full time Field Sales Executive.

[36] Her employment was covered by the Commercial Sales Award 2020 (the Award).

[37] Ms Petersen and Allpet entered a contract of employment¹¹ (the contract) which, together with the Award and the FW Act's National Employment Standards, covered her employment.

[38] The contract set out a Position and Duties description (Schedule 1) and Minimum KPI's (Schedule 4).

[39] Her role was contractually described as follows:¹²

“This is a sales focused position with the primary focus to devise and implement strategies to acquire new clients that will drive sales growth and enable a competitive edge and also maintain existing client accounts in a positive and professional manner.”

[40] Four KPI's were contractually expressed (with accompanying detail):¹³

- Planning/Preparation and reporting;
- Call rates and Customer Engagement;
- GP\$ Performance; and
- New Business Focus.

[41] Whilst the contract went on to provide that further “detailed KPI's for your role will be set in agreement” no further KPI's other than those specified were negotiated.

[42] Though ‘executive’ by title, Ms Petersen was not a member of the management or executive team. She was in reality a sales representative. She was paid an annual salary of \$60,000 inclusive of all Award loadings, allowances and penalties plus statutory superannuation (9.5%). She had access to a gross profit incentive bonus (and was paid bonuses). She was provided a company phone and I-pad (with GPS tracking). As Ms Petersen was required to use her own motor vehicle for business purposes, she was paid an annual vehicle allowance of \$7,500 and provided a fuel card (for business-related fuel expenses only). She was entitled to reimbursement of work-related expenses.

[43] Ms Petersen lived in the outer Adelaide Hills, some 55 km east of Adelaide.

[44] For the first twelve months, Ms Petersen was primarily responsible for Allpet's South Australian operations and also required to remotely service Tasmania and the Northern Territory where Allpet had more limited market penetration.

[45] In March 2019, after twelve months, the owners expanded Ms Petersen's territory to include both South Australia and Queensland. Both the owners and Ms Petersen considered this recognition of her then good work and sales output. Danielle Hall put it this way in a general notification to staff:¹⁴

“Clair has accepted the challenge of looking after Qld in addition to her SA role. Clair has performed really well and developed good customer relationships in SA, so no doubt Clair will continue the positive groundwork that Peter has put in place in Qld.”

¹¹ CP1; AP1: Contract 26 February 2018

¹² CP1 Schedule 1 Role Definition

¹³ CP1 Schedule 4

¹⁴ CP11

[46] Upon adding Queensland to her sales territory, Ms Petersen was not paid more; though she was potentially able to access additional bonuses given that increased territory may lead to increased sales.

[47] Ms Petersen was required to service Queensland remotely from South Australia with a trip to south-east Queensland each month for one week (Monday to Friday).

[48] In recognition of the fact that that adding Queensland increased her workload, Allpet re-allocated Tasmania to another sales representative and informed Ms Petersen that it did not expect the same level of attention to the Northern Territory (though if existing customers in Tasmania or the Northern Territory contacted her, she would still need to refer those customers to either head office or in the case of Tasmania to the other sales representative).

[49] At all relevant times Ms Petersen reported to the National Sales Manager who in turn reported to Mr Hall. For her first eighteen months, the National Sales Manager was Mr Thomas. Upon Mr Thomas leaving the business in September 2019, the new National Sales Manager was Ms Rafferty (from 14 October 2019).

[50] Ms Petersen remained in the role of Field Sales Executive (SA and Qld) until her termination on 14 April 2020.

[51] On 31 January 2020 Ms Petersen rejected a suggestion by senior management that she relinquish her Queensland role. I deal with this issue later in this decision.

Sales and sales targets

[52] Ms Petersen was set sales targets consistent with her contract. Those targets provided access to the gross profit incentive bonus scheme.

[53] It is not in dispute, and was readily accepted by Allpet that, at all relevant times (including in the months leading to her termination) Ms Petersen met or exceeded sales targets (combining new and existing business).

Customer engagement

[54] Effective customer relations was a core element of Ms Petersen's responsibilities. Ms Petersen's duties required customer accounts to be maintained "in a positive and professional manner". Her KPI's set a "target of maintaining 4 to 5 in field customer calls per day".

[55] Ms Petersen was required, in the South Australian market, to travel to customer retail outlets and hold pre-arranged or drop-in face-to-face meetings with customers, show customers new products, place customer orders and otherwise deal with customer feedback, questions or concerns.

[56] Ms Petersen was also required to service South Australian customers remotely as and when face-to-face contact was not possible – by phone, email or text.

[57] In the Queensland market, Ms Petersen could only meet customers face-to-face on her occasional trips to that State. Whilst intended to be monthly, the advent of COVID-19 in

March 2020 meant that Ms Petersen's last trip to Queensland was in February 2020. Otherwise Ms Petersen was required to service that market remotely, primarily by telephone, email or text.

[58] There is a factual dispute as to the quality of Ms Petersen's customer engagement. I deal with this issue later in this decision.

Planning, preparation and reporting

[59] Ms Petersen was (as were the other remote sales executives) contractually required to submit regular details of her activities to the Western Australian head office. These took two forms:

- Journey Plans (details of intended movements and client visits) – to be completed monthly in advance for each sales cycle; and
- Run Sheets (details of actual customer visits and outcomes of visits e.g. orders, credits etc) – to be completed at the completion of each week.

[60] These were to be completed on forms prepared by head office and forwarded to the National Sales Manager who would, where necessary, make them available to the relevant director.

[61] On 18 March 2020, in light of the advent of COVID-19 and associated uncertainty about its impact on business operations, an additional reporting obligation was introduced on Ms Petersen (and other sales executives):

- Sales reports – to be completed daily.

[62] Most of Ms Petersen's interaction with her superiors (the National Sales Manager Ms Rafferty, Mr Hall the relevant director overseeing sales and the General Manager Mr Lawrence) was by email, though also by phone and text.

[63] Occasionally, Ms Petersen was required to attend (remotely, by phone) meetings with the National Sales Manager and other sales executives, which may or may not be also attended by the General Manager and by Mr Hall.

Hours and method of working

[64] Ms Petersen was the only Allpet employee with a physical presence in South Australia (and Queensland). Her work required the exercise of a high degree of autonomy.

[65] Much of Ms Petersen's work was performed on the road by phone, email and face-to-face. She used her private motor vehicle for work purposes (being paid an annual car allowance and work-related fuel expenses).

[66] When Ms Petersen attended a phone meeting with management or customers (either with a customer calling in or she telephoning a customer) she would do so from either her car or would find a physical location whilst travelling. That physical location would typically be either a customer's business premises, a café, a shopping centre, a park bench or her car

parked on a roadside. Occasionally she would use a friend or relatives house nearby her route. In the latter part of her employment, scope for installation of a hands-free phone unit in her car was discussed and made available by Allpet.

[67] It being unsafe to read or write emails or text messages or submit customer orders or complete written reports whilst driving, Ms Petersen would also typically do so from a customer's business premises, a café, a shopping centre, a park bench or her car parked on a roadside. She would also do so from her home out of hours if she had not done so during standard business hours.

[68] There were no rigid hours for her work though she was expected to be working between 9.00am and 5.00pm Monday to Friday. Ms Petersen's hours were regulated by three sources:

- the National Employment Standards (Part 2-2 Division 3 FW Act) Maximum Weekly Hours;
- the Award (Clause 13) Ordinary Hours of Work; and
- the contract.

[69] Clause 13 of the Award provided:

“13. Ordinary hours of work

13.1 Maximum weekly hours and requests for flexible working arrangements are provided for in the NES.

13.2 The ordinary hours of work for a full-time employee are an average of 38 per week with a maximum of 152 hours over 28 consecutive days.

13.3 The ordinary hours of work may be worked on any days of the week.

13.4 The ordinary hours of work will not exceed 10 hours on any day.”

[70] Ms Petersen's contract provided:¹⁵

“Ordinary hours of work

The Employee's ordinary days of work will be Monday to Friday plus any reasonable additional hours that are necessary to fulfil the duties or as otherwise required by the Employer.

The ordinary hours of work will be 9.00am to 5.00pm.”

[71] There is a factual dispute as to whether Ms Petersen competently managed her time consistent with contractual obligations and whether during business hours she engaged in personal activities.

¹⁵ CP1 page 2

[72] There is a related factual dispute as to whether Ms Petersen worked or was required to work excessive hours.

[73] I deal with these issues later in this decision.

Working arrangements under COVID-19

[74] The COVID-19 pandemic impacted the Australian economy during the first quarter of 2020.

[75] In March 2020 the owners of Allpet became concerned at actual and potential COVID-19 impacts on its business, on the businesses of its customers and on staff.

[76] As noted, on 18 March 2020 Allpet (Mr Hall) required all sales executives, including Ms Petersen, to complete an additional administrative task – daily reporting of sales. This was intended to provide an immediate line of sight to the owners on retail impacts and flow-on consequences for business turnover, debtors, cash flow and profitability.

[77] In addition, the owners decided they needed to reduce labour costs. In preference to dismissing or standing down staff, the owners put the following temporary arrangement in place.

[78] On 24 March 2020 all full time staff were advised of a 20% reduction in hours and a 20% reduction in salary, effective the following day. This was confirmed to Ms Petersen (and other sales representatives) in an email from Ms Rafferty which said, in part:¹⁶

“we are unfortunately having to put in place some temporary changes to staff hours and salaries...

Effective tomorrow, all full time staff will be asked to work 20% less hours and will receive a 20% reduction in their salary commencing the next pay cycle (car allowances will remain at 100%).

This equates to a full work day however in order to continue servicing all customers we’d like to suggest it be done as below:

Mon/Tues – full days as crucial days for customer orders

Wed – finish at 3pm

Thurs – finish at 3pm

Fri – finish at 3pm

There is no problem if you prefer to do it differently, but can I please ask you to let me know asap so we can balance out the runs and assist customers if need be.”

[79] Ms Petersen replied that day requesting that the 20% reduction applicable to her be implemented by working until 5.00pm Monday to Thursday but providing a “full clear day” of absence on a Friday so “I can have the best chance possible to replace my lost earnings.”¹⁷

¹⁶ CP37

¹⁷ CP38

[80] Allpet agreed, noting that “reps will still be monitoring calls/emails to a degree”.¹⁸ Allpet subsequently advised sales representatives that in the two weeks of Easter 2020 where public holidays fell (Good Friday and Easter Monday) sales representatives would work each of the full four working days of those weeks and be absent and paid for the public holiday (resulting in 100% of pay) and return to the 20% reduction after Easter.¹⁹

[81] Post Easter 2020, Allpet re-assessed the situation and ended the temporary arrangements.

Performance meeting – 31 January 2020

[82] Although Ms Petersen was meeting and exceeding sales targets, between November 2019 and January 2020 Mr Hall developed concerns with aspects of her performance. After the Australia Day holiday, on 29 January 2020, at Mr Hall’s request, Ms Rafferty sent Ms Petersen (who was on leave that day) the following email:²⁰

“Subject: meeting request

Murray and I would like to invite you to a Zoom meeting with us both as a follow up to some previous conversations regarding reporting expectations, customer feedback and your responsibilities in SA and QLD. To enable you to speak openly and ensure that we can all hear each other properly can you please arrange to be somewhere quiet and private, either at home or perhaps in your car.”

[83] Allpet proposed a meeting on the afternoon of 31 January 2020. That morning, Ms Petersen suggested altering the meeting date to the following week as “today is quite a hectic day for me playing catch-up from Qld and public holiday/day off”.²¹ Allpet declined to do so.

[84] The meeting proceeded that day, attended by Mr Hall and Ms Rafferty with Ms Petersen telephoning-in from a roadside park bench.²² Allpet characterise this as a performance meeting. I deal with this issue later in this decision

Run sheets and reporting obligations – September 2019 to April 2020

[85] There is a factual dispute as to the adequacy and frequency of Ms Petersen’s compliance with her planning, preparation and reporting obligations in the final six months of her employment.

[86] Until September 2019 (that is, for the first eighteen months of Ms Petersen’s employment) Allpet did not rigorously enforce the monthly or weekly reporting obligations on its three remote (interstate) sales representatives. The then National Sales Manager (Mr Thomas) applied flexibility to the completion of these tasks. If sales targets and sales figures were being met (as they were in the case of Ms Petersen) the issue of monthly journey plans and weekly run sheets being missed or not provided on time was not strictly followed-up.

¹⁸ CP39

¹⁹ CP42

²⁰ CP28

²¹ AP106 page 126

²² Audio 25 August 2020 10.15

[87] In the month between Mr Thomas leaving and a new National Sales Manager (Ms Rafferty) commencing, the owners decided to “draw a line in the sand” and apply the reporting obligations strictly. This was evidenced by a series of emails in September 2019²³ from a director Mr Richards to the three remote sales representatives asking for and following up non-provision of run sheets and the monthly journey planner. It culminated in Mr Richards advising the three (including Ms Petersen) on 25 September 2019.²⁴

“The information I have requested has always been part of your employment requirements. Run sheets and call cycles are the very basic information that any professional sales rep would do daily. So I don’t understand why it can’t be supplied.”

[88] Ms Petersen’s evidence²⁵ was that around this time she and Mr Richards discussed his emails and that Mr Richards indicated to her that the firm tone of the emails was not directed at her but at others. Ms Petersen’s evidence was that she took this to understand that latitude would continue to be applied to her given her dual State responsibilities, her perceived heavy workload and good sales performance. In these proceedings, Allpet did not call Mr Richards. Ms Petersen’s evidence of her conversation with Mr Richards is plausible. I accept that it occurred and that she was led to believe that a degree of flexibility by head office would continue to apply to her monthly and weekly reporting obligations though the obligations would remain.

[89] On 15 October 2019, upon Ms Rafferty commencing, another director Mrs Hall emailed all remote sales representatives (copied to Ms Rafferty) setting out the ‘line in the sand’:²⁶

“In the past there has been ad hoc management and reporting of our client interaction and sales for SA, VIC and NSW... We are formalising this process so that each State is reporting in the same way and at the same time:

Monthly call cycle planning – to be emailed by the 1st (or the next business day if a weekend) to Amanda and cc’d to Murray and Craig;

Weekly Run Sheet – to be emailed by the Monday 9am (WST) after each week... We would expect to have a minimum of 5 – 6 client in-store visits each day... Orders are generally done in store with approx 30 mins admin work per day checking emails/planning.

Please note that THIS IS NOT NEGOTIABLE AND IS A FUNDAMENTAL REQUIREMENT OF YOUR EMPLOYMENT. Failure to provide these or/and with sufficient detail will be viewed dimly.”

[90] Head office prepared monthly and weekly reporting forms to make this accountability more consistent, and advised the remote sales representatives that if there were technology problems with populating the forms (as there had been) to let head office know.

²³ AP5, AP6, AP7, AP8, AP9

²⁴ AP9

²⁵ Audio 24 August 2020 4.31pm

²⁶ AP10 email 15 October 2019 10.43am

[91] In the final week of October 2019 emails were exchanged between Mr and Mrs Hall in which Mrs Hall expressed displeasure that Ms Petersen had not submitted a weekly run sheet despite her (Mrs Hall's) 15 October 2019 email.

[92] Ms Petersen inconsistently submitted weekly run sheets and monthly journey plans over the following three months. On some occasions she was thwarted by technology, but other times it was due to a lack of priority to the task. Coupled with some perceived customer 'concerns', the meeting of 31 January 2020 was convened by Mr Hall. The email notification referred to Ms Petersen's "reporting obligations". Amidst a recognition of some work being done well, an area of express concern raised by Allpet was:²⁷

"Reporting not being done (no visibility on who is being seen or where we may need to filling gaps) also leaves us feeling we are not respected by CP".

[93] The meeting notes record Ms Petersen's response:²⁸

"CP acknowledged she was letting go of some small stuff, as she's often busy etc...she wants to start doing run sheets/reporting and be more focussed."

[94] Ten weeks followed between the 31 January 2020 meeting and Easter 2020. Ms Petersen submitted weekly run sheets in each week of February 2020 and the first week of March 2020 but her attention to this requirement lapsed in mid-March 2020 when no running sheets for the three weeks 16 March, 23 March and 30 March were submitted, requiring follow up by Ms Rafferty.²⁹ I do not accept Ms Petersen's evidence that she sent run sheets for these three weeks but was foiled by technology.³⁰ Whilst in email exchanges with Ms Rafferty on 6 April 2020 she queried whether they had been sent by her in an earlier (17 March) email, on 7 April 2020 Ms Rafferty did not withdraw her follow-up.³¹ Had they already been sent, then in all probability the Rafferty emails would have revealed that fact or Ms Petersen could have produced an electronic copy at the hearing from her records. In neither instance did this occur.

[95] Ms Petersen sent a monthly planner (late) for March 2020 after being followed up by Ms Rafferty on 16 March 2020.³²

[96] Ms Petersen submitted some daily sales reports to Mr Hall (the new COVID-related requirement) but failed to do so for 25 and 26 March 2020 requiring a follow up email by Mr Hall to all three remote salespersons.³³

[97] Ms Petersen was also late submitting daily sales reports to Mr Hall on 2 April 2020, requiring follow up by Mr Hall on 6 April 2020 via a formal warning letter. Upon receipt of that letter, on the evening of 6 April 2020 Ms Petersen sent an email to Mr Hall with sales figures for 6 April, 3 April and 2 April 2020.

Performance meeting – 31 March 2020

²⁷ AP29

²⁸ AP29

²⁹ AP37; AP38

³⁰ Audio 25 August 2020 11.18am

³¹ AP106 pages 231 - 233

³² AP38

³³ CP41

[98] On 31 March 2020, concerned at a recent customer issue (the breeder bag issue) in South Australia that had been raised with him by Mr Lawrence (General Manager), and still concerned at inconsistent provision of run sheets and daily sales by Ms Petersen, Mr Hall asked Ms Rafferty to arrange a meeting with Ms Petersen for that day.

[99] From her car, Ms Petersen attended a telephone meeting attended by Mr Hall, Mr Lawrence and Ms Rafferty.

[100] Mr Lawrence outlined the breeder bag issue: a South Australian retailer (Customer A) was on-selling breeder bags supplied by Allpet and this had upset the manufacturer of those bags (Customer B) with whom Allpet had a relationship.³⁴ Mr Lawrence suggested that the retailer be penalised for on-selling breeder bags and asked Ms Petersen to tell the retailer that the cost of all goods supplied to them by Allpet (not just breeder bags) would be raised by adding freight costs.

[101] Ms Petersen pushed back against the proposal. She believed it unethical to charge Customer A more for all goods. Ms Petersen claimed that Customer A was her best customer and that it was unfair to single them out for freight charges. There is a factual difference as to whether Mr Hall expressed support for the position of Mr Lawrence or acknowledged the push back by Ms Petersen. I accept Mr Hall's evidence that he did not advocate in favour of either position but told Ms Petersen to work it out.

[102] In addition to the breeder bag issue, at the end of the meeting Mr Hall asked Ms Petersen where her overdue run sheets were. Ms Petersen replied that she could not do them in the car, could not do them outside as it was raining and could not do them inside as cafes and shops were closed due to COVID-19 lockdowns.

[103] Mr Hall formed a view that Ms Petersen had been "defiant" and displayed a "rude, patronising and frustrating" attitude during the meeting in front of senior staff.³⁵

[104] He left the meeting of 31 March 2020 with the view that he "had a problem in South Australia"³⁶ and that "we were banging our head on a brick wall and I was no longer confident that Clair was the right person to be representing Allpet"³⁷.

[105] I further deal with the 31 March 2020 meeting and the reasonableness of Ms Petersen's conduct and Mr Hall's assessment later in this decision.

Written warning – 6 April 2020

[106] In the days that followed 31 March 2020, Mr Hall spoke to his fellow directors and Mr Lawrence about the 'South Australian problem'.

[107] He decided that a written warning would be given to Ms Petersen and, for the purposes of emphasis, be signed by each of the three directors.

³⁴ AP107 paragraphs 87 to 90

³⁵ AP107 paragraphs 90 and 91

³⁶ Audio 14 September 2020 4.47pm

³⁷ AP 107 paragraph 92; audio 14 September 2020 4.48pm

[108] A written warning dated 6 April 2020 was prepared. It was sent by email at 2.51pm (WA time) by Danielle Hall:³⁸

“Subject: ALLPET – First Warning Notification
Clair
Please see attached correspondence from the Directors of Allpet.
Please detail any concerns you have relating to the letter in writing.
Yours sincerely
Danielle Hall”

[109] The written warning read as follows:³⁹

“6 April 2020

Private and confidential

Dear Clair

First Warning Notification

We are writing to you about your conduct during your employment with Allpet Products and our concerns, namely:

1. Failure to provide daily sales summary on a timely basis to Murray Hall, as requested by email on 27th March and followed up by various text and verbal requests
2. Inconsistent completion of weekly sales run sheets over the past few months. We have not received any since the week beginning 16 March 2020

Being in a front line sales role, the provision of the daily sales summaries during the COVID-19 pandemic, and the weekly run sheet is essential to your role as it has a direct impact on our business operations.

Unfortunately, we have had to resort to this formal warning, as there hasn't been the expected improvement in your performance since our meeting on 31st January 2020.

If you wish to respond to this warning, please do so by replying in writing.

Yours sincerely

Murray Hall
Director

Danielle Hall
Director

Craig Richards
Director”

[110] Nine minutes later (6 April 2020 3.00pm WA time) Ms Rafferty emailed Ms Petersen about overdue run sheets. I deal further with this email and the issue of overdue run sheets later in this decision.

³⁸ AP44

³⁹ AP44 Attachment

[111] Earlier that same day (6 April 2020 9.46am WA time) a head office administrative employee had received a call from a SA retailer (Customer F) to the effect that they ‘tried to get hold of Clair and hasn’t heard from her in months’. Ms Rafferty immediately forwarded the email to Ms Petersen who immediately replied that she would call the customer “ASAP” but could not locate any contact from that customer in her inbox or mobile records.

[112] Ms Petersen received the written warning at approximately 4.21pm (SA time). She was surprised and unsettled. Two hours later (6.25pm) she emailed Mr Hall as follows:⁴⁰

“Subject: Today’s sales

Hi Murray,

Daily sales for today.

Customer C \$ [REDACTED]

Customer A \$ [REDACTED]

Customer D \$ [REDACTED]

Please note, no sales were made Thursday 2nd April - hence no email.

I did however work on my unpaid day off, Friday 3rd April. Hence update of sales for that day today.

Sales;

Customer E add ons \$ [REDACTED]

Customer F \$ [REDACTED]

Regards,
Clair Petersen”

Events 7 April 2020 to 14 April 2020

[113] On the early morning of the following day (7 April 2020) at 7.15am (SA time) Ms Petersen woke unwell and sent Ms Rafferty the following email:⁴¹

“Subject: Sick today

Hi Amanda,

I am unwell today and will therefore not be working.

I have emailed clients to advise and as always will check emails/phone periodically to ensure they’re queries are attended to.

Warm regards,
Clair Petersen”

⁴⁰ AP45; Customer names and sales figures anonymised

⁴¹ CP48

[114] Ms Petersen made an appointment with her general practitioner and attended a telehealth appointment that day (7 April 2020). The general practitioner advised Ms Petersen that a sick certificate would be posted to her home address.

[115] Unaware that Ms Petersen had contacted the company unwell some two hours earlier, at 7.37am (WA time) and having read Ms Petersen's email of the previous evening (concerning 'Today's Sales') on 7 April 2020 Mr Hall sent Ms Petersen the following email:⁴²

"Subject: Today's sales

Clair

I am very disappointed with your response to the warning letter we gave you yesterday. I would like you to give some thought to how responsive you have been to the various requests from management over your time with Allpet. I had to ask several times to receive the daily sales summaries. Amanda has needed to follow up countless times on run sheets. Have you submitted run sheets for the last 3 weeks? Do you think it is even remotely acceptable that you don't complete these tasks in a timely manner? Your response below shows no reflection on your behalf on your attention to these matters.

Thanks

Murray"

[116] On 8 April 2020 Ms Petersen again emailed Ms Rafferty advising that she was still unwell and would be away sick, but had "processed" some orders yesterday and "will continue to check for urgent orders today".⁴³

[117] Ms Petersen was also absent sick the following day, 9 April 2020 and again emailed Ms Rafferty.⁴⁴

[118] The Easter period intervened 10 April (Good Friday) until 13 April 2020 (Easter Monday). These were non-working days. During this period Ms Petersen received her doctors certificate in the mail. It was dated 7 April 2020. It had certified her unfit from 6 to 9 April inclusive.⁴⁵ On the morning of Easter Monday (13 April), Ms Petersen sent the certificate by email to Ms Rafferty (9.09am SA time). Ms Rafferty replied by asking Ms Petersen "Thanks Clair, will you be okay for work tomorrow?"⁴⁶

[119] Unknown to Ms Petersen (and possibly Ms Rafferty, given her email of 13 April 2020) events concerning Ms Petersen's employment were moving fast.

[120] During the Easter break Mr Hall's wife (and co-director) Danielle Hall drew his attention to social media posts that she had located during the break. Those social media posts led Mr Hall to believe:

- that Ms Petersen was conducting a private business potentially in competition with Allpet which she had not disclosed to Allpet;
- Ms Petersen had disparaged Allpet in social media posts;

⁴² AP46

⁴³ CP48

⁴⁴ CP48

⁴⁵ AP46A

⁴⁶ AP106 page 235

- Ms Petersen had undertaken private activities during working hours whilst in Queensland in January 2020;
- that having time for private activities in Queensland was at odds with claims Ms Petersen had made about an excessive workload and being too busy to submit run sheets and sales details in a timely manner; and
- Ms Petersen had consumed alcohol while driving in Queensland in February 2020.

[121] Mr Hall decided to dismiss Ms Petersen.

[122] First thing (7.59am WA time) on the Tuesday following the Easter break, 14 April 2020, Mr Hall sent Ms Petersen (to both her work and private email addresses) a letter of dismissal under cover of an email with the subject description “Please read before your first call”⁴⁷.

[123] The letter of dismissal read:⁴⁸

“Dear Clair

NOTICE OF TERMINATION OF EMPLOYMENT

On behalf of Allpet Products, I hereby advise you that your employment has been terminated, effective immediately, due to failure to perform your duties as a Sales Representative satisfactorily.

The primary reasons for your termination are:

1. Failure to provide weekly sales run sheets in a timely manner. It is a written condition of your employment contract and this was reiterated in an email to you dated 15 October 2019.
2. Failure to provide satisfactory representation to our Clients.

A. The following clients have contacted the Head Office to complain about your levels of service and failure to return calls. These clients include:

Customer G (Dec19 and Jan20)
Customer H (Dec19)
Customer I (Dec 19)
Customer E (Jan20)
Customer J (Jan20)

B. The following clients have contacted the Head Office to ask why they haven't received their orders, why they received duplicate orders or why their credit requests have not been processed. These clients include:

Customer K (August 2020)
Customer L (Dec 19)
Customer E (Dec 19)
Customer M (Jan20)
Customer N (Jan20)

⁴⁷ CP51

⁴⁸ AP67; customer names anonymised

Customer O (March20)
Customer P (April20)

3. Poor attitude and demonstrated lack of respect of Management

As per your employment contract, we require the return of the following company property immediately:

Apple Ipad and scanner

Your termination is effective today and you will be paid 2 weeks in lieu of notice, which will be paid on the return of the above company equipment in good condition.

All statutory and employee entitlements will be paid into your nominated bank account at the next payroll.

It is unfortunate that we have had to result to terminating your employment, but we feel that you have left us with no alternative as your behaviour has not improved despite various meetings and discussions, and is affecting us financially and damaging the reputation of our company.

Yours sincerely

Murray Hall
Director

[124] Two days later (16 April 2020) Mr Hall sent a letter to Ms Petersen’s clients advising that she was no longer working for Allpet, that Allpet “thank Clair for her contribution” and “wish her well in her new endeavours”.⁴⁹

Business circumstances post-dismissal

[125] Ms Petersen’s claims that she communicated with Ms Rafferty post-dismissal and that Ms Rafferty sent her (Ms Petersen) text messages passing on positive feedback from a number of Ms Petersen’s former customers⁵⁰. Text messages from three customers are in evidence.⁵¹

[126] In contrast, Allpet submit that a number of customers advised the business in the wake of Ms Petersen’s leaving that they had been unhappy with her service and only resumed business with Allpet once she left. Mr Hall had no first-hand knowledge of these communications. His evidence relied on what he was told by the incoming sales representative.⁵²

[127] The evidence of Ms Petersen and Mr Hall was hearsay. No customer gave evidence that could be tested. It is unnecessary to make findings on post-dismissal customer attitudes and I decline to do so.

⁴⁹ AP68

⁵⁰ CP59 paragraph 65

⁵¹ CP 54; CP55; CP56

⁵² AP107 paragraph 105 and AP80A

[128] Subsequent to dismissal, Allpet restructured its sales activities. A new employee was engaged on a four day week to service South Australia. Queensland sales were remotely managed by the National Sales Manager.

[129] Allpet allege that Ms Petersen retained confidential business information (including emails) following dismissal, in breach of her employment obligations, and refused to return this intellectual property (and has used some of it in these proceedings). This, it is said, constitutes a further valid reason for dismissal. I deal with this issue below.

Ms Petersen's circumstances post-dismissal

[130] Ms Petersen's evidence was that she was shocked and upset by the dismissal. She says that the loss of a secure job and the limited payment in lieu of notice (two weeks) caused financial burdens and coupled with other personal traumas experienced in early 2020 (the Adelaide Hills bushfire and an ageing father who she was caring for) has made life hard and bleak.

[131] In late April 2020 Ms Petersen secured contract work in an administrative role with a local physiotherapy business but says that the work is substantially less remunerative, involves fewer hours and has no security.

[132] Ms Petersen says that her private hobby business, a dog chaperoning business for persons who wish their dog to attend their wedding or function, has ceased to draw any income due to the fact that public health controls in light of COVID-19 have, in the period post-dismissal, closed down weddings and functions of reasonable size.

Consideration

[133] There are no jurisdictional or preliminary issues arising.

[134] I am satisfied that Ms Petersen was a person protected from unfair dismissal within the meaning of section 382 of the FW Act. She served the required minimum employment period (section 382(a)). Her annual rate of earnings did not exceed the high income threshold (section 382(b)(iii)). Her employer was a "national system employer" within the meaning of section 14 of the FW Act. Her application was filed within the required 21 days after dismissal.

[135] I take account all the evidence and submissions before me. Given the volume of material and breadth of issues raised, I specifically deal with evidence that is most material to arriving at a decision. Some evidence is not referenced, not because I have not considered it, but because I do not need to make specific reference to it. Similarly, I have dealt with each primary submission but not every angle of each submission, not because they have not been considered but because doing so would add excessive length to these reasons.

[136] I now consider whether Ms Petersen's dismissal was unfair.

[137] Section 387 of the FW Act provides:

"387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person - whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant."

Valid reason

[138] Valid in this context is generally considered to be whether there is a sound, defensible or well-founded reason for dismissal.⁵³ In considering whether a reason is valid, the requirement should be applied in the practical sphere of the relationship between an employer and an employee where each has rights, privileges, duties and obligations conferred and imposed on them.

[139] The reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not enough for an employer (other than in cases of summary dismissal by a small business employer⁵⁴) to rely on its reasonable belief that the termination was for a valid reason.⁵⁵ Equally, facts justifying dismissal which existed at the time of the termination can be considered, even if the employer was unaware of those facts and did not rely on them at the time of dismissal.⁵⁶

⁵³ *Sydney Trains v Hilder* [2020] FWC 1373 at [26]

⁵⁴ Small Business Fair Dismissal Code: section 388(2) FW Act

⁵⁵ See *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213; *Edwards v Giudice* (1999) 94 FCR 561; *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* AIRCFB Print S5897 and *Rode v Burwood Mitsubishi* AIRCFB Print R4471

⁵⁶ *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 373, 377-378; *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1, 14. See also *Dundovich v P & O Ports* AIRC PR923358 at [79]; *Lane v Arrowcrest* (1990) 27 FCR 427, 456; cited with approval in *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410, 467 and 468

[140] The existence of a valid reason is not assessed simply by reference to a legal right to terminate a contract of employment.⁵⁷

[141] The reason for dismissal advanced by Allpet, at least in the dismissal letter, was “failure to perform your duties as a Sales Representative satisfactorily”.

[142] In support of this reason, Allpet advance three particulars, which Mr Hall described in his dismissal letter as “the primary reasons”:

- failure to provide weekly sales run sheets in a timely manner;
- failure to provide satisfactory representation to clients; and
- poor attitude and lack of respect for management.

[143] At the hearing, Allpet advanced five further reasons not disclosed in the dismissal letter:

- failure to meet other reporting obligations in a timely manner;
- non-disclosure of personal business;
- disparaging social media posts about Allpet;
- engaging in private activities during work hours; and
- driving during work hours whilst consuming alcohol.

[144] I now consider these particulars.

Run sheets and reporting obligations

[145] The adequacy and frequency of Ms Petersen’s compliance with planning, preparation and reporting obligations is in issue.

[146] I deal concurrently with the alleged failure to provide weekly sales run sheets in a timely manner and the further alleged failure to meet other reporting obligations in a timely manner.

[147] As noted, Ms Petersen’s formal accountability obligation was via her contract as it concerned ‘Planning, Preparation and Feedback’. This involved:

- a journey plan submitted each sales cycle (monthly);
- sales run sheets (weekly); and
- daily sales reports (from 18 March 2020).

[148] Informal accountability was expected by email, text and phone responsiveness to head office, and in particular to her immediate manager (Ms Rafferty), Mr Hall and (as required) the General Manager (Mr Lawrence) and other directors.

[149] On a fair assessment of the evidence, I am satisfied that Ms Petersen failed to consistently meet her formal reporting obligations.

⁵⁷ *Sydney Trains v Hilder* [2020] FWCFB 1373 at [26] principle (6)

[150] I do not give particular weight to Ms Petersen’s failure prior to September 2019. Until then, the obligations were not strictly enforced by her then manager vis-a-vis any of the three remote salespersons.

[151] Whilst I have found that in September 2019 Ms Petersen was led to believe from Mr Richards that reasonable accommodation to such failures on her part would continue to be made, Mrs Hall’s email of 15 October 2019 upped the ante. All salespersons, including Ms Petersen, were on notice that a new approach to enforcing these requirements applied.

[152] Given the tone and formal nature of the 15 October 2019 email and Ms Petersen’s failure to seek formal dispensation from the obligation it specified, it was not reasonable for Ms Petersen to thereafter apply a ‘business as usual’ approach to the reporting obligations, treat them as discretionary or assume the same level of past latitude with non-compliance. Yet, over the next three months, she did so. Whilst it was reasonable for Ms Petersen to believe that the business would be understanding if reasonable explanations for non-compliance or late compliance were provided, the onus for active compliance was on her. She was aware that non-compliance would be, in the words of the email, “viewed dimly”.

[153] The 31 January 2020 performance meeting with Mr Hall and Ms Rafferty was in part a response to Mr Hall’s frustration that the message had not got through to Ms Petersen and his view that failure to complete formal reporting obligations as required by the directors and her contract was disrespectful. At the very least, from 31 January 2020 Ms Petersen was on clear notice that the monthly and weekly reporting obligations, would be applied strictly and that any latitude to not comply that had been previously given or assumed was no longer the approach taken by the owners.

[154] This was not misunderstood by Ms Petersen; at this meeting she verbally committed to compliance. Her subsequent conduct in submitting reports over the next five weeks evidenced that intent.

[155] Ms Petersen failed to submit weekly reports for the last three weeks of March 2020.

[156] Ms Petersen also failed to submit daily sales reports on time for at least 2, 3 and 6 April 2020.

[157] Was the failure to provide the required formal reports to head office after October 2019 a performance failure? I am satisfied it was. The requirements were not unreasonable especially given the level of trust and autonomy devolved to a remotely operating salesperson. They were made known in writing and in advance. The failures deeply frustrated Mr Hall and materially contributed to his loss of confidence in Ms Petersen. Ms Petersen had a somewhat tin ear prior to and even after January 2020 to the reality that she was required to meet these reporting obligations and would be marked down for not doing so.

[158] However, not all performance failures are a valid reason for dismissal. The seriousness of a performance failure requires a consideration of context and circumstance.

[159] Weighing in favour of these failures being considered serious was:

- their contractual nature;

- their reasonableness particularly in light of the trust devolved to a remotely working salesperson;
- some failures were a failure to submit, not just a failure to submit on time;
- a pattern of failure and inconsistency over months, not a single act of failure;
- knowledge from at least 31 January 2020 that the obligation was strictly applicable to Ms Petersen (“to be done on time and consistently”⁵⁸); and
- a commitment given by Ms Petersen to an owner (Mr Hall) and her immediate manager on 31 January 2020 that the obligation would be met.

[160] Weighing against the seriousness of the failures was:

- these were requirements which had to be incorporated into a broader range of daily, weekly and monthly activities and responsibilities;
- these requirements were not to be undertaken at the expense of servicing customers, and in that sense, whilst important, had a lesser priority if a choice of priority needed to be made. Ms Petersen’s contract provided that “face to face customer time is paramount every day” and “face to face time with clients is maximised”. Her contract went on to provide that time devoted to “administration and planning to be kept to a reasonable minimum each week”⁵⁹. In other words, she was required to maximise customer time and minimise time on internal administration whilst still meeting internal responsibilities; and
- after 31 January 2020 Ms Petersen made genuine efforts to comply but did so inconsistently. Her reporting performance improved for five weeks but then fell away in mid to late March 2020.

[161] There are two further significant factors that mitigate the seriousness of the failures: a heavy workload and the hours and pay reduction.

Workload

[162] I deal with this issue only in the context of its relevance to the reasons for dismissal or mitigation of their seriousness. I do not deal with any issues as to whether the hours worked were in breach of the provisions of the contract, the Award or the NES.

[163] A significant volume of evidence was devoted to the issue of workload. Ms Petersen submitted that her workload was “excessive”. Allpet submitted that her workload was manageable, that the employer provided suggestions to ease the workload burden, and that Ms Petersen simply did not organise her time effectively as a professional should.

[164] There is truth in both perspectives. Ms Petersen raised her workload concerns with Ms Rafferty on numerous occasions. It was the subject of discussion at the 31 January 2020 performance meeting. She had two States to cover, and whilst in the field in South Australia she had to also service Queensland retailers, and vice versa. It is clear from her overall email correspondence (especially to Ms Rafferty) that she regularly worked well beyond the 9.00am to 5.00pm contractually stipulated ordinary hours, and when she flew to Queensland the 6.00am flights (booked by head office) required her to rise two or three hours earlier and then do a day’s work on arrival. Her out of ordinary hours work was commonly administrative

⁵⁸ AP106 page 130

⁵⁹ AP1 Schedule 1 “Time in Field”

catch-up but also included emailing customer orders or details for customer credits. For example, Ms Petersen's run sheets for the first week of March 2020 were sent at 8.38pm on a Sunday evening.⁶⁰

[165] Ms Rafferty acknowledged and expressed empathy and sensitivity to Ms Petersen's workload in many of her emails:⁶¹

- "I know how you are really under the pump this week but could you please send through last week's run sheet as soon as you get a chance? Hope your day hasn't been too hectic." (22 October 2019);
- "...please let me know if there is anything I can do to make things less hectic" (29 October 2019);
- "I tried to call earlier but I know you're flat out today..." (22 November 2019);
- "Thanks so much Clair, I know you're busy so appreciate you helping with this" (7 February 2020);
- "I've been thinking about the credits that are outstanding for some of your customers and feeling bad about all the paperwork we expect you to do, as I know how hard it can be on the road..." (6 March 2020); and
- "I know the last few weeks have been hectic and stressful, and I can completely understand run sheets being overlooked as a result." (6 April 2020).

[166] As her employer, Allpet was not indifferent to this workload. For example:

- Ms Rafferty frequently made it clear to Ms Petersen that, if her workload was inhibiting prompt responsiveness to customers, Ms Rafferty would make calls to customers if asked to,⁶² and
- Mr Hall made two relevant suggestions on 31 January 2020: he offered to have the company purchase a hands-free phone kit for installation in Ms Petersen's car; and suggested Ms Petersen give up the Queensland jurisdiction.

[167] Ms Petersen supported the hands-free kit suggestion but failed to have it installed, being initially unsure whether the company would pay for both the kit and its installation. She also believed that this was only a limited solution as speaking to customers or head office often required her to contemporaneously read or access an email, order or product sheet and this could not be done whilst driving.

[168] Ms Petersen pushed back against the suggestion (it was only a suggestion, not a direction) to give up Queensland. Ms Petersen considered that doing so would be interpreted as a failure on her part, and she wanted to succeed in all elements of her job. Mr Hall accepted her desire to keep servicing both territories on the condition that she complied with her reporting obligations. It was only after receiving the warning letter of 6 April 2020 that Ms Petersen privately decided that she would pursue the suggestion to relinquish the Queensland territory (I accept this evidence notwithstanding its self-serving nature and absence of corroboration; it is plausible and consistent with my view that Ms Petersen was naïve but

⁶⁰ AP106 page 172

⁶¹ AP106 pages 6, 14, 37, 149, 179 and 231

⁶² On 16 January 2020 AP106 page 105; on 20 January 2020 AP106 page 110; on 6 February 2020 AP106 page 144; on 26 February 2020 AP106 page 167; on 6 March 2020 AP106 page 179; on 12 March 2020 AP106 page 181

acting in good faith). As things turned out, she was dismissed by Mr Hall before raising the matter again with him.

[169] Ms Petersen’s mode of working in the field is also relevant. Only limited work could be transacted whilst driving. Whilst Mr Hall expected customer related paperwork and customer calls to be mainly done from a customer’s premises (and whilst Ms Petersen did do so on occasions) this was not always possible, especially if it involved a different customer or the need to travel to a customer. Finding cafes, shopping centres and roadside parking bays to do work was part of the job but not always amenable to planning and formal reporting as distinct from transactional work (such as placing orders or returning calls). On occasions, business supplied technology let Ms Petersen down; both with her I-phone and I-pad. Mr Hall rightly acknowledged in his evidence that time management is a necessary competency of a salesperson but that time management whilst on the road is not easy.⁶³

[170] I conclude that Ms Petersen had a heavy workload which often required her to undertake administrative tasks outside of ordinary hours and that this was a material contributing factor to her failure to submit monthly journey plans, weekly run sheets and daily sales reports on a timely basis. I do not conclude that her workload was “excessive” as this is a judgment that requires an objective comparator. I have no such evidence of a comparator before me. I am however satisfied that it was a heavy workload and one she was struggling to cope with once she took the Queensland territory. It was not an inherently unmanageable workload but could not be fully performed by a remotely located salesperson inside the ordinary hours of work stipulated in her contract without resort to reasonable additional hours.

Hours and salary reduction

[171] As noted, COVID-19 related decisions by Allpet communicated on 24 March 2020 resulted in Ms Petersen (and other full time sales employees) incurring an immediate 20% reduction in working hours and a 20% reduction in salary.

[172] Relevantly, the employer did not envisage a diminution in customer servicing. Mr Hall’s evidence on this was vague and unconvincing.⁶⁴ His email of 24 March 2020 is what matters because this is what Ms Petersen received. It said:⁶⁵

“This equates to a full working day however in order to continue servicing all customers we’d like to suggest it be done as follows...” (my emphasis)

[173] The advent of COVID-19 was clearly a time of great stress and uncertainty for both Allpet and its employees. Ms Petersen’s response to Ms Rafferty that evening (“it is tough times...equally I will have to make adjustments within my own life in order to navigate these changes...”) made this clear, as did Ms Rafferty’s response the next day (“yesterday certainly was a tough one”).⁶⁶ Ms Petersen’s evidence was that in the early days of COVID-19 she felt somewhat anxious about working in public places and retail shops without personal protective equipment⁶⁷ which Allpet was having trouble acquiring.

⁶³ Audio 21 September 2020 12.42pm

⁶⁴ Audio 14 September 2020 3.20pm to 3.24pm

⁶⁵ AP34

⁶⁶ AP34

⁶⁷ Audio 24 August 2020 1.08

[174] Irrespective of whether Allpet's decision to reduce hours and salary was a necessary business response to then COVID-19 circumstances, and notwithstanding Ms Petersen's acceptance of the directive (not that she had any real choice) with the work-arounds she foreshadowed (Friday off to do alternate work), it still left Ms Petersen with two States to service in 80% of the time. Given that Ms Petersen was already sinking amidst the workload even when 100% of working time was available to her, it is hardly surprising that she was further challenged by the change. The goalposts had shifted but not the workload.

[175] Further, given that customer service remained a priority it was or ought to have been reasonably foreseeable to Allpet that something had to give; and that was likely to be the administrative and reporting obligations. Yet, at that very time an additional reporting obligation (daily sales) was introduced on top of the monthly and weekly reporting requirements.

[176] This dilemma was appreciated by Ms Rafferty within days (6 April 2020):⁶⁸

"I know the last few weeks have been hectic and stressful, and I can completely understand run sheets being overlooked as a result."

[177] Nor was it unreasonable that an employee in Ms Petersen's situation would experience some demotivation as a result of less pay, fewer hours but comparable obligations. Yet Allpet conducted another performance meeting on the spur of the moment on 31 March 2020 and formed a view that Ms Petersen had a disrespectful attitude after pushing back on a questionable suggestion by Mr Lawrence and telling Mr Hall why she could not immediately submit sales or run sheets whilst driving. Whilst I have accepted Mr Hall's evidence that he did not side with Mr Lawrence's suggestion once he heard Ms Petersen's protestation, he nonetheless formed an unreasonable view that she was defending the client retailer at the expense of Allpet when what she was in fact doing was seeking to protect the client from an arguably unjustified price increase.

[178] In the same way that Ms Petersen had a somewhat tin ear to the reality that she was required to submit reporting obligations and would be marked down for not doing so, Allpet demonstrated a similar tin ear to Ms Petersen's circumstances in the last three weeks of her employment. It failed to recognise her natural anxieties about COVID-19 (mixing with clients in public places) and all that COVID-19 could mean for her job security if the business was to be severely impacted. Instead, the employer required competing and conflicting obligations: service all customers largely to the same extent (including keeping an eye out on days off); complete all reporting obligations; comply with a new reporting obligation; and do this for 20% less pay and in 20% less time.

[179] While the business was also dealing with competing and conflicting pressures (not wanting to lose customers but having to contain costs in light of uncertainty) this was, objectively viewed, an unreasonable cocktail of expectations on Ms Petersen. With the sudden changes to working hours, pay and job security, Ms Petersen's performance could not at that time be objectively assessed against orthodox working hours or standard performance criteria.

[180] I conclude that Ms Petersen's failure to comply with reporting obligations in mid to late March 2020 and in the first week of April 2020 coincided in part with Ms Petersen being

⁶⁸ AP106 page 231

required to work 20% less hours and take a 20% pay cut but to do so without material compromise to customer service. It was also accompanied by a heavy-handed disciplinary approach and a natural anxiety about the impact of COVID-19 on her job and the business. These were material mitigating factors in assessing the seriousness of her failures.

[181] Considered overall, there are substantial mitigating factors that reduce the level of seriousness of the failures to meet reporting obligations in the period mid-March 2020 to the date of dismissal.

[182] Given context and circumstance, the reporting failures warranted formal sanction (either by a fairly conducted performance meeting or a fair written warning once the immediate impact of COVID-19 on the business and on employees had become clearer) but were not a valid reason for dismissal.

Customer relations

[183] Allpet stated in its dismissal letter that Ms Petersen “failed to provide satisfactory representation to our clients”. It specified twelve clients who it claimed had complained to head office about Ms Petersen’s service and responsiveness since December 2019.

[184] In his evidence, Mr Hall described this reason as the “most important” of the reasons for dismissal.⁶⁹

[185] Evidence on most (but not all) of these twelve customer issues is now before me; both via Ms Petersen’s oral evidence and documents produced by the parties (and in particular the Rafferty emails produced in consequence of the Commission’s production order).

[186] On a fair assessment of the evidence, I am satisfied that on occasions Ms Petersen was slow to return a customer’s call or overlooked a customer email resulting in a delay in dispatching an order. On most of these occasions Ms Petersen was apologetic, Ms Rafferty was understanding and either Ms Petersen or Ms Rafferty acted promptly to placate the customer. Ms Petersen’s explanation usually referred to her workload, as it did in relation to Customer Q on 12 March 2020.⁷⁰

“Unfortunately yesterday’s meeting went for quite a bit longer than I expected, which meant that I couldn’t get to a number of my calls and tasks I would have like to. They were already closed for the day. Agreed, in future perhaps a quick office call may have alleviated this.”

[187] By way of an earlier example, on 20 January 2020 Customer E, a Queensland-based pet retailer, escalated contact to Ms Rafferty wanting to place an order but had been unable to contact Ms Petersen for a number of days. Ms Rafferty said to Ms Petersen:⁷¹

“Always let me know if you’re under the pump and having trouble returning customer calls or emails so we can help you out from head office.”

Ms Petersen replied:

⁶⁹ Audio 14 September 2020 11.05am

⁷⁰ AP106 page 181

⁷¹ AP106 pages 109 - 110

“Apologies and thank you for replying to this one. So sorry I missed it in my in-box last week. I’ll apologise when I see them this week.”

Ms Rafferty accepted the apology:

“No worries, thanks for getting back to me. Good luck this week...”

[188] By way of further example, Customer N placed an order with Ms Petersen by email on 23 January 2020 and followed up with Ms Rafferty five days later. Ms Petersen had failed to place the order. Ms Rafferty attended to the order on 29 January 2020. On returning after taking leave around Australia Day Ms Petersen replied to Ms Rafferty:⁷²

“Thank you for processing, yes I must’ve missed this Friday morning was hectic before flying out to QLD. And was obviously away over the last few days. Apologies if any issue.”

Ms Rafferty responded:⁷³

“Thanks Clair, they were desperate for stock but unfortunately their order has ended up being delayed a week as a result. I spoke to (Customer N) this morning and she has been fairly understanding and I think she’s okay now.”

[189] These interactions (Customers Q, E and N) were clearly failures on Ms Petersen’s part which prejudiced the customers.

[190] These failures, and a handful of other examples in March 2020 notwithstanding,⁷⁴ a fair conclusion from an overall assessment of the evidence is that Ms Petersen generally had productive and professional relationships with customers until dismissed. I make that finding for the following reasons.

[191] Firstly, the employer’s own assessment was not wholly negative. The notes of the performance meeting of 31 January 2020 record Allpet’s position as Ms Petersen “doing well” in:⁷⁵

“CP visiting customers every day – no question of not being on the road and doing your job;
Good rapport with most customers;
Have had some wins with Customer T and key accounts;
Take ownership of mistakes and always apologetic.” (my emphasis)

[192] The concerns raised at this meeting was not frequency of visits or rapport with customers but inconsistent follow-up and some calls not returned and some orders not processed.

⁷² AP106 page 122

⁷³ AP106 page 122

⁷⁴ Customer E AP106 pages 185 – 192; Customer O AP106 page 184

⁷⁵ AP29

[193] Secondly, even though Mr Hall’s evidence⁷⁶ was that sending the warning letter on 6 April 2020 was triggered by a “complaint” from Customer R that morning (discussed below), the warning letter makes no reference to customer issues. It refers solely to internal administrative matters. Further, as noted below, the complaint by Customer R was not a soundly based criticism of Ms Petersen.

[194] Thirdly, whilst it may not always follow, that a salesperson achieves good sales and meets sales targets suggests that the salesperson has an effective relationship with those customers which whom they are transacting sales. Ms Rafferty acknowledged this relationship:

“You’ve done a great job lifting the GP in both states, well done!”⁷⁷ (18 November 2019)

“Great job on achieving 51% GP in QLD for November, but also remember you can sometimes use margin to advantage to drive extra sales. I’ve no doubt QLD will continue to grow with you nurturing it.”⁷⁸ (4 December 2019)

“QLD sales may have been affected by the fact you weren’t able to visit so this is a great result.”⁷⁹ (3 April 2020)

[195] To disregard Mr Petersen’s good record of customer sales from an assessment of whether customer accounts were maintained in a “positive and professional manner” (as per the contract) would be to unfairly assess her overall performance.

[196] Fourthly, even in the trying times of her last three weeks of employment (COVID-19; illness), Ms Petersen demonstrated a commitment to customer service including out of hours work. For example, while Ms Petersen was absent ill (10 December 2019 and 7 April 2020) or absent on rostered days off (27 March 2020 and 3 April 2020) she transacted customer sales and orders.⁸⁰

[197] Fifthly, assessing whether Ms Petersen failed to deal with customers in a positive and professional manner cannot be fairly conducted by marking her down simply because a customer went over her head and contacted head office.

[198] I accept Mr Hall’s evidence that a customer taking time out to contact head office rather than deal with the immediate salesperson is a serious issue⁸¹ and may suggest a problem in that customer’s relationship with the salesperson. However, that does not necessarily follow. A myriad of possibilities exist aside from a failure of duty. For example, the customer could be drawing head office’s attention to an issue but not making a complaint, could be factually wrong or could be unreasonably impatient. The salesperson could be non-responsive for reasons unknown to the customer such as approved leave or dealing with other customers. Not all customers make reasonable demands. Mr Hall himself recognised this

⁷⁶ AP107 paragraph 97

⁷⁷ AP106 page 33

⁷⁸ AP106 page 48

⁷⁹ AP106 page 227

⁸⁰ AP106 pages 63, 217 and 234; AP45

⁸¹ Audio 14 September 2020 1.20pm

when he emailed Ms Petersen on 30 August 2019 concerning a difficult customer in the following terms:⁸²

“I do understand she is painful and a small client but she is probably worth a phone call to smooth things over and maintain a relationship with her.”

[199] Further, even where customer contact can be fairly characterised as a complaint, that is not necessarily evidence of failure by a salesperson; the failure could be a system failure or the failure of an officer in another part of the business (such as accounts or product dispatch).

[200] Whilst it is appropriate in a customer-facing business for managers and owners to work from the principle that ‘the customer is always right’ when trying to resolve a customer issue, this is not a sound premise on which to take disciplinary action against a salesperson with whom the customer was engaging. Determining whether a salesperson has failed in their duty is a separate matter. It requires an objective qualitative assessment of what the salesperson did or did not do, or how they did it. Ms Rafferty acknowledged this reality in an email to Ms Petersen on 18 December 2019:⁸³

“It is clear that Customer K are a difficult customer and it is good we are all working as a team to navigate this together...I totally understand that customers get difficult and often only tell their side of the story. Unfortunately though it is the reality of sales that the customer is “always right” and as much as it may be frustrating we often just need to find the easiest way to keep them happy...I just want to let you know that we are grateful for all the hard work you do out in the field, and we’re here to support you. It is never our intention to make you feel like we are criticising you, so we are very sorry if it has come across that way. It is only ever to bring issues to your attention so we can get your side of the story and work through them together.”

[201] Based on the evidence before me, in some (but not all) of the cases of alleged ‘customer complaints’ Mr Hall made unfair assumptions of error on Ms Petersen’s part. For example:

- On 17 December 2019 Customer K contacted head office chasing credits which they claimed they had not received after dealing with Ms Petersen. Head office expressed concern to Ms Petersen that “there doesn’t seem to be any paperwork for these returns”.⁸⁴ The documentary evidence before me is that Ms Petersen had in fact sent Allpet’s head office a credit sheet two months earlier, on 16 October, and re-sent it to accounts when the issue was raised with her on 17 December. On 17 December 2019 Ms Rafferty wrote to Ms Petersen in these terms:⁸⁵

“Please accept our apologies regarding the credit paperwork which you sent in October as it seems to not have been processed by [employee name] at the time.”

⁸² CP18

⁸³ AP106 page 90

⁸⁴ AP106 page 91

⁸⁵ CP25

Yet Mr Hall referred to this customer in the dismissal letter on the basis that a credit request “had not been processed”. It had not been processed by head office, not by Ms Petersen.

- Mr Hall asserted in the dismissal letter that the January 2020 head office contact by Customer E was an example of a “complaint” about Ms Petersen’s level of service and failure to return calls. As noted, there had been a failure on Ms Petersen’s part (overlooking email contact the previous week) for which she had apologised, and which Ms Rafferty accepted. For this issue to be characterised by Mr Hall four months later as a “complaint” evidencing grounds for dismissal was an overreaction. Customer E had escalated contact but in doing so had expressed understanding, the customer herself making reference to Ms Petersen’s workload.⁸⁶

“I am having trouble getting in contact with Clair. I understand her territory has expanded recently so she does have a lot on her plate.”

- Mr Hall’s evidence was that on 6 April 2020 Customer R had “complained that she had not seen Clair in months”.⁸⁷ This customer telephoned head office. However, the head office email passed on to Ms Rafferty indicated that whilst the customer had said that she “hasn’t heard from her for months” the officer taking the call went on to say “she didn’t seem too mad or anything”. This warranted follow-up but is not indicative of a “complaint” as characterised by Mr Hall. Further, the Rafferty emails show that Ms Petersen responded immediately to the issue that day by searching her inbox and then advising Ms Rafferty that the “only emails received from her were from June last year...she hasn’t called this mobile either”.⁸⁸ This was Ms Petersen’s evidence at the hearing. I accept that evidence. On that basis, it cannot be concluded that Ms Petersen failed in her duty concerning this customer.

[202] Mr Hall neither delved qualitatively into these circumstances to assess whether actual error on Ms Petersen’s part had occurred nor given himself the benefit of Ms Petersen’s explanation.⁸⁹

[203] Sixthly, the overall view formed by Mr Hall that Ms Petersen failed to satisfactorily represent Allpet to customers was unbalanced as it made no mention of the customers who were satisfied with her service (some of whom had said so to Ms Petersen or Ms Rafferty including during Ms Rafferty’s trip to Adelaide in November 2019) or where Ms Petersen had advocated customer interests to management (for example, by email to Ms Rafferty 25 October 2019 “my reasoning for this request is to try to ensure all clients’ needs are met and they’re kept happy. As much as possible anyway.”⁹⁰). In the midst of the uncertainty of mid-March 2020, Ms Petersen was congratulated by Ms Rafferty on securing a new customer account (Customer S).⁹¹

[204] For these reasons, I find that Mr Petersen’s interaction with customers was occasionally deficient but generally professional and productive. The standard an employer

⁸⁶ AP106 page 110

⁸⁷ AP107 paragraph 96

⁸⁸ AP39

⁸⁹ Audio 14 September 2020 12.59pm

⁹⁰ AP106 page 11

⁹¹ “Good news on the new account Clair!” AP106 page 199

can reasonably expect of an employee is that of competence. Whilst the standard is not one of perfection it is more than someone simply trying their best.⁹² It is not to the point that Ms Petersen may have been imperfect in the sense of making some errors or sometimes being slow to respond. Her workload coupled with the multiplicity of customers she was servicing in two States whilst working remotely necessarily gave rise to some frustrations on both the business and the customer side. The shortcomings warranted a business response, but a handful of errors scattered across months of otherwise productive work was not, particularly in the unorthodox circumstances operating from mid-March 2020 (COVID-19 coupled with the hours and salary reduction) a sound or defensible ground for dismissal.

Attitude and respect

[205] Mr Hall formed the view that Ms Petersen's poor attitude was manifest by a lack of respect for management.

[206] For this to be a valid reason for dismissal it needs to be supported by more than Mr Hall's subjective belief. I reject the employer's submission, put in closing, that a subjective view of an owner suffices. A valid reason for dismissal under the FW Act (other than in a small business context where a reasonably formed subjective belief of serious misconduct is statutorily recognised) is one that is objectively fair; anything less would fail to give effect to the 'fair go all round' principle that governs the operation of Part 3-2 of the FW Act.

[207] Overall, the evidence does not support this view.

[208] The evidence supports a conclusion that Ms Petersen generally had a positive attitude towards her job, sought to act in the best interests of Allpet, was courteous and professional in her communication with staff, managers and owners, and despite a certain naivety about her reporting obligations and a misguided desire to not let anyone down by relinquishing the Queensland territory until it was too late, she had the interests of the company at heart.

[209] It was only in the final weeks of her employment when she was subjected to an hours and pay reduction and a further performance meeting that she became somewhat disillusioned; and even then she largely kept that from customers, anonymised some comments on social media (discussed below) and exercised her right to push back against an unethical proposal by her General Manager.

[210] Mr Hall formed the view of a disrespectful attitude on two bases: a failure to meet reporting obligations required by the owners; and Ms Petersen's conduct during the 31 March 2020 meeting.

[211] I agree that it was disrespectful for Ms Petersen to have a tin ear to the owners 'line in the sand' direction of September and October 2019 about reporting obligations. Each of the three directors, Mr Hall, Mrs Hall and Mr Richards variously expressed that direction and were fully entitled to do so. However, for reasons mentioned, Ms Petersen's failure was not one of a defiant attitude but a failure borne of an inability to consistently reconcile customer obligations with reporting obligations once her territory had been expanded and the reporting obligation enforced. Further, for reasons mentioned, there were objectively operating

⁹² *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* Print S5897 at [62] – [63]

mitigating circumstances at the time of dismissal that minimised the seriousness of this failure.

[212] The trigger for forming a view that Ms Petersen displayed a disrespectful attitude was Mr Hall's assessment of Ms Petersen at the 31 March 2020 meeting. That was not a reasonably formed view, considered objectively. Ms Petersen, Mr Hall and Mr Lawrence were on a phone line. What Ms Petersen said to Mr Lawrence was a push back. I have found that the pushback was not improper. The trigger for Mr Hall's negative view on attitude was more personal – it was the pushback against his question about why run sheets had not been supplied and that Ms Petersen responded defensively in front of Mr Lawrence. I accept that Mr Hall felt somewhat belittled having a sales representative tell the owner that a certain request could not be met at that time, and doing so in the presence of the General Manager. Yet, the question sought a response, and a response was given. Whilst Ms Petersen may not have read the moment well, what she said was a relevant response, was said on a phone line from her car without the benefit of reading body-language and was in part an explanation.

[213] Mr Hall was entitled to feel that Ms Petersen had not handled the situation well but it was unfair to conclude that she was generally disrespectful to management or that perceived disrespect was of such gravity that warranted dismissal.

[214] Mr Hall's email to Ms Petersen on the morning of 7 April 2020 pointedly expressed deep frustration at her email to him the previous night which advised daily sales after receiving the warning letter. I do not consider Ms Petersen's email to Mr Hall on the evening of 6 April 2020 as indicative of a bad attitude. Mr Hall wrongly jumped to the conclusion that Ms Petersen was responding as a whole to the warning letter, when in fact she was simply providing sales data that was sought by the letter and doing so at the earliest opportunity to try and give the owner what he needed. She neither presented her email reply as a response to the warning letter nor did she indicate that she would not provide any response. In the heat of the moment, Mr Hall drew an adverse conclusion not reasonably open and his pointed email of 7 April 2020 simply added to Ms Petersen's anxiety.

[215] I do not however make a finding based on Ms Petersen's evidence⁹³ that during her days of illness after 6 April 2020 she had already drafted a reply which she intended to send Mr Hall immediately after Easter 2020 had she not been dismissed. This evidence was not corroborated. It was self-serving. Whilst I accept that Ms Petersen was considering how to respond, had a draft been prepared and still in existence it would have been produced in these proceedings. It was not.

[216] For these reasons I do not conclude that Ms Petersen's attitude towards the business or its owners was a valid reason for dismissal.

Non-disclosure of personal business

[217] Allpet submit that whilst Mr Hall did not include this issue in his dismissal letter, Ms Petersen failed to disclose her private business to Allpet, and that this was a valid reason for dismissal. An allied submission is that Ms Petersen's private business was potentially in competition with Allpet.

⁹³ Audio 25 August 2020 11.30am

[218] Ms Petersen established a private business in 2014 ‘The Little Animal Co’ through which she conducted a private pet-chaperoning and concierge business targeted at (but not exclusively for) persons who wished their dog to be groomed and brought to their wedding or special event.

[219] The evidence is that Ms Petersen conducted this business at weekends and in her own time.

[220] Ms Petersen did not disclose her private business to Allpet in her CV. There is a factual dispute as to whether she disclosed the business when interviewed for the role. Ms Petersen said she did. Mr Hall said it wasn’t disclosed. There is no corroborative material to support either contention. If there was disclosure, it was made purely in passing, not in any formal sense. It is more likely than not that Mr Hall would have recalled if this had been mentioned given his obligations as a director to ensure that the best interests of the business are upheld and to make assessments in that regard concerning the background and activities of prospective employees. On the balance of probabilities but without reaching a high level of certainty I find there was no disclosure in 2018.

[221] However, in no material respect was Ms Petersen operating in competition to Allpet or its customers. To a very limited degree a product Ms Petersen occasionally included in a charge to her private customers (such as a bow-tie for a dog) was a product also sold by Allpet to a retailer or a product sold by an Allpet customer to the public. However these were incidental to the core business of providing a service - grooming and chaperoning an animal and attending weekend events with the animal which was in no sense in direct competition.

[222] An employee’s duty of trust and fidelity extends to not operating a business in competition and the disclosure of facts which may give rise to an actual or an apparent conflict of interest.⁹⁴

[223] Whilst not operating in direct competition, the private business was associated in a loose sense with a common industry (pets) – her private customers obviously loved their pet, and those customers could well be customers of retailers who were being supplied Allpet products. Equally, it could be seen as a complimentary business, as pet chaperoning customers would necessarily need to source pet food and pet products.

[224] For these reasons, I conclude that Ms Petersen was remiss in not disclosing her private business to Allpet, in the interest of transparency. Her failure to do so carried the risk (which materialised) that an adverse inference would be drawn, fairly or unfairly, once discovered by the owners.

[225] The failure to disclose warranted counselling. However, as the conflict was not real, and as the business activity was readily explicable had it been disclosed, and as there is no evidence of the business compromising Ms Petersen’s employment obligations or enriching her private interests through her employment, it was not a valid reason for dismissal.

[226] Further, for reasons mentioned below, there was a denial of procedural fairness on this issue to the extent Mr Hall relied on it when making the decision to dismiss.

⁹⁴ *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81 - 82

Disparaging social media posts about Allpet

[227] Allpet submit that whilst Mr Hall did not include this issue in his dismissal letter, Ms Petersen made disparaging social media posts about Allpet, and that this was a valid reason for dismissal.

[228] The evidence does not support this conclusion.

[229] The evidence is that on 24 March 2020 Ms Petersen, on her private Instagram account, made a post under her pseudonym 'claire clancy pet'. The post was responsive to a photograph of a COVID-related street poster 'Stay at home SAVE LIVES'. Ms Petersen posted.⁹⁵

"If I could I absolutely would. I really want to!! Tell me this and I know I am not the only one in this boat, what do you do when your boss won't tell you that you are to stay at home for work?!! I know the seriousness of this situation...however the government's lack of decision making to have EVERYONE in lockdown at the same time has left the community fragmented and confused. It's also left companies to make decisions for their own operations...perhaps not the right decisions. When they tell you to keep doing your job, servicing clients?! What do you do? Risk losing your job altogether after already having your hours and wage cut? This is so shit." (my emphasis)

[230] Considered in context, I do not consider this post insubordinate or otherwise a valid reason for dismissal:

- firstly, it was posted by Ms Petersen on the very day she had been advised by Allpet of their COVID-19 response: a 20% reduction in her hours and a 20% reduction in salary, effective immediately, whilst still needing to service all customers. It was an expression of her unhappiness with her employer's decision on her circumstances; where she still had to work in an uncertain COVID environment, but for less remuneration;
- secondly, although some readers of the post are likely to have known Ms Petersen (at least one was a customer) and thus associated the post with it being adverse commentary on her employer, she did not name Allpet. In refraining from doing so she exercised a degree of judgement and restraint amidst her frustration;
- thirdly, what Ms Petersen said in the post was not extreme in meaning or tone given its social media context. It presented a point of view via a series of propositions and posed a question. Whilst the final sentence was vulgar, it was a vulgarity concerning her circumstance, not one directed at any specific officer of Allpet; and
- fourthly the evidence of both Ms Petersen and Mr Hall⁹⁶ was that Allpet had no policy to guide staff postings on social media.

⁹⁵ AP54

⁹⁶ Audio 21 September 2020 10.48am

[231] To the extent Mr Hall considered this post a “public condemnation of Allpet”⁹⁷ and took this into account in making the decision to dismiss, he overreacted.

[232] Further, for reasons mentioned below, there was also a denial of procedural fairness on this issue once Mr Hall was alerted to this post over Easter 2020.

Engaging in private activities during work hours

[233] Allpet submit that whilst Mr Hall did not include this issue in his dismissal letter, Ms Petersen engaged in private activities during work hours, and that this was a valid reason for dismissal. An allied submission is that this conduct was inconsistent with Ms Petersen’s claim of an excessive workload.

[234] The evidence does support the proposition that, from time to time, Ms Petersen engaged in private activities during work hours. Whilst warranting explanation and counselling, in overall context the evidence does not support the proposition that this was misconduct or conduct that was a valid reason for dismissal.

[235] The instances of alleged misconduct were ascertained by Mrs Hall’s investigation of private social media and business records over Easter 2020, and then advised to her husband. Some were ascertained post-dismissal. They are summarised in AP56 to AP76A and AP94 to AP101. Most relate to Ms Petersen’s week-long work trip to Queensland in January 2020. What Mrs Hall did was examine Ms Petersen’s social media posts, compare them to her work schedule and orders lodged, and compare them to GPS data in-built to her Allpet provided I-pad.

[236] A number of conclusions drawn by Mrs Hall were, when tested in evidence before me, factually wrong or unable to be made out to the requisite standard of proof. For example:

- the assertion that none of the orders made on 20 January 2020 concerned Brisbane customers is wrong. AP56 shows two orders logged that day were Queensland orders;
- the assertion that Ms Petersen acted improperly in going to a pineapple farm “who is not a client of Allpet” on 21 January 2020 is unfair. The evidence is that Ms Petersen was on the road that day on the way to client locations, was travelling past a pineapple farm at around lunch time, and went into the farm during her lunch break (1.45pm).⁹⁸ Having lunch in a location such as this whilst on the road represented no failure of duty;
- the assertion that a friend of Ms Petersen’s stayed in hotel accommodation funded by Allpet on 20 January 2020 is also wrong. The evidence is that the friend met Ms Petersen after work at the hotel. There is nothing unremarkable in that occurring. There is no evidence the friend stayed over. Ms Petersen’s evidence, which I accept, is that the friend went home that evening.
- the assertion that Ms Petersen took a photograph of the Glass House Mountains whilst driving a car during work hours involves an assumption that is unsupportable. The

⁹⁷ Ap107 paragraph 113 dot 2

⁹⁸ AP59

assumption is based purely on the photograph Ms Petersen posted to her social media.⁹⁹ Whilst the photograph could have been taken whilst driving, it could equally have been, as Ms Petersen claimed in her evidence, taken from the roadside or whilst the car was parked roadside. The evidence is not sufficient to support a finding of misconduct on this account;

- the evidence that Ms Petersen failed to attend planned customer appointments at a regional location on 21 January 2020 is correct but fails to take into account Ms Petersen’s explanation. Her evidence was that a serious road accident and storm that afternoon whilst en-route to the destination had chronically backed-up traffic, resulting in Ms Petersen making a judgment that arrival at the township in time to service customers was unlikely, and turning around and attending to other work. I accept Ms Petersen’s evidence. The judgment she made was not unreasonable. It was plausible and withstood cross examination; and
- the assertion that Ms Petersen “spent the morning in the hotel pool”¹⁰⁰ on 24 January 2020 is an unfair exaggeration. Ms Petersen swam in the hotel pool at breakfast. She left the hotel at 9:59am that day after checking emails. A 9:59am departure represents a late departure on a working day but was not a “morning” swimming in the pool.

[237] These assertions do not individually or collectively represent error on Ms Petersen’s part. As such, they cannot form part of a sound or defensible reason for dismissal.

[238] However, I am satisfied that on 22 January 2020 Ms Petersen was not fully engaged on work matters at all relevant times. On that day Ms Petersen went with a friend to a bridal boutique and tried on wedding dresses. This was not done during a lunch break or otherwise outside of hours. Although she did attend a lengthy work zoom meeting from the bridal boutique, the private activity interfered with her paid working time and was undertaken when she should have been otherwise meeting responsibilities to Queensland clients.

[239] I am also satisfied that on that day Ms Petersen took time out of her working day to drive her friend to the Brisbane airport, and that this was during time that should have been devoted to clients.

[240] In attending the bridal boutique and in driving her friend to the airport during work time in a work-funded vehicle Ms Petersen exercised poor judgment and on that day failed in her duty. Her planning and approach to the January 2020 Queensland trip was sub-optimal and not just in hindsight. Given the rare opportunities she had to meet Queensland clients face-to-face and given the frustrations she had with servicing Queensland this trip was not approached by Ms Petersen with appropriate care. Her poor judgment was exacerbated by the fact that she did not provide a weekly run sheet to Allpet for her time in Queensland and this rightly concerned Mr Hall. This failure denied Allpet a clear line of sight of her client visits and, in part, explains why Mr and Mrs Hall made assumptions about her activities during this Queensland visit when they subsequently examined GPS data.

⁹⁹ AP59 page 3

¹⁰⁰ AP107 paragraph 113 dot 8

[241] These failures warranted counselling and, together with the failure to provide a run sheet, a warning. They were not however of such magnitude to warrant dismissal. Clients were visited by Ms Petersen and work was transacted during her time in Queensland.

Driving during work hours whilst consuming alcohol

[242] Allpet submit that whilst Mr Hall did not include this issue in his dismissal letter, this was a valid reason for dismissal.

[243] The evidence does not support this conclusion.

[244] The assertion that Ms Petersen drove a motor vehicle whilst in Queensland on or about 18 February 2020 during work hours whilst consuming alcohol is a serious allegation to make in a case such as this, and given the gravity of such an allegation should be supported by clear and probative evidence.¹⁰¹ Yet the assertion is based simply on a photograph Ms Petersen posted to social media holding a bottle of alcoholic ginger beer across a motor vehicle console alongside a post “lunch adulting at its finest...because why not”.¹⁰² There is no evidence that the motor vehicle was being driven at the relevant time, let alone driven whilst consuming alcohol. Nor is it entirely clear that the bottle is open as the photograph obscures the upper neck of the bottle. Ms Petersen’s evidence is that she had lunch at a ginger beer factory whilst on the road.

[245] At its highest, it is possible to draw an inference that Ms Petersen drank alcoholic ginger beer at lunch on this particular day. That is not evidence of misconduct. There is no evidence of drinking whilst driving; no evidence of drinking under the influence; and no evidence that a glass of alcohol with lunch was in breach of Allpet’s policies or contractual obligations on Ms Petersen.

[246] Being unable to identify misconduct or a breach of policy, this was not a valid reason for dismissal.

[247] Further, for reasons below and given the seriousness of such an allegation, there was a significant denial of procedural fairness on this issue given that Mr Hall relied on it¹⁰³ after being alerted to the social media photograph by Mrs Hall.

Conclusion on valid reason

[248] Ms Petersen’s role was conducted remotely from head office and involved a high degree of trust and autonomy. Necessarily the working method and working hours of a remote sales representative responsible for business activity across two States involved give and take.

[249] To fairly assess whether deficiencies in Ms Petersen’s performance were a valid reason for dismissal her performance needs to be objectively assessed against the relevant contractual obligations as a whole and considered in the context of surrounding circumstances applicable at the time of relevant performance failures.

¹⁰¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336

¹⁰² AP62

¹⁰³ Audio 21 September 2020 11.58am

[250] I have found that Ms Petersen's performance was deficient in a number of important respects.

[251] Most significantly, she was inconsistent and unreliable in meeting formal reporting obligations required and repeatedly asked of her. However, for reasons outlined, there were significant mitigating factors that minimised what would otherwise have been a fundamental breach of a core condition of her employment: her overall workload (including the priority she was required to give to customer service over internal reporting) and the COVID-related changes to her hours and salary from 24 March 2020.

[252] Relevantly, there were also instances of error and oversight in servicing customers but these were sporadic. Overall her customer engagement was competent, productive and professional. The instances of error and oversight were prejudicial to customers but some mitigating factors arising from her overall workload existed that explain (though not justify) the failures.

[253] Relevantly, there were also instances of poor organisation of her time especially during the work trip to Queensland in January 2020 but overall she did not fail to do her job during this trip or, given the give and take of her working arrangements, otherwise misconduct herself.

[254] The context of these performance failures is also relevant.

[255] There was no formal Performance Improvement Plan proposed or implemented.¹⁰⁴ Periodical key account reviews as contemplated by Ms Petersen's contract were not conducted.¹⁰⁵ By mid-March 2020 Ms Petersen was clearly struggling to stay afloat amidst her multiple responsibilities. The commitment she had made to herself and to Allpet to take her internal reporting obligations seriously after the performance meeting on 31 January 2020 lasted five weeks but then lapsed the next three. Three instances of customer orders being overlooked or transacted late occurred in mid-March 2020. Not through the fault of either Allpet or Ms Petersen, this was the very time of early COVID-19 impacts leading to an additional reporting obligation, a reduction in salary and hours (but a need to keep serving all clients) as well as the natural worry and uncertainty of being in public places during the pandemic.

[256] Not having all facts before him, Mr Hall also made assumptions about Ms Petersen's performance, some of which were well founded but others misguided. Aside from unfair assumptions that customer contact with head office evidenced a complaint or fault on Ms Petersen's part, Mr Hall wrongly assumed that requests Ms Petersen had made of head office to enter customer orders was Ms Petersen asking head office to do her job.¹⁰⁶ Mr Hall conceded in evidence that Ms Rafferty had suggested to Ms Petersen that she seek this assistance from head office during times of busy workload, so as to not delay the dispatch of customer orders.¹⁰⁷

¹⁰⁴ Audio 25 August 2020 3.56pm

¹⁰⁵ Audio 21 September 2020 10.54am

¹⁰⁶ AP107 paragraph 99

¹⁰⁷ Audio 14 September 2020 1.01pm; audio 21 September 2020 11.19am

[257] The mitigating factors applying pre-COVID-19 together with the accentuation of those factors from mid-March 2020 significantly weigh against a conclusion that the failures of duty, whilst real, were individually or collectively a valid reason for dismissal.

[258] For these reasons I do not conclude that a valid reason either by reference to performance of conduct existed at the time of dismissal. The failures of duty and errors of judgement warranted warning but not dismissal.

[259] The absence of a valid reason weighs in favour of a finding of an unfair dismissal.¹⁰⁸

Notification of reason for dismissal

[260] Notification of a valid reason for dismissal should be given to an employee protected from unfair dismissal before a decision is made to terminate their employment¹⁰⁹ and in plain and clear terms.¹¹⁰

[261] Allpet's dismissal letter of 14 April 2020 was for an alleged "failure to perform your duties as a sales representative satisfactorily."

[262] The particulars provided gave Ms Petersen clear insight to the three principal operating factors – alleged failure to provide run sheets; alleged failure to provide satisfactory client representation; and alleged poor attitude and lack of respect to management.

[263] In providing these reasons, together with customer references, Allpet provided a reasonable level of information.

[264] Mr Hall also chose to not disclose other reasons he had before him, on which he relied in these proceedings: alleged undisclosed private business; alleged disparaging social media posts; alleged neglect of duty and misconduct whilst in Queensland; and alleged drinking whilst driving.

[265] These non-disclosed reasons were, for reasons mentioned above, based on unfair assumptions and scant evidence, and largely cannot be made out to the requisite standard of proof.

[266] Further, by not disclosing but in part relying on these reasons to form a view that the business had been "fooled"¹¹¹ by Ms Petersen, the employer acted unfairly.

[267] It was only as a result of Mr Hall's evidence in these proceedings that Ms Petersen was notified of these additional reasons.

[268] This consideration weighs somewhat in favour of a finding of unfair dismissal.

Opportunity to respond

¹⁰⁸ [2011] FWAFB 7498 at 20

¹⁰⁹ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 at [73]

¹¹⁰ *Previsic v Australian Quarantine Inspection Services* Print Q 3730 (AIRC, 6 October 1998)

¹¹¹ AP107 paragraph 114

[269] An employee protected from unfair dismissal should be provided an opportunity to respond to a reason for dismissal relating to their conduct or capacity. An opportunity to respond should be provided before a decision is taken to terminate an employee's employment.¹¹²

[270] The opportunity to respond is an element of procedural fairness but does not require formality and this consideration is to be applied in a common sense way to ensure the employee is treated fairly.¹¹³ Where an employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, that is enough to satisfy this consideration.¹¹⁴

[271] Ms Petersen was denied procedural fairness with respect to both the stated reasons for dismissal and the unstated reasons for dismissal.

[272] There were two performance meetings (31 January 2020 and 31 March 2020). These provided an opportunity to discuss the reporting concerns and the then concerns with some aspects of her customer engagement. However, neither meeting was a substitute for an opportunity to respond to the specific failures of duty relied on by Mr Hall as grounds for dismissal and no opportunity was provided to do so in advance of the decision to dismiss.

[273] Ms Petersen was not provided an adequate opportunity to explain why she failed to provide reporting data on time for the last three weeks of March 2020. Given that she was absent ill and then Easter intervened, she was dismissed before she could reasonably have been expected to reply to the warning letter of 6 April 2020.

[274] Ms Petersen was never provided an informed opportunity to respond to the specific allegations that she failed in her duty to the twelve customers mentioned in the dismissal letter.

[275] Ms Petersen was never provided an opportunity to respond to the allegation that she had been rude to Mr Hall at the 31 March 2020 meeting or was generally disrespectful to the owners.

[276] Ms Petersen was never provided an opportunity to respond to the allegation that her private business had not been disclosed or was being operated in competition to Allpet.

[277] Ms Petersen was never provided an opportunity to respond to the allegation that she disparaged Allpet in public social media posts.

[278] Ms Petersen was never provided an opportunity to respond to the allegation that she conducted multiple private activities in work time especially whilst in Queensland in January 2020.

[279] Ms Petersen was never provided an opportunity to respond to the allegation that she drank whilst driving on the job in February 2020.

¹¹² *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 at [75]

¹¹³ *RMIT v Asher* (2010) 194 IR 1 at 14-15

¹¹⁴ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7

[280] These breaches of procedural fairness are made more serious by the fact that in almost each respect what Ms Petersen would have had to say by way of explanation was highly relevant to assessing whether there was in fact a breach or, at the least, the level of seriousness of the breach.

[281] I conclude that ultimately Allpet applied an unfair disciplinary approach: a spur of the moment performance meeting (31 March 2020) then a week later a formal warning letter signed by not one but all three directors (6 April) and then a week later dismissal (14 April 2020).

[282] In the circumstances this amounted to a denial of procedural fairness:

- the performance meeting of 31 March 2020 occurred only a week after the employer's unilateral decision to reduce hours and salary – hardly enough time to allow Ms Petersen to determine how comparable work demands could be reconciled around fewer hours;
- the warning letter of 6 April 2020 came only two working days (1 and 2 April) after the performance meeting – patently no adequate time to absorb or act on the message of the performance meeting; and
- there was not one working day between the date of the warning letter and the date of dismissal – patently no time at all to act on the actual or perceived concerns raised in the warning letter. Ms Petersen was absent ill on 7, 8 and 9 April 2020. She was entitled to be off work over Easter (10, 11, 12 and 13 April 2020).

[283] Mr Hall also decided to dismiss Ms Petersen by sending a letter attached to an email. He chose not to speak to Ms Petersen in person or discuss his reasons. His email instructed Ms Petersen to read before calling, with the clear inference that she consider herself dismissed before speaking to her manager or anyone else. Given that a working relationship existed between Ms Petersen and Mr Hall, the dismissal by email and letter evidenced a closed mind and an unwillingness to enter into discussion or correspondence on the issue. Mr Hall made it impossible for Ms Petersen to offer any explanation or for Ms Petersen to make representations to Ms Rafferty in advance of the decision to dismiss. It is well established that implementation of a dismissal in such a manner is a denial of procedural fairness.¹¹⁵

[284] The impersonal nature of the dismissal by email and letter compounded the procedural unfairness.

[285] Even taking into account that two performance meetings were held in the first three months of 2020, the denial of procedural fairness weighs strongly in favour of a finding of unfair dismissal.

Opportunity for support person

[286] Where an employee protected from unfair dismissal has requested a support person to assist in discussions relating to dismissal, an employer should not unreasonably refuse that person being present.

¹¹⁵ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 at [73] – [75]

[287] Allpet did not refuse Ms Petersen a support person, let alone unreasonably so.

[288] This is a neutral consideration.

Warnings concerning performance

[289] A formal letter of warning was given on 6 April 2020. As noted, it related to only one subject matter (the reporting obligations) notwithstanding it being triggered by a customer relations issue raised that morning.

[290] That Ms Petersen was “very surprised to receive it”¹¹⁶ is somewhat indicative of naivety of her part. The subject matter of the warning (meeting reporting obligations) had been discussed on 31 January 2020 and on 31 March 2020, and run sheets for 16, 23 and 30 March 2020 had not been received by head office.

[291] However, as noted, not a working day occurred between the warning and dismissal.

[292] There were no other formal warnings. Ms Petersen had a somewhat of a tin ear to the seriousness with which her employer viewed her failure to meet contractual reporting obligations. Sufficient concerns were expressed verbally and in the various emails about this issue to constitute prior warning. Although not said expressly, in light of Mrs Hall’s email of 15 October 2019, the two performance meetings and the fact that the 6 April 2020 warning was signed by all three directors it ought to have been reasonably apparent to Ms Petersen that that non-compliance with her reporting obligations could lead to dismissal.

[293] There were no warnings given by Allpet on the customer relations issue which had a disciplinary flavor.

[294] The counselling and encouragement given by Ms Rafferty on both the reporting issue and customer relations was nurturing in nature and reflective of a manager supporting Ms Petersen but also seeking to meet the reasonable requirements of the owners and General Manager. Ms Rafferty’s counselling did not have a disciplinary edge and cannot be objectively characterised as a warning.

[295] Overall, the existence of warnings on the reporting issue to a limited extent weighs against a finding of unfair dismissal, but only to a limited extent.

Size of enterprise and human resource capability

[296] Allpet is a nationally operating business but one of relatively small scale and with no dedicated human resource specialists and expertise.

[297] It is a business that does not seek to apply a culture that demotivates or fails to recognise the give and take between itself and its employees.¹¹⁷ There are also particular challenges for a business employing remotely operating staff. Many of the shortcomings of process and decision-making identified in this decision appear to be a product of this

¹¹⁶ Audio 25 August 2020 11.34am

¹¹⁷ Audio 14 September 2020 11.04am

circumstance and the unusual pressures and uncertainty that existed in the early weeks of the COVID-19 pandemic.

[298] Whilst the absence of specialist human resource capability limited somewhat the internal checks and balances that guard against unfair or impulsive decision-making (of the type made by Mr Hall over Easter 2020), this is a business that has operated for thirty-seven years. It has had decades to understand the risks and complexities inherent in employing and dismissing staff notwithstanding the unusual pressures of 2020.

[299] This matter only slightly weighs against a finding of unfair dismissal.

Other matters

Post-dismissal conduct – retention and use of confidential information

[300] Allpet raise a further matter. It claims that the dismissal was not unfair because, after being dismissed, Ms Petersen failed to return confidential business information and used that information in prosecuting this case.

[301] This is one of a number of issues arising between Ms Petersen and Allpet following dismissal. The others related to claims by Ms Petersen (through her lawyers¹¹⁸) that Allpet were in breach of the Award by making payment of notice in lieu conditional on the return of equipment, and a further allegation by Ms Petersen that she had been underpaid in breach of the Award whilst employed on account of the hours she worked.

[302] Allpet dispute these claims. It relies on two provisions in Ms Petersen's contract:¹¹⁹

- an obligation to immediately return company equipment upon termination or resignation (Contract page 5 'Return of Company's Equipment'); and
- an obligation to not, during employment or "thereafter", use or disclose confidential information except with consent, as required by law or in the performance of duties (Contract page 4 'Confidentiality').

[303] In its letter of dismissal, Allpet advised Ms Petersen:¹²⁰

"As per your employment contract, we require the return of the following company property immediately: Apple Ipad and scanner...you will be paid 2 weeks in lieu of notice which will be paid on the return of the above company equipment in good condition."

[304] Monies in lieu of notice were subsequently paid and the I-pad and related property were returned by Ms Petersen on 29 April 2020.

[305] However, Allpet allege that documents filed in the Commission by Ms Petersen with her originating application and as attachments to her witness statements are the property of Allpet and have been retained by Ms Petersen in breach of her employment contract. There

¹¹⁸ AP105

¹¹⁹ AP1

¹²⁰ CP52 page 2

are some 45 documents. They are the documents which are the subject of the Commission's confidentiality order of 24 July 2020, made by consent and on the employer's application.

[306] The alleged confidential documents are copies of emails sent to Ms Petersen (either directly as an addressee or copied to her) during the course of her employment. They are emails between officers of Allpet and Ms Petersen, emails between officers of Allpet copied to Ms Petersen, emails between Ms Petersen and certain customers of Allpet, and emails between officers of Allpet and certain customers copied to Ms Petersen.

[307] It is clear that Ms Petersen retained copies of these emails following her dismissal and did not return them to Allpet or destroy them.

[308] Was the retention of copies and their use in these proceedings a valid reason for dismissal?

[309] I think not.

[310] Firstly, at its highest, this is a contractual dispute between the parties. Resolving that dispute requires terms of the contract to be interpreted and in particular whether the documents are properly characterised as "confidential information" within the meaning of the contract and whether the conduct was caught by any of the exclusions from breach in the relevant contractual provisions. The Commission, in determining an unfair dismissal matter, has no jurisdiction to determine contractual disputes.

[311] Secondly, whilst it is well established that in certain circumstances post-dismissal conduct by an employee can constitute a valid reason for dismissal, not all conduct relevant to a former employment relationship can be so categorised. Commonly, the conduct is such that would have fundamentally struck at the heart of the employment relationship such that the relationship could not have continued had it been known at the time of dismissal. This necessarily requires the conduct to have occurred during the course of employment, that is prior to dismissal. In this matter, the conduct complained of by Allpet is post-dismissal conduct, not pre-dismissal conduct.

[312] Thirdly, Ms Petersen's witness statement and its attachments formed part of Ms Petersen's response to a direction issued by the Commission on 10 June 2020 that she file a statement and disclose all documents on which she intended to rely. It is well arguable that an act of disclosure in response to the Commission's direction was conduct "as required by law" within the meaning of the contract.

[313] Fourthly, Ms Petersen consented to the confidentiality order issued by the Commission concerning the documents.

[314] Whatever the status of the contractual dispute between Allpet and Ms Petersen, her post-dismissal conduct concerning the documents was not a valid reason for dismissal.

Conclusion

[315] In considering whether Ms Petersen's dismissal was "harsh, unjust or unreasonable" the Commission is required to consider each of the matters in section 387 of the FW Act to

the extent relevant.¹²¹ Those matters must be considered as part of an overall assessment. Each assessment must be considered on its merits. That assessment is to be based on the ordinary meaning of the words, in their statutory context. That context includes the object stated in section 381(2) of the FW Act that:

“...the manner of deciding on and working out such remedies are intended to ensure that a “fair go all round” is accorded to both the employer and the employee concerned.”

[316] In arriving at an overall assessment, the statutory considerations must be applied in a practical, common sense way to ensure that the employer and employee are each treated fairly.¹²² The Commission will not stand in the shoes of an employer and assess what the Commission would have done had it been in the position of the employer¹²³ but has a statutory obligation to objectively determine fairness given the relevant circumstances.

[317] I have found that whilst there were performance deficiencies that warranted counselling and warning, those deficiencies in the context of Ms Petersen’s overall work output together with mitigating factors operating at the time of dismissal lead to the conclusion that there was no valid reason for dismissal.

[318] Whilst unfair dismissal matters are multifactorial,¹²⁴ I adopt the observations of a Full Bench of the Commission in *Parmalat Food Products Pty Ltd v Wililo*.¹²⁵

“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.”

[319] I have also found that whilst Ms Petersen was on notice concerning legitimate concerns with her performance, there were serious failures of procedural fairness in the decision to dismiss and its implementation. This is not a matter where procedural deficiencies in implementing a dismissal are not significant nor is this a matter where a valid reason of substance existed so as to outweigh procedural deficiencies.¹²⁶

[320] Ms Petersen had been a committed employee, consistently making good sales but largely due to workload pressures and remote working she became inconsistent in meeting other material requirements of her role. Over many months Allpet had been an understanding employer endeavouring to support and assist the challenges faced by its remote salespersons and Ms Petersen in particular. The employer’s confidence in Ms Petersen began to wane in late 2019 and meaningful discussions about problem issues with her performance occurred on 31 January 2020 and 31 March 2020. The waning of confidence was not entirely unreasonable. Run sheets for the final three weeks of March 2020 had not been provided.

¹²¹ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR 915674 at [69] (AIRC, 21 March 2002)

¹²² *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 as cited in *Potter v WorkCover Corporation* (2004) 133 IR 458 per Ross VP, Williams SDP, Foggo C and endorsed by the Full Bench in *Industrial Automation Group Pty Ltd T/A Industrial Automation* [2010] FWAFB 8868, 2 December 2010 per Kaufman SDP, Richards SDP and Hampton C at [36]

¹²³ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

¹²⁴ *Jones v Brite Services* [2013] FWC 4280 at [24]

¹²⁵ [2011] FWAFB 7498 at 20

¹²⁶ *Tham v Hertz Australia Pty Limited* [2018] FWCFCB 5972 at [46]

[321] Regrettably however, Mr Hall allowed a view he formed on 31 March 2020 (a view that was in part warranted that there was problem with his South Australian and Queensland sales representative) to result in dismissal two weeks later based on wrongly made assumptions, an inadequate appreciation of the then operating COVID-19 employment context impacting Ms Petersen and an impulsive examination of social media posts and tracking information without the benefit of securing Ms Petersen's response or explanation.

[322] It is clear that this is a case of a committed but occasionally deficient employee who was already starting to sink amidst a heavy workload being unable to sustain strictly enforced internal reporting obligations on top of her customer servicing obligations across two States without lapses. When COVID-19 hit, the combination of reduced hours to do the job, demotivation arising from reduced hours and pay and an additional reporting obligation combined to create a set of circumstances in which an objective assessment of performance was fraught. Yet in that very context untested assumptions about conduct from social media posts led to an unfair conclusion that Ms Petersen had fooled the business.

[323] Allpet tried to act fairly but its judgement in the final analysis was rash and impaired. When considered objectively Ms Petersen's dismissal was harsh, unjust or unreasonable.

Remedy

[324] Having found Ms Petersen's dismissal harsh, unjust or unreasonable I now turn to remedy.

[325] In determining remedy, I am required to apply the provisions of Division 4 of Part 3-2 of the FW Act. Section 390 provides:

“390 When the FWC may order remedy for unfair dismissal

(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 Commission may make the order only if the person has made an application under section 394.

(3) The Commission 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.”

[326] In this matter, the requirements of subsections (1) and (2) have been met.

[327] A decision to order a remedy is discretionary.¹²⁷ Subsections (1) and (2) provide that the Commission “may” make an order. The FW Act does not require the Commission to do so.

[328] Having regard to my findings, and in particular the conclusion that Ms Petersen was unfairly dismissed, I am satisfied that I should exercise discretion in favour of granting a remedy.

[329] The only remedies required to be considered are reinstatement under section 391 of the FW Act or compensation under section 392. I am required by the provisions of section 390(3) to not order compensation unless I am “satisfied that reinstatement is inappropriate”.¹²⁸

[330] Ms Petersen is not seeking reinstatement.

[331] I conclude that reinstatement is inappropriate.

[332] There is no basis upon which Ms Petersen and the owners of Allpet could restore an effective employment relationship. It would be unfair on both parties to make such an order. The necessary element of trust and confidence, especially in the context of a relatively small family business based on the west coast of Australia with remotely operating salespersons in customer-facing roles, does not exist and could not be reasonably restored.

[333] I turn to the issue of compensation. Section 392 of the FW 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

- (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

¹²⁷ *Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [9]

¹²⁸ Section 390(3)(a) FW Act

- (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.”

[334] I now consider each of the criteria in section 392 of the FW Act.

Viability: section 392(2)(a)

[335] Allpet is an established family owned business operating nationally and in New Zealand. Although dependant on private capital, and having to operate in an impaired economy impacted by COVID-19, there is no evidence before me that a compensation order

would affect business viability. In the quantum of the order I will make, I do not conclude that an adverse effect on business viability exists.

Length of service: section (section 392(2)(b))

[336] Ms Petersen worked for Allpet for two years and one month, until dismissed.

Remuneration that would have been received: section 392(2)(c)

[337] There is a necessary element of informed projection inherent in considering this factor. That projection is informed by the nature of the work and the circumstances facing the business and Ms Petersen at the time of dismissal, including her employment context.

[338] Ms Petersen was a full time employee and, as such, had a reasonable expectation of ongoing employment all things being equal. She enjoyed working in the industry, had an associated hobby business connected to the industry and showed commitment to the job that wavered only in her final weeks when her motivation was impacted by COVID-19 and related decisions made by Allpet.

[339] Things were not however equal. Ms Petersen had two performance meetings in 2020 during which areas of necessary improvement were discussed. A written warning had been issued on 6 April 2020 just prior to dismissal and although its timing was procedurally unfair, its content reflected reasonably held concerns by the employer given the lapse back into failing to meet and inconsistently meeting reporting obligations.

[340] Whilst at the time of dismissal Ms Petersen (and other employed salespersons) had been working for a short period under COVID-19 arrangements (20% fewer hours and 20% less pay) the evidence before me is that following Easter 2020 the employer reconsidered these arrangements in light of business circumstances and reverted to 100% hours and 100% pay for its salespersons.

[341] I take into account that had Ms Petersen not been dismissed her contractual hours and income would have almost immediately reverted to 100%, as it did for other salespersons.

[342] The evidence before me is that post-dismissal Mr Hall restructured Ms Petersen's role such that a new sales representative was employed for South Australia only on a part time basis (four days per week) and the Queensland sales work which had been performed by Ms Petersen was incorporated directly into the responsibilities of the National Sales Manager.

[343] I take into account the contingency that Mr Hall may have taken the Queensland work off Ms Petersen, either upon her belated concession that servicing the State was beyond her or his business decision to do so. However, this would not have altered Allpet's contractual obligation to employ Ms Petersen on a full time basis performing sales work and pay her full contractual remuneration.

[344] Of particular relevance in assessing the quantum of compensation is the fact that Ms Petersen, whilst unfairly dismissed, had placed her employment at risk by being unable to sustain all requirements of the job to the necessary level without lapses and oversight.

[345] However, this is not a case where compensation can be ordered simply for a short period whereby Ms Petersen would have had an opportunity to respond to the social media and GPS tracking data acquired by Mr and Mrs Hall over Easter 2020. The dismissal was unfair on both substantive and on procedural grounds that went beyond procedural unfairness over Easter 2020.

[346] Having been issued a warning on 6 April 2020, a reasonable period of time (not including periods of leave or public holidays) was required to allow Ms Petersen to not fall back into late or unresponsive reporting of daily sales, weekly sales and monthly planning.

[347] A reasonable period would have also been required to assess her conduct after the warning that late responsiveness or failures concerning customer orders was putting her employment at risk together with forming a view that balanced the employer's concerns with the positive aspects of her customer engagement.

[348] A reasonable period to assess whether there had been improvement or sustained improvement in these areas of performance deficiency would need to have occurred, together with a procedurally fair process should termination of employment have remained an option after this period of assessment, counselling or warning.

[349] Given her good sales record but inconsistent compliance with internal reporting obligations and the fact that Ms Petersen was sinking amidst workload and motivation issues, there is a reasonable chance that she would not have ultimately remedied these deficiencies on a consistent basis and in a timely way. The owners' confidence in her overall output had been eroded. That notwithstanding, there was no inevitability about Ms Petersen being unable to make good. She still had a strong relationship with her immediate manager, Ms Rafferty. The effect of the formal written warning together with Ms Petersen's belated recognition that she was spreading herself too thin and the possibility of either giving up the Queensland work or more effectively reaching out to Ms Rafferty's offers to cover Queensland sales at times of heavy workload had not been tested.

[350] The impact of COVID-19 restrictions and work-arounds on the activity of salespersons would have also needed to be factored-in and reasonable latitude given for necessary changes in working methods including any issues arising from restrictions on Ms Petersen's capacity to travel to Queensland to service existing and new clients and the potential need to do so wholly remotely.

[351] I take into account that two performance meetings had already been held with Ms Petersen (31 January 2020 and 31 March 2020) and one formal letter of warning (6 April 2020).

[352] I also take into account that fair employment decisions concerning salespersons operating in multiple states in this environment needed to take into account the desirability of allowing the early days of the COVID-19 disruption to settle somewhat to enable a clear line of sight for both the business and its salespersons on working methods, customer circumstances, local restrictions or work-arounds and revised reporting obligations.

[353] Some contingency also needs to be made for the fact that Ms Petersen's temporary drop in motivation in her final three weeks may have rectified once the hours and pay of sales representatives were restored to contractual levels after Easter 2020.

[354] The relatively small scale of the business also needs to be taken into account in considering its limited tolerance to cover for a customer-facing employee who was in some respects performing well but in others under-performing.

[355] Taking these factors into consideration, overall I consider that Ms Petersen would have had a reasonable expectation of future employment of at least three months, during which time she would have earned a full time salary and comparable bonuses on sales.

[356] For the purposes of section 392(2)(b) I will estimate the remuneration that would have been received to have been for a fifteen week period to the near end of July 2020. This would have allowed:

- the post-Easter 2020 reversal of the COVID-19 hours and salary reduction to occur (one week);
- a period to allow the impact of COVID-19 on the business, staff working methods, its customers and staff motivation to settle (around two weeks);
- a period to allow performance to be assessed in light of the written warning (around four weeks);
- a period to allow for any final warning to be issued (including discussions with Ms Petersen) (around one week);
- a period to allow performance to be assessed in light of any final warning (around four weeks);
- a period of decision-making whether to dismiss (including discussions with Ms Petersen) if considered appropriate (around one week); and
- a period of notice of dismissal (two weeks).

[357] Whilst some of these events would have overlapped, a period of fifteen weeks of prospective employment is a reasonably informed projection of future employment had Ms Petersen not been unfairly dismissed.

[358] In calculating the remuneration that would likely have been earned over this period, I take into account all elements of Ms Petersen's remuneration package. This includes her base salary at the time of dismissal (\$60,000 per year) and vehicle allowance (\$7,500 per year) plus 9.5% statutory superannuation.

[359] As it was not in contest that Ms Petersen's sales were satisfactory, I also make allowance in the compensation order for the fact that Ms Petersen would have not only earned her contracted remuneration during this period but also been likely to have continued to earn income from the contractual gross profit incentive bonus.

[360] Bonuses paid to Ms Petersen in the September 2019 and December 2019 quarters were \$274.50 and \$565.65.¹²⁹ I consider it appropriate to take the average bonus payment in these quarters and apply that average to the fifteen week period of prospective future employment. I estimate that Ms Petersen would have earned a bonus on sales of \$484.70¹³⁰ over the fifteen week period. I will add this sum to the compensation order.

¹²⁹ AP106 page 158

¹³⁰ Two quarters (\$274.50 + \$565.65) x 2 (to arrive at a notional annual sum) divided by 52 (to arrive at a notional weekly sum) x 15 weeks

[361] The quantum of earnings that would have been received by Ms Petersen for this fifteen week period were:

- \$19,471.15 gross wages (including car allowance);
- \$484.70 bonus; and
- \$1,644.23 superannuation.

Mitigating efforts: section 392(2)(d)

[362] Ms Petersen made immediate attempts to mitigate her loss. The impacts of COVID-19 on events (including weddings) resulted in no material income or profit from her private business in the wake of her dismissal.

[363] However, Ms Petersen took immediate steps to secure contract work with a local business of a more menial nature and for less pay. That work commenced on 27 April 2020.

[364] As Ms Petersen took active steps to mitigate her losses, I make no deduction from the compensation order on this account.

Remuneration earned: section 392(2)(e)

[365] Post-dismissal, Ms Petersen earned income as a contractor at a lesser rate of earnings and working fewer hours than whilst employed at Allpet, and with less job security.

[366] I take into account Ms Petersen's post-dismissal earnings from her contract work.

[367] Those earnings totalled \$8,371.85 gross in the eleven weeks 27 April 2020 to 15 July 2020.¹³¹ The remaining period beyond 15 July 2020 for which compensation is to be ordered is a fortnight of earnings for which I will deduct \$1,800 notional earnings. The total deduction on account of monies earned in the fifteen week period in which compensation will be calculated is \$10,171.85 gross.

[368] As there has been no income of significance earned in the relevant period arising from Ms Petersen's private dog chaperoning business, no quantum is taken into account on that basis.

Income likely to be earned: section 392(2)(f)

[369] As the period of compensation to be ordered does not extend beyond the date of the hearing of this matter, this is not a relevant consideration.

Other matters: section 392(2)(g)

[370] There are no other matters to be taken into consideration.

Misconduct: section 392(3)

¹³¹ CP60 paragraph 93

[371] Ms Petersen's dismissal was based on alleged performance failures. I have found no relevant misconduct on her part. I make no deduction on this account.

Shock, Distress: section 392(4)

[372] Compensation allowable by the FW Act does not include a component for hurt feelings. The compensation order will make no provision for such matters.

Compensation cap: section 392(5)

[373] The amount of compensation I will order does not exceed the six-month compensation cap.

Conclusion on compensation

[374] An order by way of remedy is an integral part of determining an unfair dismissal application. As with the decision on merit (unfairness) it needs to reflect the statutory principle of a 'fair go all round'.

[375] A decision to order a remedy is discretionary. The quantum of any compensation order must take into account the circumstances set out in section 392(2) and apply those considerations as a whole and consistent with the fair go all round principle.

[376] Whilst an orderly process of quantification is to be conducted in accordance with established authority,¹³² the quantum (if any) ordered ultimately needs to be a sum that reflects the overall exercise of discretionary considerations.

[377] Having regard to section 392 factors and overall discretionary considerations I conclude that Ms Petersen should be compensated for fifteen weeks of prospective employment (\$19,955.85 gross) less deductions for monies received from Allpet in lieu of notice (two weeks equalling \$2,307.69 gross) and less earnings from contract work since dismissal (\$10,171.85), plus superannuation (\$1,644.23).

[378] The compensation order is accordingly \$7,476.31 gross plus \$1,644.23 superannuation.

[379] I consider this sum to be consistent with the application of section 392 considerations and just having regard to discretionary considerations.

Conclusion

[380] I conclude that Clair Petersen, a person protected from unfair dismissal, was dismissed on 14 April 2020 by Maycorp Pty Ltd as trustee for the Craig Richards Trust, Cricklewood Capital Pty Ltd and Kizuri Capital Pty Ltd as trustee for the Jamucada Family Trust trading as Allpet Products and that her dismissal was harsh, unjust or unreasonable.

[381] I conclude that reinstatement is inappropriate.

¹³² *Ellawala v Australian Postal Corporation* [2000] AIRC 1151, Print S5109; *Sprigg v Paul's Licensed Festival Supermarket* [1998] AIRC 989, Print R0235

[382] I conclude that an order of compensation is appropriate.

[383] I conclude that the amount of compensation payable under sections 390 and 392 of the FW Act be \$7,476.31 (to be taxed as required by law) plus an amount of \$1,644.23 to be paid into the superannuation fund applicable to Ms Petersen's employment.

[384] I will order these sums be paid within fourteen (14) days of the date of this Order.

[385] In conjunction with the publication of these reasons, I issue an Order¹³³ in these terms.



DEPUTY PRESIDENT

Appearances:

*Ms M Kaukas, with permission, for Ms Petersen
Ms M Saraceni, with permission, for Maycorp Pty Ltd as trustee for the Craig Richards Trust,
Cricklewood Capital Pty Ltd and Kizuri Capital Pty Ltd as trustee for the Jamucada Family
Trust trading as Allpet Products*

Hearing details:

2020
Adelaide (with video to Perth)
24 and 25 August and 14, 21 and 29 September

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<PR723335>

¹³³ PR723662

ANNEXURE 1

LEGEND OF CUSTOMER ANONYMISATION IN [2020] FWC 5332

(unredacted version for the information of the Applicant and Respondent only)

- Customer A
- Customer B
- Customer C
- Customer D
- Customer E
- Customer F
- Customer G
- Customer H
- Customer I
- Customer J
- Customer K
- Customer L
- Customer M
- Customer N
- Customer O
- Customer P
- Customer Q
- Customer R
- Customer S
- Customer T

