DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Yordanos Fesshatsyen
v
Mambourin Enterprises Ltd
(U2020/9962)

DEPUTY PRESIDENT MANSINI — MELBOURNE, 9 MARCH 2021

Application for an unfair dismissal remedy.

[1] This decision concerns an application by Miss Yordanos Feeshatsyen (Applicant) for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (Cth) (Act), in relation to her employment as disability support worker with Mambourin Enterprises Ltd (Respondent).

[2] I have determined that the Applicant was not unfairly dismissed from her employment and, accordingly, to dismiss the application. The reasons for this decision follow, arranged as:

Part A: Initial matters to be considered	
• Has the Applicant been dismissed?	[3]
• Other initial matters?	[4] to [5]
Part B: Was the dismissal harsh, unjust or unreasonable?	
• The evidence	[6] to [27]
• The findings	[28] to [41]
• Consideration of section 387(a) to (h)	[42] to [69]
Conclusion	[70] to [74]

PART A: INITIAL MATTERS TO BE CONSIDERED

Has the Applicant been dismissed?

[3] A person who has been dismissed may apply to the Commission for a remedy pursuant to s.394. It is not contentious, and I am satisfied that the Applicant was terminated at the initiative of her employer within the meaning of ss.385 and 386 of the Act.

Other initial matters

[4] Section 396 of the Act sets out four matters which I am required to determine before I consider the merits of the application.

[5] There is no dispute between the parties and I am satisfied on the evidence that:

a) the Applicant's application for unfair dismissal was made within the 21 day period required by s.394(2) of the Act;

b) the Applicant was a person protected from unfair dismissal in accordance with s.382, as she had completed at least the minimum employment period[1] and the sum of the Applicant's annual rate of earnings was less than the high income threshold;

c) the Small Business Fair Dismissal Code did not apply to the Applicant's dismissal; and

d) the Applicant's dismissal was not a case of genuine redundancy.

PART B: WAS THE DISMISSAL HARSH, UNJUST OR UNREASONABLE?

The evidence

[6] The Respondent is in the business of providing support and training to people with disabilities and is funded by both the Commonwealth and Victorian Governments.

[7] The Applicant commenced casual employment as a disability support worker, at the Respondent's Braybrook facility, on or around 18 February 2019. The contract of employment relevantly contained terms and conditions which required the Applicant to:

- undergo regular medical checks, including at the Respondent's request or direction;
- acquaint herself with and comply with all policies and procedures of the Respondent, including future policies (introduced after the contract of employment was issued);
- take reasonable care and exercise due diligence in the performance of her duties and comply with all reasonable instructions to protect her own health and safety at work and that of other staff or any other persons; and
- observe all safe operating procedures notified to her by the Respondent, and not to undertake any activity that may cause injury to herself or others and familiarise herself with the Respondent's health and safety procedures. [2]

[8] The Applicant worked regular shifts until she was summarily dismissed, by reason of serious misconduct, on 17 July 2020. The reason given for termination was that the Applicant had breached the Respondent's temperature check procedure when she recorded a high temperature reading but did not take the necessary steps and instead commenced work.

[9] The temperature check procedure was introduced by the Respondent in or around 8 April 2020, to guide temperature monitoring at all sites "to prevent and minimise spread of the virus COVID-19". The procedure applied to staff and customers. It required every person attending one of the Respondent's workplaces to complete a temperature check on entry to all

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[1] The Respondent's initial objection was withdrawn during the procedural mention on 28 August 2020.

[2] Dated 14 February 2019, filed by the Respondent and confirmed by the Applicant (see Transcript of Hearing at PN756, 759 and 760).

sites, to be undertaken by "a nominated staff member". Temperature checks were to be recorded in a temperature check register. For a temperature elevated above 38 degrees, it required the person to be immediately isolated. Among other things, the procedure provided that if the "symptomatic person" is a staff member, they must "immediately leave the site and go home or to the medical centre". It also provided that the relevant manager or delegate would maintain further communication with the "symptomatic person".[3]

[10] On 8 April 2020, Ms Jane Pearce (Site Manager of the Respondent's Braybrook facility) sent an email to employees attaching the temperature check procedure.[4] Her email had the subject line "FW: ALERT – new COVID-19 documents published in SharePoint". The content of the email said "FYI" and forwarded an email from another manager which alerted colleagues to be aware that the temperature check procedure and a temperature check register were now available in SharePoint (presumably the Respondent's intranet). On the face of the email, the Applicant was a recipient. The Applicant said that she did not receive the email and produced evidence of having experienced difficulties logging in to and accessing her emails on 23 March 2020 which was corrected on 24 March 2020 (and was not the first occurrence).[5] The Applicant however contended that her work emails had not worked since 23 March 2020.[6]

[11] At 8.30am on 20 May 2020, the Applicant is recorded as having attended a "morning brief" (staff) meeting in which the first agenda item discussed was occupational health and safety and specifically the "temperature check COVID-19 procedure".[7] The minutes of that meeting record that a copy of the procedure was handed out and read out by Ms Pearce, who explained that someone with a temperature higher than 38 degrees was to be isolated, using PPE, and also instructed staff to "notify Jane or Georgia if someone's temperature is above 38 degrees". The Applicant said that she had training that day and did not attend this meeting.[8] However the Respondent filed a sign in sheet which showed that the Applicant had signed it at 8.30am and a temperature check register which showed the Applicant did the temperature check after the staff meeting concluded at 9.00am.[9]

[12] After the introduction of the procedure in April 2020, the Applicant participated in temperature check procedures prior to commencing each shift. Her evidence was that she was unaware of the copy of the procedure which was posted on the wall at the testing station and she was unaware of any requirement to leave the workplace in the event of a read above 38 degrees.[10]

[13] On 10 June 2020, the Applicant attended for work and undertook a temperature check. The Applicant said that the check was conducted by Mr Kwasi (the nominated person at that time), affirmed by Mr Kwasi in an affidavit. Initially, the Applicant said her first read was 33 degrees.[11] In sworn affidavits, both the Applicant and Mr Kwasi gave evidence that, because

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[3] Exhibit R1, Annexure CS-1.

[4] Exhibit R3, Annexure JP-3.

[5] Exhibit A3.

[6] Exhibit A6.

[7] Transcript of Hearing at PN634 and Exhibit R3, Annexure JP-5.

[8] Transcript of Hearing at PN87.

[9] Unmarked documents filed 27 October 2020.

[10] Transcript of Hearing at PN369 and 370.

[11] Exhibit A6.

the first was (an impossibly low read of) 34 degrees, a second check was conducted.[12] The temperature check register of 10 June 2020 recorded the Applicant's reading being taken at 9.00am and a reading of 38.5 degrees; whereas the affidavit of Mr Kwasi of 14 October 2020 said he recorded it as it came up, at 38 degrees.[13] The Applicant and Mr Kwasi considered the temperature checking device (or "gun") to be unreliable on account of these inconsistent readings taken within minutes. Neither the Applicant nor Mr Kwasi reported the Applicant's temperature readings on 10 June 2020 to management and the Applicant proceeded to go about performing her duties.

[14] At around 9.00am on 10 June 2020, the Applicant was briefed by Ms Georgia Theodoropoulos (Team Leader) on the days' roster. Ms Theodoropoulos gave evidence that they had a discussion in which the Applicant mentioned her son was not feeling well when she had dropped him at school, that the school checked his temperature and it was 38 degrees, that the school had accepted him. Ms Theodoropoulos also gave evidence that she proceeded to ask the Applicant if she had checked and recorded her temperature in the temperature check register, as a reminder, to which the Applicant replied "yes".[14] The Applicant accepted that there was a discussion, and that she did not mention that there were two readings or that one was recorded as 38.5 degrees.[15]

[15] At around 11.55am on 10 June 2020, the Applicant came to the office again and told Ms Theodoropoulos that she needed to leave. Ms Theodoropoulos's evidence was that the Applicant said she had to collect her son from school because he was unwell. The Applicant denied this and stated that what she had actually said was that she felt unwell (with back pain) and needed to attend to her son at school. The Applicant produced a letter from an acting school principal which verified that the child had "wet his pants at school" and "there was no need for [child] to go home on this day as all he needed was a change of clothes".[16] Also during this discussion, Ms Theodoropoulos said that she had counselled the Applicant about checking her phone and emails on a laptop while on duty, to which the Applicant had responded she had been doing so on 10 June 2020 because her son was sick. At the hearing, the Applicant gave initially very clear evidence that she was "checking through my email, my work email, and to do the progress note for the client" whilst on duty on 10 June 2020, but quickly sought to retract this in further questioning.[17] She also gave evidence that she tends to carry her mobile phone with her because she is the sole carer for her son.

[16] On 11 June 2020, the Applicant had a telephone discussion with Ms Pearce. Ms Pearce made a case note of the discussion (entered on 12 June 2020), in which she recorded having spoken to the Applicant about her temperature reading of 10 June 2020 being in excess of 38 degrees and that she would need to see a doctor and have a COVID test if she had any symptoms. Ms Pearce also recorded that the Applicant said that her son had the flu and an eye infection – the Applicant denied having said this.[18] It is not contentious that the Applicant was advised during this discussion that she was required to self-isolate for two weeks because she had attended a rally in Melbourne (as was the case with all of the Respondent's staff who had

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[12] Exhibits A2 and A4.

[13] Exhibit R3, Annexure JP-1; Exhibit A4.

[14] Exhibit R2.

[15] Transcript of Hearing at PN140.

[16] Exhibit A3, letter dated 12 October 2020.

[17] Transcript of Hearing at PN189 and 209.

[18] Exhibit R4.

been at the rally, and that she would still receive Job Keeper payments during this time). It was agreed that she would not return to work again until 13 July 2020, after the school holidays had ended (as she was caring for her son during the holidays).[19]

[17] At 10.55am on 11 June 2020, Ms Theodoropoulos said she had a telephone conversation with the Applicant. Ms Theodoropoulos made a case note of the discussion which recorded that the Applicant sounded very distressed over the phone, was talking very fast, mentioned her earlier telephone call from Ms Pearce, that she was not able to access her email account the day prior, said she had been to the doctor that day and her body temperature was 36 celsius. Ms Theodoropoulos also noted her recollection of the previous days' discussions with the Applicant in the case note of this telephone conversation.

[18] At 11.05am, the Applicant sent an email to Ms Pearce and others from her work email address attaching a medical certificate which certified the Applicant's temperature on 11 June 2020 at 36 degrees.[20]

[19] The Applicant had no further contact with her employer until she was invited to a virtual meeting with Ms Smith and Ms Pearce on 14 July 2020.[21]

[20] By virtual meeting and letter of 14 July 2020, the Applicant was placed on notice that a workplace investigation had commenced. The allegation was particularised as follows:

- That you attended work on 10 June 2020 where you recorded your temperature as 38.5 degrees in our temperature check register. You continued to work and did not report this to anyone.
- Mambourin's temperature check procedure states that you must not continue to work if your temperature is in excess of 38 degrees.
- You attended a team meeting on 20 May 2020 where the temperature check procedure was discussed. Copies were provided to all staff who attended this meeting.
- A copy of this procedure was also emailed to you from your Manager, Jane Pearce.
- This serious breach in procedure placed venerable people with disabilities and your colleagues under a significant risk to their health and safety.[22]

[21] The 14 July 2020 letter invited the Applicant to a meeting, to respond to the allegations, and to bring a support person of her choice. She was notified that the allegation, if substantiated, would result in disciplinary action and could mean the termination of her employment. The letter also stated that the Respondent would have conducted the process "much sooner" but had not as the Applicant had requested time off due to childcare responsibilities.

[22] On 16 July 2020, the Applicant attended the meeting, with her support person (Mr George Sovitslis, her "union rep and support person"), and her responses were recorded.[23] The Respondent's record of the meeting noted that the Applicant was given an opportunity to

[19] Transcript of Hearing at PN185.

[20] Exhibit A3.

[21] Transcript of Hearing at PN383 and 384.

[22] Exhibit R1, Annexure CS-2.

[23] Exhibit R1, Annexure CS-3.

respond to the allegations contained in the 14 July 2020 letter, was specifically asked whether she understood the importance of following a safety procedure "especially now, in the middle of a pandemic", whether she understood that a temperature read of 38.5 degrees (even if it was a "false" reading) required her to stop working and report this to her manager; and her responses included an acknowledgement that, if sick the Applicant knows not to come to work; a repeated assertion that the temperature check device was faulty and not accurate; that the Applicant knew she was not sick on 10 June 2020; that her temperature "is never over 36, I know that within myself" and "I felt well so I could work". It was also noted that the Applicant said she had received a phone call from the school to pick up her son because he had a temperature and so she left work to pick him up from school. The Applicant's demeanour was noted as argumentative and confrontational, with no remorse or contrition and no accountability for not following procedure or real acknowledgement of how important safety procedures are. The Applicant accepted each point of this record, as it was noted, as being true and correct except for the notes that she said she felt well, that she said her son had a temperature and about her alleged demeanour. The Applicant also contended that some things were discussed that were not noted – including the certification from her doctor that her temperature read 36 degrees the following day. Ms Pearce gave evidence that the Applicant had raised this in the meeting.[24] However Ms Smith and Ms Pearce denied that the Applicant made any mention of two inconsistent readings in her defence at that time.[25] Ms Pearce also did not recall the Applicant having said that it was not her own signature on the temperature check register of 10 June 2020.[26]

[23] Also on 16 July 2020, the Applicant emailed Ms Smith from her work email address in which she said she would like to apologise for what had happened on 10 June 2020, that she had always followed the Respondent's policies and procedures and that it was a misunderstanding.[27]

[24] The termination letter of 17 July 2020 cited the reason for the Applicant's dismissal as being:

> "...due to you causing serious and imminent risk to the health and safety of our vulnerable customers and your work colleagues. You refused to carry out a reasonable and lawful instruction that is part of your job.
>
> This termination follows our investigation into allegations of misconduct as detailed in our letter of 14 July 2020."[28]

[25] At the hearing, the Applicant accepted that there was a procedure but maintained she was not unwell on 10 June 2020 and was unaware of any requirement to report a high reading in excess of 38 degrees. However, she acknowledged her awareness of the following:

- that a temperature in excess of 38 degrees was a possible symptom of COVID-19,
- the serious safety risk of exposing staff and customers to COVID-19, and

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[24] Transcript of Hearing at PN628.

[25] Transcript of Hearing at PN649.

[26] Transcript of Hearing at PN652.

[27] Unmarked record filed on 22 October 2020.

[28] Exhibit R1, Annexure CS-4.

- this is why there was a temperature check procedure/test required at the start of every shift since early April 2020.

[26] In the Applicant's defence, she said that as she was receiving Job Keeper payments by 10 June 2020. She therefore did not *need* to attend for work if she was unwell. Those payments came to an end when her employment was terminated.

[27] The Applicant asked the Commission to find that reinstatement was not appropriate as it would not be pleasant or appropriate to return to work given what has happened.[29] At the time of the hearing, she had not found another job and had made three job applications. There was a range of evidence before the Commission which may be relevant to the question of remedy including payslips.[30]

Findings

[28] In cases relating to alleged misconduct, the Commission must make a finding, on the evidence provided, whether *on the balance of probabilities* the conduct occurred.[31] It is not enough for the employer to establish that it had a reasonable belief that the termination was for a valid reason.[32] The nature of the relevant issue necessarily affects the "process by which reasonable satisfaction is attained" and such satisfaction "should not be produced by inexact proofs, indefinite testimony, or indirect inferences" or "circumstances pointing with a wavering finger to an affirmative conclusion".[33] The Commission should not lightly make a finding that an employee engaged in the misconduct alleged.[34]

[29] The rule in *Briginshaw* has elsewhere been described as reflecting a conventional presumption that members of society do not ordinarily engage in fraudulent or criminal behaviour.[35] In *Greyhound Racing Authority,* Santow JA noted:

> … The notion of "inexact proof, and indefinite testimony or indirect inferences" needs to be translated to a comfortable level of satisfaction, fairly and properly arrived at, commensurate with the gravity of the charge, achieved in accordance with fair processes appropriate to and adopted by [a Tribunal]'.[36]

[30] The "level of comfort" referred to means that the finder of fact must "feel an actual persuasion of the occurrence or existence of the fact in issue"; the "mere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact."[37]

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[29] Transcript of Hearing at PN694.

[30] Exhibits A1 and A3.

[31] *Edwards v Guidice* (1999) 94 FCR 561, at 564; *King v Freshmore (Vic) Pty Ltd*, (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), Print S4213 at [24].

[32] Ibid.

[33] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 363, 362 and 350.

[34] *Sodeman v The King* (1936) 55 CLR 192 at 216.

[35] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450.

[36] *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388, [35]; approved in *Karakatsanis v Racing Victoria Ltd* (2013) 306 ALR 125 at [35] - [37].

[37] *NOM v Director of Public Prosecutions* (2012) 38 VR 618, [124].

[31] Some initial observations of the evidence. I have had regard to the fact that English is not the Applicant's first language. However, in the process of giving evidence, I observed that the Applicant presented as forthright and confident and was well able to converse in and comprehend the English language. There were times when the assistance of a translator was requested by the Applicant at a particularly critical moment in evidence, for example there was an occasion where the Applicant's credit was challenged and she had previously comprehended and answered the question in English with no difficulty yet requested a translator. Her written evidence was clear. There were a number of factual contests, and the Applicant received the reasonable assistance of the Commission in navigating the process and testing those matters with the Respondent's witnesses. I also note that the Applicant said she was unable to bring further witness evidence in support of her case because those people were not willing as they remain employed by the Respondent. However, there was no indication as to the relevance of any such evidence to the case and the Applicant was able to present evidence of direct relevance (including the nominated person who was checking temperatures). I am satisfied that the evidence before the Commission presented a complete picture of the matters in issue and is a reliable basis on which to proceed.

[32] I make the following findings of fact having regard to the evidence that is before the Commission. For completeness, any recitations of non-contentious evidence constitute findings I have made.

[33] There was no contest and I accept that the contract of employment dated 14 February 2019 and the *Mambourin Enterprise Inc Disability Services (Part 1) Collective Agreement 2008* (Agreement) governed the Applicant's employment immediately prior to her dismissal. The contract plainly required the Applicant to acquaint herself with and comply with the Respondent's policies and procedures, including those introduced after her acceptance and during the course of her employment. By its terms, the need to observe the Respondent's occupational health and safety procedures and to comply with all reasonable instructions to protect her own health and safety and that of other staff and other persons were conveyed as fundamental conditions of employment. The Applicant accepted these things.

[34] The introduction of the temperature check procedure occurred in early April 2020 and was a direct response to the global pandemic (COVID-19). It was not controversial that the mandatory temperature check upon arrival the Respondent's sites was a necessary risk mitigation in an attempt to protect staff and customers from the spread of COVID-19, a temperature reading in excess of 38 degrees accepted as a strong indicator that a person was "symptomatic". Having regard to the Respondent's business and the gravity of the risk, I consider the requirement to comply with the temperature check procedure and the instruction to self-report any read in excess of 38 degrees to a manager to amount to reasonable and lawful directions consistent with the terms and conditions of the Applicant's employment.

[35] In these proceedings, the Applicant gave evidence that she was not aware of the temperature check procedure. On the evidence before the Commission, this is simply implausible and I do not accept her evidence in this respect because:

- There was an email sent directly to the Applicant on 8 April 2020 which attached a copy of the new procedure, drawing it to the attention of the employees including the Applicant. The evidence establishes that the Applicant, at times, had difficulties with logging in to her email but this falls well short of establishing that she was not able to access her work emails for the period from 8 April 2020 through to the date

of the incident on 10 June 2020. Indeed, an important concession was made at the hearing – the Applicant gave clear evidence that she was reviewing her work emails whilst on shift on 10 June 2020. I acknowledge that there were subsequent attempts by the Applicant to patch over this at the hearing, however, I find her initial answer which was given in clear and plain English to be the most believable.
- There is a record of the Applicant having attended a staff meeting on 20 May 2020, in which the new procedure was handed out and discussed. At the hearing, the Applicant said she was in training that day. After the hearing, the Applicant sent some undated screenshots which show nothing more than that her name does not appear on an undated, unspecified roster and it is unclear whether this was intended to relate to 20 May 2020. The most reliable evidence is the minutes of the staff meeting of 20 May 2020 which show that the Applicant was in fact in attendance. The Respondent also filed a sign in sheet and a temperature check register both confirming the Applicant was at work on the morning of 20 May 2020.
- The Applicant was required to complete a temperature check at the start of every shift and did so for the period from early April 2020 until 10 June 2020 and again when she attended the disciplinary meeting on 16 July 2020. It simply beggars belief that she did so without knowledge of the requirement to do so.
- In response to the allegation and in the course of the disciplinary process, there is no record of the Applicant having denied knowledge or understanding of the temperature check procedure and the instruction to report a read in excess of 38 degrees to a manager. To the contrary, the Applicant's responses as recorded in the minutes of the 16 July 2020 meeting and her subsequent email of 16 July 2020 strongly indicate her knowledge of both the procedure and the instruction. Further, the evidence of both Ms Pearce and Ms Smith, which I accept as truthful, was that the Applicant never claimed to have had no knowledge of the procedure or the instruction prior to her termination and until these proceedings.

[36] I find that the Applicant was informed of the temperature check procedure and the instruction to report any reading in excess of 38 degrees to management. Even if she chose not to familiarise herself with these requirements, these were reasonable and lawful directions with which she was obliged to familiarise herself and comply with as conditions of her employment.

[37] I accept that, on 10 June 2020, the Applicant submitted to a temperature check upon arrival at work. I also accept that the check was conducted by Mr Kwasi. I prefer the evidence of the contemporaneous register, signed by Mr Kwasi on 10 June 2020, which showed the Applicant's temperature as 38.5 degrees and consider this to constitute a reading in excess of 38 degrees. It is not controversial that neither the Applicant nor Mr Kwasi reported this read to management. Indeed, the Applicant had an instant opportunity to tell her Team Leader (in their 9.00am meeting). In that meeting, the Applicant was even reminded of the importance of having her temperature checked and asked if she had done so – at this point, she willingly chose not to disclose the 38.5 degree reading or what she now alleges were two inconsistent readings. The Applicant also did not isolate or immediately leave the site as the procedure required. Rather, the Applicant went about performing her duties in the workplace.

[38] The Applicant's claim that the temperature checking device must have been inaccurate is simply not made out on the evidence before the Commission. There is no contemporaneous record of an earlier inconsistent reading on 10 June 2020 and the Applicant's failure to follow the procedure meant that further tests were not conducted or able to be verified by

management. The Applicant's own evidence of these matters was inconsistent, initially saying the first read was 33 degrees and later saying it was 34 degrees. I also do not consider Mr Kwasi's evidence to be reliable, including because his recollection was that the Applicant read 38 degrees whereas the temperature check register that he completed and signed shows a read of 38.5 degrees. Accordingly, the evidence of Mr Kwasi about the inconsistent readings and his opinion of the accuracy of the device does not assist the Applicant's case.

[39] Whilst it goes mainly (if not only) to the question of credit, there was a strong contest over whether the Applicant said her son was unwell on 10 June 2020. The acting principal's letter establishes no more than that the child did in fact wet his pants that day and was not required to leave the school. I acknowledge that the case notes of Ms Pearce and Ms Theodoropoulos were in some instances taken one to two days after the events. However, I have difficulty accepting that the Applicant's version should be preferred in light of the relatively contemporaneous notes which included quite specific recollections of what the Applicant had said about her son being unwell and that these comments were made in the context of the Applicant being counselled about using her mobile phone and laptop whilst on shift that day.

[40] Although the Applicant was on notice (as of 11 June 2020) that her employer knew of the 38.5 degree temperature reading recorded on 10 June 2020, and appeared to have understood the seriousness of the issue in light of her telephone call to Ms Theodoropoulos (which was not denied), she was unaware of the disciplinary process until 13 July 2020. I accept the delay was because the Applicant was not due to return to work until 13 July 2020 and in this time presented no risk to other staff or customers of the Respondent. In the eventual disciplinary discussion, I accept that the Applicant was probably shocked about the seriousness of the issue and presented as defensive, as she presented before the Commission. She later, by email, issued an apology of sorts but at the hearing conceded that she only said this in an effort to save her job. Importantly, she did not express any contrition in the disciplinary meeting nor before the Commission. Perhaps more concerning, she did not, at any time, convey any insight into the seriousness of her behaviour, preferring to justify it by her own perceived state of wellness, her actual state of wellness (as established one day later) and claimed lack of knowledge of the procedure.

[41] The termination letter said the Applicant was terminated for serious misconduct for failure to follow a reasonable and lawful instruction, and would be paid two weeks' notice as a gesture, not because it was owed. The Agreement applied to the Applicant's employment and for no notice of termination for casuals or in the case of dismissal for serious misconduct. There is no dispute that the Applicant was paid two weeks' notice.

Consideration

[42] Section 387 requires that I take into account the matters specified in paragraphs (a) to (h) in considering whether the Applicant's dismissal was harsh, unjust and/or unreasonable. Having regard to my findings, I turn now to consider each of the matters at s.387 in turn below.

Section 387(a) – Was there a valid reason for the dismissal related to the capacity or conduct of the Applicant (including its effect on the safety and welfare of other employees)?

[43] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal. A valid reason is one that is "sound, defensible and well founded" and should not be "capricious, fanciful, spiteful or prejudiced".[38]

[44] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[39] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees), in the sense that it was both a good reason and a substantiated reason.

[45] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.

[46] A "failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. A substantial and wilful breach of a policy will often, if not usually, constitute a valid reason for dismissal."[40]

[47] The dismissal letter describes the reason for the Applicant's dismissal as being her failure to carry out a reasonable and lawful instruction that was part of her job, causing serious and imminent risk to the health and safety of the Respondent's vulnerable customers and the Applicant's work colleagues. Having examined the reason to determine whether I am persuaded that the Applicant engaged in some or all of the relevant conduct, I now turn to whether such conduct constitutes a valid reason.

[48] Having regard to my findings above, the conduct of the Applicant in failing to report her temperature reading of 38.5 degrees to a manager and instead to go about performing her duties without following the requirements in the procedure (including to isolate whilst further testing was conducted or immediately leave the site) was of itself a valid reason for the dismissal.

[49] The Applicant did not dispute that the temperature check procedure, and the need to report a high reading in excess of 38 degrees, were important requirements of her role and necessary to ensure the safety of her colleagues and customers of the Respondent's service.

[50] I have found that:

- the Applicant was informed of the temperature check procedure and the direction to self-report a high read to management, and was also obliged to familiarise herself with these requirements;
- the Applicant's temperature was recorded on 10 June 2020 as it was taken, at 38.5 degrees;
- the Applicant did not self-report her temperature reading of 38.5 degrees to a manager (Ms Pearce or Ms Theodoropoulos), did not isolate upon obtaining that reading and did not immediately leave the site but rather went about performing her duties in the workplace.

[38] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373.
[39] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
[40] *B, C and D v Australian Postal Corporation t/a Australia Post* [2013] FWCFB 6191, [36].

[51] That the Applicant produced a medical certificate the next day of 36 degrees does not justify the Applicant's behaviour in failing to follow the procedure and the instruction on 10 June 2020. Similarly, whether the temperature checking device was inaccurate (which is not established on the evidence before me) is beside the point – the Applicant failed to follow the procedure and the instruction. Indeed, in doing so, she denied herself the opportunity to prove any such issue with the device at the time and has engaged in what I have found to be deliberate misconduct on her own part.

[52] I am satisfied on the evidence adduced that the Applicant's conduct amounted to a deliberate, knowing and serious breach of the conditions of her employment with the Respondent.

[53] In conclusion, having regard to my findings above and for the reasons given, I am satisfied that there was a sound, defensible and well-founded reason for the Applicant's dismissal. Accordingly, there was a valid reason for the Applicant's dismissal within the meaning of s 387(a) of the Act.

Section 387(b) and (c) - Was the Applicant notified of that reason and given an opportunity to respond to any reason related to his capacity or conduct?

[54] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[41] and in explicit,[42] plain and clear terms.[43]

[55] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[44]

[56] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.[45] Where the 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, this is enough to satisfy the requirements.[46] Simply "going through the motions" of giving an employee an opportunity to respond when, in substance, a firm decision to terminate has already been made may not constitute an opportunity to defend.[47]

[57] Having regard to my findings above, I am satisfied that the Applicant was notified of, and afforded opportunity to respond to, the conduct which underpinned the Respondent's finding of serious misconduct and which I have found to constitute a valid reason for the dismissal. The allegations were discussed with the Applicant on 14 July 2020 and recorded in

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[41] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
[42] *Previsic v Australian Quarantine Inspection Services* (AIRC, Holmes C, 6 October 1998), Print Q3730.
[43] Ibid.
[44] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), Print S5897, [75].
[45] *RMIT v Asher* (2010) 194 IR 1, 14-15.
[46] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
[47] *Wadey v YMCA Canberra* [1996] IRCA 568.

a letter of 14 July 2020. The Applicant was invited to respond in a meeting on 16 July 2020 and later that day sent an email in which she responded further to the matters discussed.

[58] Having regard to the matters referred to above, I find that the Applicant was notified of and given an opportunity to respond to the conduct which I have found to comprise a valid reason for her dismissal prior to the decision to dismiss being made, and in explicit, plain and clear terms.

Section 387(d) – Was there any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussions related to the dismissal (s.387(d))?

[59] In this case, the Applicant was offered to have a support person in the meeting of 16 July 2020 and did, in fact, take a support person to the meeting of 16 July 2020.

[60] In all of the circumstances, and having regard to my findings above, I find that there was no unreasonable refusal to allow the Applicant to have a support person present at the discussions relating to the dismissal on 16 July 2020.

Section 387(e) - If the dismissal related to unsatisfactory performance, was the Applicant warned of the unsatisfactory performance before the dismissal?

[61] The Applicant was not dismissed for unsatisfactory performance. As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

Section 387(f) and (g) - The degree to which the size of the Respondent's enterprise, and the absence of dedicated human resources management specialists or expertise in the enterprise, would be likely to impact on the procedures followed in effecting the dismissal?

[62] It is not disputed, and I find, that neither the size of the enterprise or any absence of in-house human resources expertise likely impacted on the procedures followed in effecting the Applicant's dismissal.

Section 387(h) - Any other matters that the Commission considers relevant?

[63] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[64] The following matters are most pertinent to this case and may be taken into consideration for the purposes of s.387(h) of the Act.

[65] During her period of just less than 18 months' service, there is no suggestion of any previous disciplinary issues involving the Applicant failing to follow an occupational health and safety procedure or indeed any other reasonable and lawful instruction, policy or procedure of the Respondent. However, with regard to my findings above, I consider the Applicant's failures to follow the temperature check procedure and the instruction to report a high temperature read to management to amount to a serious breach of the conditions of her employment. It is accepted that these were important safety requirements and designed to

ensure the safety of the Respondent's staff and customers through minimising and potentially containing the spread of COVID-19. That this was an isolated incident does not, in my view, outweigh the seriousness of the breach which I have found to be knowing and deliberate.

[66] I acknowledge that the Applicant's personal and financial circumstances are such that the loss of her job with the Respondent had an immediate and sad consequence. She is a single mother and sole carer of her 6 year old son. She was no longer in receipt of Job Keeper payments as a result of her employment coming to an end. At the time of the hearing, she had made limited attempts but nonetheless had not yet been able to find another job. These are matters I have taken into account in my assessment of whether the dismissal was harsh, unjust or unreasonable. I empathise with the Applicant's situation greatly but do not consider this to sufficiently outweigh the other factors as to result in a finding that the dismissal was unfair.

[67] Although not entitled to receive notice, the Applicant received two weeks' pay upon termination.

[68] The Applicant lacked insight in terms of the seriousness of her conduct and the gravity of the risk it created for the Respondent, its staff and customers. On the balance of the materials, I have found that the 16 July 2020 email did not reflect any genuine contrition and the Applicant was otherwise not contrite by any means (whether in the disciplinary meeting of 16 July 2020 or before the Commission in these proceedings). The Respondent was justified in its lack of confidence that the Applicant would comply with its procedures going forward. I have also found the Applicant's attempts to justify her behaviour did not withstand scrutiny and were even dishonest at times. Whilst these facts of themselves did not substantiate a valid reason for the dismissal, in the circumstances of this case they are relevant to an overall assessment of whether the dismissal was harsh, unjust or unreasonable. I find these factors weigh against a finding of harshness.

[69] Finally, the Respondent took a consistent approach to a similar issue. The nominated person to check the Applicant's temperature, who also failed to follow the procedure in failing to report the Applicant's read in excess of 38 degrees (which he recorded as 38.5 degrees) is no longer employed by the Respondent for reasons which included his failure to follow the temperature check procedure.

Conclusion – is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[70] I have made findings in relation to each matter specified in section 387 as relevant.

[71] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[48]

[72] I am satisfied there was a valid reason for the dismissal of which the Applicant was properly notified and afforded adequate opportunity to respond. There was no unreasonable refusal of a support person in discussions related to the dismissal. The dismissal was not for unsatisfactory performance. The seriousness of the procedure and instruction to ensuring the safety of the Respondent's staff and customers are paramount to my consideration that

[48] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd*(AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), PR915674, [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

summary dismissal was not disproportionate to the conduct. The circumstances weighing in favour of a conclusion that the dismissal was harsh are noteworthy, but not sufficient to alter my conclusion.

[73] In summary, having considered each of the matters specified in section 387 of the Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable.

[74] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that Ms Yordanos Fesshatsyen was unfairly dismissed within the meaning of section 385 of the Act. The question of remedy does not therefore arise. Accordingly, this application is dismissed.

DEPUTY PRESIDENT

Appearances:

The Applicant appeared on her own behalf

Mr *J Tracey,* of Counsel instructed by Mr *D Hartnett,* Solicitor appeared for the Respondent

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