

[2021] FWC 1751

The attached document replaces the document previously issued with the above code on 30 March 2021.

Cross-reference at paragraph [29] amended to paragraph [26].

Cross-reference at paragraph [30] amended to paragraph [27].

Cross-reference at paragraph [63] amended to paragraph [50].

Casey Sutton

Associate to Deputy President Clancy

Dated 31 March 2021



DECISION

s.394—Unfair dismissal

*Fair Work Act
2009*

Ariana Goss

v

Health Generation Pty Ltd

(U2020/12801)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 30 MARCH 2021

Application for an unfair dismissal remedy-termination for disclosure of confidential information during an investigation process-dispute regarding who was a support person-behaviour and role of support person discussed-Employer direction regarding confidentiality of the investigation unreasonable-dismissal unfair-remedy to be determined.

[1] Ms Ariana Goss has applied to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy, having been dismissed from her employment with Health Generation Pty Ltd (the Respondent) on 3 September 2020.

[2] The matter proceeded to a hearing conducted via Microsoft Teams on 2 December 2020. Both Ms Goss and the Respondent sought permission to be legally represented. Having weighed the circumstances and considerations in s.596 of the Act, I granted permission for both parties to be represented. Mr Nick Harrington of Counsel appeared on behalf of Ms Goss and Mr Rohan Millar of Counsel appeared for the Respondent. On 2 February 2021, I heard final oral submissions from the parties on the question of liability only.

Background

[3] Ms Goss commenced employment with the Respondent on 29 April 2019 in the role of an Associate Director in the Advisory and Client Partner Team and in January 2020 was appointed to the new position of Director of Client Relations.

[4] On 31 July 2020, Ms Goss sent, via her lawyers Hall & Wilcox, a letter to the Respondent outlining allegations of sexual harassment, workplace bullying and unpaid entitlements. Ms Goss requested the Respondent undertake an independent investigation into her allegations.

[5] By letter dated 4 August 2020 to Ms Goss' lawyers, Ms Goss was advised that the Respondent had appointed Mr Adam Lunn, a partner in the firm of Mills Oakley to conduct an investigation into the matters she had raised. Within this letter, it was stated:

“.....your client can safely assume that the investigation will be conducted in a fair and impartial manner, that principles of due process and natural justice will be afforded to all participants in the investigation and any recommendations or outcomes that flow from the investigation.

In order to commence the investigation, we propose to first interview Ms Goss in order to obtain all relevant information from her. With that in mind we will be grateful if you will let us know when Ms Goss may be able to attend a meeting - obviously, given the current COVID circumstances either by telephone, Zoom or some other electronic means, with Mr Lunn.

Naturally Ms Goss is entitled to have a support person attend the interview with her and obviously it may well suit her to have you or another lawyer attend the interview in the capacity of support person.

We request that you let Ms Goss know that she must treat the investigation as confidential and should not disclose the content of our discussions or information disclosed to Ms Goss with anyone other than her support person or legal advisers (who must also commit to the same obligation of confidentiality). You will doubtless appreciate that in order to conduct the investigation process and report upon it we cannot commit to maintaining confidentiality but we will impress upon other participants in the process the same obligation of confidentiality.” (my emphasis)

[6] In response, Ms Goss’ lawyers sent a letter dated 6 August 2020 seeking to have a number of questions answered concerning the investigative process and its potential outcome. This letter also stated that while Ms Goss was happy to participate in the investigation process, she was not at that time in a position to be interviewed. Ms Goss’ lawyers proffered that they did not consider that this would prevent the investigation from commencing and stated that should Mr Lunn require any further information, Ms Goss was happy to provide this in writing.

[7] By letter dated 19 August 2020 from Mr Lunn to Ms Goss’ lawyers, Ms Goss was advised that it was now critical to the process that Ms Goss participated in an interview as some of the information that they had obtained was not consistent with the information provided by her in her initial complaint and they wished to give Ms Goss the opportunity to provide her input in relation to those matters and to provide any further evidence that she may regard as important. The letter concluded as follows:

“Naturally Ms Goss is entitled to have a support person attend the interview with her and obviously it may well suit her to have you or another lawyer attend the interview in the capacity of support person.”

[8] By letter dated 26 August 2020, Ms Goss’ lawyers advised that the incidents set out in their 31 July 2020 letter had had a severe impact on Ms Goss’ mental wellbeing. As Ms Goss was on sick leave at the time, Ms Goss’ lawyers did not consider that it was lawful or reasonable for the Respondent to direct an employee in her condition to participate in an interview against her will in circumstances it asserted would likely exacerbate her condition. However, it was conveyed that Ms Goss was eager for the investigation to be completed and did not want to be seen as hindering the investigation. As such, Ms Goss’ lawyers advised she

was prepared to participate on a number of conditions. One of these was that that Ms Kamleh, one of Ms Goss' lawyers, would attend as Ms Goss' support person, and would be entitled to intervene if the interview went beyond the parameters previously set or, having regard to her wellbeing, Ms Goss was unable to continue.

[9] In an email in response dated 26 August 2020, Mr Lunn replied that Ms Goss, among other things, had not been directed to attend a meeting but that his client reserved its right to do so. Further, it was stated:

“Ms Kamleh may of course attend as Ms Goss' support person. However, she will not be permitted to advocate on Ms Goss' behalf. If Ms Goss determines at any point in time that she does not wish to continue the interview, obviously Ms Kamleh will be permitted to convey those instructions to me...

The content of the interview must remain confidential between Ms Goss and you as her legal advisers...” (my emphasis)

[10] Mr Lunn conducted interviews with a number of persons on the matters alleged in the 31 July 2020 letter, including with a former employee of the Respondent, Ms Jean Prout on 13 August 2020. Ms Prout had been present at a number of the events referred to in the allegations of Ms Goss and was interviewed by Mr Lunn about the allegations made by Ms Goss.

[11] On 27 August 2020, Mr Lunn conducted an interview with Ms Goss via Teams and she was accompanied by her support person, Ms Kamleh from Hall and Wilcox. This interview was recorded.¹ At the commencement of the interview Mr Lunn said:

“There are just a few matters that have arisen in my interviews with people that I need to give Ariana the need to respond to. And I don't propose to go into detail in relation to the allegations. But there are some matters that have cropped up in the meantime that Ariana should probably need time to respond to. Ariana, I'm sure it's been explained to you the discussion that we have today should remain confidential other than as between yourself and your lawyers.” (my emphasis)

[12] Mr Lunn says that when interviewing Ms Goss, he made reference to information which had been provided to him by Ms Prout during Ms Prout's interview with him. He says the interview with Ms Goss concluded at approximately 4.15pm. Ms Bianca McBride, the Director of Operations at the Respondent, said she was aware that Mr Lunn was interviewing Ms Goss on 27 August 2020 and at approximately 5.00pm that day, she was contacted by Ms Prout by telephone. Ms McBride said Ms Prout sounded distressed and told her that she had just received a series of text messages from Mr Brendan McConnell. Ms Goss gave evidence that at the time she made the complaint on 31 July 2020, she was living with Mr McConnell. Ms Goss described Mr McConnell as her “critical support person on a daily basis” and considered that his support through the entire investigation process was vital to her mental health and wellbeing because she was overwhelmed by the fact of making the complaint and the subsequent investigation process.

¹ Exhibit A4.

[13] The text messages sent by Mr McConnell to Ms Prout were said to have referred to information Ms Prout had provided to Mr Lunn and to which Mr Lunn had referred during the course of his interview with Ms Goss. The contents of the seven text messages sent by Mr McConnell to Ms Prout appear to have been as follows:

- One text message at 4.30pm:

“Did you just throw Ariana under a bus. Sending photos of coke to Health Generation, saying she’s a big drug user. Saying her relationship with health was consensual blah blah fucking blah”;

- Three text messages at 4.43pm:

“Fuxk u.”

“You told them that her bruises from USA were from. passiknate love.”

“Fuck u”; and

- Three text messages at 5.07pm:

“You were interviewed?”

“Your statements were raised today...from that night with all 4 of us, did you or did you not say ‘the bruises were from passionate love making’ Did you or did you not send a sandwich bag of coke, Did you or did you not say ‘that you loved health’. Did you or did you not say ‘Ariana was upset cobie was on the trip’ Why has an ex employee of this shit company even relevant.”

“Answer the questions.”²

[14] Mr Lunn says Ms McBride informed him that Ms Prout had been sent text messages from a person named “Brendan”. Mr Lunn says that he informed Ms McBride that the confidentiality of the interview process had been confirmed with Ms Goss at the commencement of her interview.

[15] Mr Lunn says he then called Ms Kamleh, to advise her that Ms Prout had been contacted by Mr McConnell. Mr Lunn says he told Ms Kamleh that she must immediately tell Ms Goss to stop discussing the matter with Mr McConnell and that the contact with Ms Prout must stop. Mr Lunn says that he also told Ms Kamleh that the Respondent might regard the disclosure of the confidential information as serious misconduct by Ms Goss.

[16] On 31 August 2020, Ms McBride sent a letter Ms Goss’ lawyers suggesting Ms Goss had disclosed information that had been disclosed to her during her interview to Mr McConnell. In this letter, it was stated that if it was established that Ms Goss had made the disclosure, such a disclosure would constitute:

- (a) a breach of a lawful and reasonable direction provided to Ms Goss;

² DCB at 257 and 258.

- (b) wilful or deliberate behaviour inconsistent with the continuation of her contract of employment;
- (c) conduct that caused serious and imminent risk to the health and safety of Ms Prout; and
- (d) conduct that caused serious and imminent risk to the reputation of the business of Health Generation, given Ms Prout's position as a former employee of Health Generation.

[17] A number of questions requiring the response of Ms Goss were then outlined:

1. Was Ms Goss aware of the obligation to maintain confidentiality of the interview?
 - (a) Did Ms Goss receive instructions to (sic) you to that effect;
 - (b) Did Ms Goss receive instructions from Mr Lunn to that effect?
2. Did Ms Goss inform Mr McConnell of contents of the discussion that she had with Mr Lunn on 27 August 2020?
3. If so, does Ms Goss wish to provide any explanation as to the reason that she did so?
4. If the answer to question 2 is "No"; does Ms Goss have any idea how Mr McConnell became aware of information that, by the time he had sent messages to Ms Prout, was known only to Mr Prout, Mr Lunn, Mr Lunn's personal assistant, Ms Kamleh and Ms Goss.
5. Was Ms Goss aware that Mr McConnell sent the messages to Ms Prout?
6. Did Ms Goss encourage Mr McConnell to send the messages to Ms Prout?
7. Did Ms Goss take any steps to try to prevent Mr McConnell sending the messages to Ms Prout?

[18] Ms McBride concluded the letter by stating that the Respondent reserved its rights to assess the impact and determine the consequences of any responses that Ms Goss might give to the questions and foreshadowed the responses could foreseeably result in the termination of Ms Goss' employment.

[19] On 2 September 2020, Ms Goss' lawyers responded that Ms Goss did not deny that she discussed some of the contents of the investigation with Mr McConnell. This letter stated that while Mr McConnell was not Ms Goss' support person during the interview, he had been and continued to be Ms Goss's support person during the investigation process. Further the letter stated that:

"...it would be implicit that our client would be able to communicate with her immediate family, particularly following the 27 August 2020 interview which had a major detrimental impact on our client given the sensitive nature of the allegations and the line of questioning pursued by Mr Lunn. In particular, as outlined in our 26 August 2020, we set the parameters of the interview, which was to discuss the 'alleged inconsistencies' to her initial complaint. The reason the parameters were set in the first instance was to ensure our client's condition was not unnecessarily aggravated or exacerbated. Mr Lunn was made aware of our client's condition prior to the interview commencing, as our client made the following statement to him:

‘I have been diagnosed with depression. This exogenous depression is a direct outcome of Heath’s workforce bullying, harassment and this ongoing legal investigation. I am currently being treated by my Doctor and Psychologist’

Unfortunately, those parameters were not adhered to, and in those circumstances our client suffered a high level of emotional disturbance. Notwithstanding the fact that the interview was prejudicial to our client’s mental health, which required her to seek further solace from her Psychologist that evening, she continued with the interview in order to assist Health Generation. As such, we do not consider the disclosure to Brendan constitutes a breach of confidentiality. In any case, even if Health Generation considers that our client has breached confidentiality, the fundamental premise on which your conclusions are based are wrong in fact and law for the following reasons:

1. At no stage prior or during the investigation did Health Generation give our client a direction to in respect to confidentiality. While our client accepts that Mr Lunn advised her that the investigation should be treated as confidential, this cannot be construed as a lawful and reasonable direction given to her by her employer. Health Generation cannot rely on requests made by Mr Lunn regarding confidentiality as being ‘authorised’ by it in circumstances where Mr Lunn has been engaged as an independent investigator. In any case, we would consider that any direction given to our client that would prohibit her from discussing the investigation with her partner would not be lawful or reasonable, particularly in circumstances where she has made the complaint.
2. In the absence of Health Generation providing our client with a direction that she is not entitled to speak to her partner about the investigation and that any breach of that direction may result in the termination of her employment, there is no basis for Health Generation to claim that the disclosure constitutes a wilful or deliberate behaviour that is inconsistent with the continuation of our client’s contract of employment.
3. There is no evidence to substantiate Health Generation’s position that our client’s disclosure to her partner has caused a serious and imminent risk to the health and safety of Ms Prout or that it causes serious and imminent risk to the reputation of the business of Health Generation. This is particularly the case given the substance of Brendan and Ms Prout’s interaction in circumstances where Mr Prout (as an ex-employee of Health Generation) was aware of the drug taking culture at Health Generation.

In respect to your specific questions, we are instructed to respond as follows:

1. Our client was aware of her obligation to maintain confidentiality as this had been conveyed to her by Mr Lunn. Our client was aware that she was prohibited from talking to her partner about the investigation and at no stage was advised that any breach of confidentiality could result in the termination of her employment.
2. As outlined above, our client does not deny that she discussed the contents of the interview with her partner, Brendan.

3. Our client felt ‘broken’ after the interview and was experiencing severe emotional distress. In order to manage her emotional distress and mental wellbeing she confided in her partner about the investigation.
4. Our client became aware that Brendan sent the message to Ms Prout after the fact.
5. Our client did not encourage or instruct Brendan to send the messages to Ms Prout.
6. Given Brendan’ relationship with Ms Prout, as they have known each other for approximately 30 years, Brendan indicated to our client that he intended to contact Ms Prout. Our client advised Brendan not to contact Ms Prout.

The disclosure is a single instance of a breach of confidentiality in respect to the investigation by a third party, which has in no way jeopardised the investigation. Given that Brendan is our client’s partner and support person, she will continue to speak with him regarding the investigation. Both Brendan and our client have been made aware of their obligations in respect to confidentiality, and as such we are confident that there will not be any further breaches...”

[20] On 3 September 2020, Ms McBride of the Respondent sent Ms Goss via her lawyers a letter terminating her employment on the grounds of serious misconduct. It stated:

1. Ms Goss was warned about the need to maintain confidentiality in writing and in her interview with Mr Lunn.
2. “Brendan” was not Ms Goss’ nominated support person but by her reasoning, Ms Goss was free to breach confidentiality to anyone and then claim that the person to whom she made the improper disclosures was her “support person”.
3. Neither Ms Goss nor her lawyers had the right to set the parameters of her participation in the investigation.
4. Mr Lunn made it clear to Ms Goss and her lawyers what would occur if she was not able to continue the interview. In light of those instructions, Ms Goss elected to proceed and had the support of a lawyer with her in the interview. At one stage Ms Kamleh requested a break; that was acceded to, and then Ms Goss chose to proceed with the interview.
5. The warnings regarding confidentiality did constitute reasonable and lawful directions.
6. Ms Goss’ disclosure through the letter dated 2 September 2020 that she intends to continue making disclosures to “Brendan” represents a wilful breach of her obligations.
7. The questions of the fact or content of legal advice obtained by Health Generation are privileged and Ms Goss’ lawyers should not be seeking disclosure of privileged information.

[21] Ms McBride concluded her letter dated 3 September 2020 by stating:

“In view of the matters set out in my letter of 31 August 2020 and your client’s response as set out in your letter of yesterday, Health Generation terminates the employment of your client with immediate effect on the grounds of serious misconduct.....”

[22] The unfair dismissal application of Ms Goss was filed on 24 September 2020.

Initial matters to be considered

[23] There is no dispute between the parties, and I am satisfied, in relation to the four matters referred to in ss.396(a)-(d) of the Act, as follows.

[24] Firstly, Ms Goss’ application was made within the 21-day period after the dismissal took effect, as required by s.394(2) of the Act (s.396(a) of the Act).

[25] Secondly, there is no dispute that Ms Goss is a person protected from unfair dismissal as defined by s.382 of the Act in that she is an employee who has completed a period of employment of at least the minimum employment period, and the sum of her annual rate of earnings and such other amounts is less than the high income threshold (s.396(b) of the Act).

[26] Thirdly, as to whether this matter involves a dismissal that was consistent with the Small Business Fair Dismissal Code (s.396(c) of the Act), it was not in dispute and I am satisfied that the Respondent is not a small business employer within the meaning of s.23 of the Act, having had 15 or more employees at the relevant time. As such, I am satisfied that the Small Business Fair Dismissal Code does not apply.

[27] Fourthly, neither party suggested this case involves a dispute as to whether or not the circumstances involved a genuine redundancy and I find this to be the case (s.396(d)) of the Act).

Section 385 – Was Goss’ dismissal unfair?

[28] A dismissal is unfair if I am satisfied, on the evidence before me, that all of the circumstances set out at s.385 of the Act existed. Section 385 of the Act provides the following:

“385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

Section 385(a) – Was Goss dismissed?

[29] There was no dispute, and I am satisfied, that Mr Goss was dismissed within the meaning of s.386(1) of the Act.

Section 385(c) – Small Business Fair Dismissal Code

[30] As outlined in paragraph [26] above, s.385(c) of the Act does not apply.

Section 385(d) – Genuine redundancy

[31] As outlined in paragraph [27] above, s.385(d) of the Act does not apply.

Section 385(b) – Harsh, unjust or unreasonable

[32] In determining whether the dismissal was harsh, unjust or unreasonable (s.385(d) of the Act), I must have regard to s.387 of the Act:

“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.”

[33] I am under a duty to consider each of these criteria in reaching my conclusion and will do so below.³

Was there a valid reason for dismissal relating to Ms Goss’ capacity or conduct? – s.387 (a)

[34] In considering whether the dismissal of Ms Goss was harsh, unjust or unreasonable, I am required to take into account whether there was a valid reason for the dismissal related to her capacity or conduct (including its effect on the safety and welfare of other employees). The reason or reasons should be “sound, defensible and well founded”⁴ and should not be “capricious, fanciful, spiteful or prejudiced”.⁵

[35] 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.⁶ 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).

[36] This is a case in which it is asserted that there was a valid reason for Ms Goss’ dismissal related to her conduct. Specifically, the Respondent asserts Ms Goss was dismissed for serious misconduct through the disclosure of confidential information to Mr McConnell. It is not in dispute that Ms Goss passed onto Mr McConnell information about matters raised during her interview with Mr Lunn on 27 August 2020. Nor is it in dispute that Mr McConnell sent text messages to Ms Prout.

[37] The Respondent submits the expectation of confidentiality could not have been more clearly expressed and had been conveyed as follows:

a) In the letter from its lawyers to Ms Goss’ lawyers dated 4 August 2020, which Ms Goss refers to as “the Direction”⁷:

“We request that you let Ms Goss know that she must treat the investigation as confidential and should not disclose the content of our discussions or information disclosed to Ms Goss with anyone other than her support person or legal advisers (who must also commit to the same obligation of confidentiality).”

b) In the letter from its lawyers to Ms Goss’ lawyers dated 26 August 2020:

“The content of the interview must remain confidential between Ms Goss and you as her legal advisers...”

c) At the outset of Ms Goss’ interview with Mr Lunn, when Mr Lunn stated:

³ *Sayer v Melsteel Pty Ltd* [2011] FWA 7498.

⁴ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁵ *Ibid.*

⁶ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.

⁷ Applicant’s Outline of Submissions dated 6 November 2020 at 2(g) – DCB at 42.

“There are just a few matters that have arisen in my interviews with people that I need to give Ariana the need to respond to. And I don’t propose to go into detail in relation to the allegations. But there are some matters that have cropped up in the meantime that Ariana should probably need time to respond to. Ariana, I’m sure it’s been explained to you the discussion that we have today should remain confidential other than as between yourself and your lawyers.”

[38] The Respondent says the Direction was made in the course of an investigation into serious allegations which had been made by Ms Goss and submits that a requirement of confidentiality is manifestly reasonable given the need to protect the integrity of the process. The Respondent submits it is impossible to see the requirement as other than lawful and reasonable.

[39] Ms Goss submits there was no valid reason as to conduct for the dismissal because it was irrational, capricious and spiteful having regard to all the facts and circumstances. Further, Ms Goss submits that the Direction was, in its form and ultimate application:

- a) Not lawful on three bases; and
- b) If lawful, not reasonable on three bases.

[40] Ms Goss submits that the first basis upon which the Direction was not lawful was that it was made in a purported investigative process that was no such thing because it was conducted by a lawyer collecting information to advise his client. Secondly, Ms Goss submits the Direction was not lawful because it was submitted in a course of conduct, in trade and commerce, that was misleading and deceptive. The third basis upon which Ms Goss submits the Direction was not lawful was it was issued by the Respondent in circumstances where it would operate to injure her in the course of her employment or further exacerbate an injury sustained by her. In this regard, Ms Goss relies upon s.21 of the *Occupational Health and Safety Act 2004* (Vic), an express contractual duty owed by the Respondent to provide a safe workplace and an opinion from Ms Goss’ treating psychologist, Ms Colleen Murphy.

[41] Ms Goss submits the Direction was not reasonable in circumstances where it sought to deprive her of the ability to communicate with Mr McConnell, with whom she lived, during COVID-19 Stage 4 lockdown and in the circumstances of her unchallenged mental health decompensation, a fact or matter well known to the Respondent. Ms Goss submits the opinion of Ms Murphy that the extension or the application of the Direction so as to preclude communication with Mr McConnell was, from a clinical and health perspective, ‘*entirely unreasonable*’ and ‘*placed Ms Goss at significant risk of harm*’ is critical on this issue.

[42] The second basis upon which Ms Goss submits the Direction was not reasonable was because it was manifestly unclear and ambiguous as to how the exception or carve out would operate. The Applicant was permitted to communicate about the matters under investigation with her ‘*support person*’ or ‘*legal advisors*’. She communicated with her support person after a harrowing interview process yet was then accused of misconduct because of *his* behaviour.

[43] The third basis upon which Ms Goss submits the Direction was not reasonable was that upon its proper construction, the Direction permitted the Respondent to control the

communications between Ms Goss and Mr McConnell in the domestic setting and as a consequence, arrogated to the Respondent the right to determine the identity of a support person at any particular point in time. Ms Goss submits that on any sensible view, an employer direction in employment with such breadth/reach cannot be reasonable.

[44] I have noted that Mr McConnell was said by Ms Goss and her lawyers to have been her support person during the investigation process and that after it became apparent that Ms Goss passed onto Mr McConnell information about matters raised during her interview with Mr Lunn and Mr McConnell then sent his text messages to Ms Prout,⁸ Ms Goss' lawyers advised the Respondent's lawyers in their letter dated 2 September 2020, "*Both Brendan and our client have been made aware of their obligation in respect to confidentiality, and as such we are confident there will not be any further breaches.*"

[45] Ms Goss' lawyers also stated in that letter that Ms Goss had been aware of her obligation to maintain confidentiality and had also been aware that she was prohibited from talking to Mr McConnell about the investigation. However, Ms Goss' lawyers did not also state that Mr McConnell had also been made aware of his obligations in respect of confidentiality at the outset of the investigation. Further, Ms Goss, when asked, did not give evidence to this effect and Mr McConnell himself did not give evidence at all.

[46] In these circumstances, my conclusion is that the requirements regarding confidentiality were either not outlined (or adequately outlined) to Mr McConnell at the outset of the investigation process or if they were, he simply chose to ignore them.

[47] If Mr McConnell was indeed Ms Goss' support person, he clearly did not understand or appreciate what his role was. His text messages to Ms Prout, sent despite the express request of Ms Goss, were multiple and spaced over a 37-minute time period. The language Mr McConnell used was aggressive, threatening, and intimidatory. Had Ms Prout been a witness in this proceeding and Mr McConnell engaged in such behaviour in response to her testimony or proposed testimony, he would have committed a serious offence under s.676 of the Act and been liable to imprisonment.

[48] Support persons have an important and useful role to play when involved in investigatory and disciplinary matters in the workplace. While a support person is not an advocate per se and should not hijack a lawful and reasonable process or answer for an employee, I do not subscribe to the absolute view that they should only be seen and not heard. This is because there may be circumstances in which an employee might be experiencing difficulty in comprehending aspects of the process or an employer might be misconstruing an explanation and the support person present can help improve the quality of the dialogue. Above all, what is required is for all parties to a process and conversation to behave reasonably and respectfully. This means behaving in a civil manner and respecting each other's rights and obligations. Mr McConnell's behaviour was the antithesis of that which should be demonstrated by a support person because he set off a chain of events that resulted in the termination of Ms Goss' employment. However, as much as Mr McConnell's thuggish behaviour towards Ms Prout was disgraceful, Ms Goss was not dismissed because of it.

[49] I am satisfied the Direction that Ms Goss treat the investigation as confidential was lawful but I am not persuaded it was reasonable having regard to the circumstances of this

⁸ Outlined above at [12].

case. It was apparent from the outset that both parties had engaged lawyers and wanted the benefit of legal advice. I consider it neither reasonable nor realistic to have required Ms Goss to elect to confide in either one support person or her legal advisers acting in the capacity of support person(s), but not both. Assume Ms Goss had, for example, attended the investigation interview with a support person other than one of her lawyers. It would have been unreasonable for the Respondent to then insist that she not disclose what transpired at the interview to her lawyers in the event she felt the need to subsequently obtain their advice with regard to matters that may have arisen or in relation to her ongoing employment. Similarly, I consider it is manifestly unreasonable and unrealistic to seek to insist that a person only consult with their lawyers but not a spouse, de facto partner or other individual upon whom they rely for advice and emotional support. Litigious and potentially litigious matters are emotionally draining and require consideration of complex issues. Decisions of significance need to be made. To have expected an individual to operate within the type of solitary vacuum the Respondent appears to have insisted upon was unreasonable. The reality is that with a disciplinary process or an investigation carried out by an external adviser, a circle of individuals may be party to the subject matter and matters arising. Such practicalities were laid bare by the Respondent's lawyers themselves, when it was stated in their letter to Ms Goss' lawyers dated 4 August 2020:

“You will doubtless appreciate that in order to conduct the investigation process and report upon it we cannot commit to maintaining confidentiality but we will impress upon other participants in the process the same obligation of confidentiality.”

[50] This is the key. An individual brought into a circle of confidentiality must respect that privilege and behave appropriately. Ms Goss was spectacularly failed by the stupidity of the boorish Mr McConnell, but I am not persuaded her disclosure of confidential information to him in all the circumstances of this case, including her symptoms and the prevailing conditions brought about by COVID-19, constituted a valid reason for the termination of her employment.

Notification of the valid reason – s.387 (b)

[51] As I am not satisfied there was a valid reason related to the dismissal, this factor is not relevant to the present case.⁹

Opportunity to respond to any reason related to capacity or conduct – s.387(c)

[52] As I have not found there was a valid reason related to the dismissal, this factor is not relevant to the present circumstances.¹⁰

Unreasonable refusal by the employer to allow a support person – s.387(d)

[53] This consideration is irrelevant in this case. There was no unreasonable refusal by the Respondent to allow Ms Goss a support person at discussions relating to her dismissal and nor has any such refusal been alleged.

⁹ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 200), [41]; *Read v Gordon Square Child Care Centre* [2013] FWCFCB 762, [46]-[49].

¹⁰ *Ibid.*

Warnings regarding unsatisfactory performance – s.387(e)

[54] As Ms Goss was not terminated on the basis of unsatisfactory performance, this factor is not a relevant consideration in this case.

Impact of the size of the Respondent on procedures followed - s.387(f) and Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[55] I do not consider the size of the Respondent to have been a relevant factor in this case (s.387(f)) and have noted that the Respondent had lawyers acting for it during the investigatory process, such that s.387(g) of the Act is not a relevant factor in this case.

Other relevant matters – s.387(h)

[56] Section 387(h) of the Act requires the Commission to take into account any other matters it considers relevant.

[57] Ms Goss submits it was unjust and unreasonable for the Respondent to strictly enforce the Direction. She says the “deeply flawed” investigation was nearing its end and it was unjust and unreasonable in all the circumstances to extend the Direction to preclude her from seeking any succour or comfort from Mr McConnell and then summarily dismiss her because she would not agree to accept an employer directed muzzle in respect of him. Ms Goss submits she was a conspicuously successful performer in the business and had never attracted censure for her work performance.

[58] Ms Goss also submits her termination was harsh in the circumstances of her treatment by Mr Downie, her mental health injury, her need to engage the emotional support of Mr McConnell and the strictures and deprivations imposed on her by the Stage 4 COVID-19 lockdown in Victoria.

[59] The Respondent submits the actions of Ms Goss were inconsistent with the continuation of the contract of employment by reason of her avowed intention to continue to divulge confidential information about the investigation process. It asserts Ms Goss has attempted to conflate the motivation for her allegations being made with her failure to respect the confidentiality of information imparted on 27 August 2020. The Respondent also submits Ms Goss did not acquire immunity from the reasonable expectations of the Respondent to respect confidentiality of information. The Respondent proffers Ms Goss could have responded on 2 September 2020 by undertaking to not pass on information to Mr McConnell but instead made matters worse by stating she would continue breaching the Direction. The Respondent submits that instead of recognising the seriousness of what had occurred, accepting that information should not have been divulged and undertaking to ensure there was no repetition, Ms Goss has sought to blame all manner of other factors.

[60] In all fairness, I suspect that neither Ms Goss and her lawyers nor the Respondent and its lawyers could have anticipated the behaviour of Mr McConnell which detonated the relationship between the parties. As was outlined by the Respondent, if Mr McConnell had not sent his text messages to Ms Prout on 27 August 2020, the disclosure of confidential information to him was unlikely to have become known. Nonetheless, I consider cooler heads and a more conciliatory tone than that adopted by the parties and their respective lawyers was

required after Mr McConnell's behaviour became apparent. In the aftermath, the Respondent might have recognised that having regard to Ms Goss' mental health injury and need for emotional support, together with the COVID-19 restrictions in Victoria, a more realistic approach to confidentiality was warranted. Balanced against this, the lawyers for Ms Goss could have given the Respondent a greater level of comfort so as to satisfy it that its legitimate concerns regarding Mr McConnell had been taken seriously and addressed.

[61] In all the circumstances, I do not consider the matters raised by either party in relation to s.387(h) weigh in favour or against a finding that Ms Goss' dismissal was unfair to any material extent. I have found, when considering s.387(a), that the Direction that Ms Goss treat the investigation as confidential was unreasonable insofar as it required Ms Goss to elect to confide in either one support person or her legal advisers acting in the capacity of support person(s), but not both. In this regard, I have noted the report of Ms Murphy and the opinion she expressed in relation to the role Mr McConnell was playing in relation to Ms Goss. As to Ms Goss' complaint about the treatment she says she was subjected to by Mr Downie, this was not a basis for the Respondent's decision to terminate her employment and I am not in a position to make any findings in relation to behaviour of Mr Downie.

Was Ms Goss' dismissal harsh, unjust or unreasonable?

[62] I have made findings in relation to each matter specified in s.387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.¹¹

[63] As outlined above at [50], I am not persuaded Ms Goss' disclosure of confidential information to Mr McConnell, in all the circumstances of this case, including her symptoms and the prevailing conditions brought about by COVID-19, constituted a valid reason for the termination of Ms Goss' employment.

[64] Having considered each of the matters specified in s 387 of the Act, I am satisfied that the dismissal of Ms Goss was unreasonable. This is because I am not satisfied the Direction that Ms Goss treat the investigation as confidential was reasonable insofar as it required Ms Goss to elect to confide in either one support person or her legal advisers acting in the capacity of support person(s), but not both. I am therefore satisfied that Ms Goss was unfairly dismissed within the meaning of s.385 of the Act.

[65] Issued concurrently with this decision are directions for the filing and service of further material to address the question of what remedy if any should be ordered given my conclusion. I also encourage the parties to engage in discussions to see whether an agreement as to remedy might be reached and thereby negating the necessity for any further hearing, with its associated legal costs. I will facilitate making available a Member of the Commission to assist the parties if the parties so request. Such arrangements can be made by contacting my Chambers.

¹¹ *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* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7]



DEPUTY PRESIDENT

Appearances:

Mr N Harrington on behalf of Ms Ariana Goss

Mr R Millar on behalf of Health Generation Pty Ltd

Hearing details:

2020.

By Video via Microsoft Teams

2 December.

Final Oral submissions:

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