



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Henry Armour

v

Mader Contracting Pty Ltd
(U2022/5218)

COMMISSIONER SCHNEIDER

PERTH, 2 MAY 2023

Application for an unfair dismissal remedy

[1] On 9 May 2023, Mr Henry Armour (the Applicant) made an application to the Fair Work Commission (the Commission) under section 394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Mader Contracting Pty Ltd (the Respondent).

[2] The Applicant seeks compensation as a remedy.

Background

[3] The uncontested factual background to the matter is as follows:

- The Applicant commenced employment with the Respondent on 5 August 2019.
- The Applicant had been working for the Respondent at the Tanami Gold Mine which is operated by Newmont Mining Services from May 2020 (the Client Site).
- The Applicant was engaged as a heavy-diesel mechanic.
- On 5 April 2022, the Applicant arrived on site and commenced night shift.
- On 9 April 2022, the Applicant checked out two, new, 300mm shifters from the Dead Bullock Soak Warehouse (DBS Warehouse).
- On 12 April 2022, the Applicant finished his swing and was due to depart site.
- During a routine x-ray screening at the airport, the Applicant was found to be in possession of the shifters.
- The Respondent first became aware of the incident on 15 April 2022.

- The events that occurred between 15 and 19 April 2022, when the Respondent moved to dismiss the Applicant, are contested between the parties and will be discussed in depth in this decision.
- The Applicant's employment with the Respondent was terminated on 19 April 2022.
- The Applicant was covered by an Award, being the *Mining Industry Award 2020*.

[4] The matter was subject to a Hearing before the Commission. At the Hearing, the Applicant gave evidence on his own behalf. The following witnesses gave evidence on behalf of the Respondent:

- Mr Brody Grohs (Mr Grohs), Coordinator at the Respondent.
- Mr Liam Whitehead (Mr Whitehead), Operations at the Respondent.

Legislation

When can the Commission order a remedy for unfair dismissal?

[5] Section 390 of the Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[6] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[7] Section 382 of the Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[8] Prior to the Hearing concerning the merits of the application, a hearing was held in relation to a jurisdictional objection raised by the Respondent.

[9] The objection raised was that the Applicant was a casual employee who had not met the minimum employment period requirements.

[10] As outlined in my previous decision,¹ I am satisfied that the Applicant, whilst being casual, met the minimum employment period requirements as required in the Act.

When has a person been unfairly dismissed?

[11] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission 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.

[12] Section 396 of the Act also requires that I determine several initial matters before considering the merits of the Applicants' applications. There is no dispute between the parties concerning these initial matters, and I am satisfied that none of the usual preliminary issues require attention.²

[13] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account several criteria.

[14] Section 387 of the Act reads:

“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.”

[15] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.³

Submissions – Evidence – Consideration of criteria

Was there a valid reason for the dismissal related to the Applicants’ capacity or conduct?

[16] In order to be a valid reason, the reason for the dismissal should be “*sound, defensible or well founded*”⁴ and should not be “*capricious, fanciful, spiteful or prejudiced*.”⁵

[17] However, 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

[18] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁷ The test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct.⁸ The Commission must make a finding as to whether the conduct occurred based on the evidence before it.⁹

[19] A single foolish, dishonest act may not always, in the circumstances of a particular case, justify summary dismissal.¹⁰

Applicant Submissions

[20] The Applicant submits that there was no valid reason for the dismissal related to his conduct as the Respondent *assumed*, based on the incident reported by its client, that the Applicant had intended to *steal* the tools from the site. The Applicant asserts that this conclusion could not be proven with certainty.

[21] The Applicant submits that the incident was simply an oversight. The Applicant stated he had forgotten to return the tools to the DBS Warehouse prior to departing the work site.

[22] The Applicant submits that it is illogical to propose he would risk his employment with the Respondent for two 300mm shifters, with a value of less than \$100 in total. The shifters in question are a common tool and it is irrational that the Applicant would attempt to steal items that he already had at home, in his personal tool kit.

[23] The Applicant submits that the incident is explainable, and the argument put forth in response to the allegations is reasonable.

Respondent Submissions

[24] The Respondent submits that the Applicant's serious misconduct, and the subsequent dishonesty during the investigation and following termination, elevates the seriousness of the misconduct to a point where it would be inconsistent for him to continue in employment. Mader submits that this constitutes a valid reason for the purposes of section 387(a) of the Act.

[25] The Respondent submits that, following the *Briginshaw* standard of proof,¹¹ the Commission must be satisfied that *on the balance of probabilities* that the misconduct occurred.

[26] The Respondent outlines that the Applicant's submission that the Respondent needed "100% guarantee that it was not an oversight and in fact it was a clear attempt to remove the tools from the site"¹² is misconceived and not the required test for the Commission to consider.

[27] The Respondent submits that the timeline of the event leads to the logical conclusion that the Applicant attempted to remove the tools from the site.

[28] The Applicant checked out the tools from the DBS Warehouse on 9 April 2022. The Applicant was then discovered to still have the tools in his backpack, on 12 April 2022, at the Granite airport.

[29] The Respondent submits that, if the Applicant's submission that the shifters were the wrong size for the job in question is true, the Applicant would have had ample opportunity to return the tools to the DBS Warehouse between 9 April and 12 April 2022.

[30] The Respondent also submits that the Applicant was dishonest during the investigation.

[31] The Respondent further asserts that the Applicant, in his submissions, is intentionally vague and misleading in the presentation of key events. The Respondent is of the position that this is done in an attempt to support his position that it was a simple oversight.

Findings

[32] The parties do not dispute that the Applicant was found in possession of the two shifters at the airport on 12 April 2022.

[33] The major point of contention is the Applicant's intention behind, or lack thereof, removing the shifters from site.

[34] The Applicant is of the position that it was an accident and was not intentional.

[35] The Respondent is of the position that the Applicant's conduct satisfies the standard of proof, under the *Briginshaw* principle, for a finding of serious misconduct and the Respondent was therefore open to its conclusion and the dismissal.

[36] I am satisfied, on the evidence before the Commission, that the conduct occurred.

[37] Paramount to this conclusion, is the Applicant's clear admission of taking the shifters.

[38] Additionally, several documents, photos, and the DBS Warehouse data all clearly evidence the conduct occurring. Although, as will be explored further, there was a lack of thorough investigation by the Respondent, I am satisfied on the balance of probabilities that the conduct occurred.

[39] The Respondent states that the actions of the Applicant amount to *serious misconduct*. Serious misconduct is defined in the *Fair Work Regulations 2009* (Cth).¹³

[40] I am not satisfied, on the evidence before the Commission, that the Applicant's actions amount to *serious misconduct*. There is no evidence that could satisfy, on the balance of probabilities, that the conduct engaged in was theft.

[41] I am not satisfied that the conduct was willful or deliberate, or that it caused a serious and imminent risk to the reputation of the Respondent's business.

[42] It is clear that the Respondent's client was unhappy with the conduct incident, this I do not question. However, upon review of the correspondence with the client, I am not satisfied that it caused a *serious and imminent risk* to reputation.

[43] Accordingly, I am not satisfied that the conduct of the Applicant amounts to *serious misconduct*.

[44] However, in the circumstances of this matter, I am satisfied that the conduct of the Applicant gave rise to a valid reason for dismissal.

[45] The Applicant was employed at a gold mine and with that comes a significantly higher expectation in relation to any removal of equipment from site without approval. The Applicant was aware of this expectation and requirement.

[46] The Applicant completed induction with the Respondent and the Respondent's client. As a part of his induction, the Applicant was aware of the seriousness that any removal of equipment from site without approval would have on his employment.

[47] The Respondent, in its submissions, provided extensive extracts of the policies employees must adhere to. Upon assessment of the materials and evidence before me, and in the context of the Applicant's employment within a gold mine, it is clear that the conduct of not returning the shifters gives rise to a valid reason and constitutes a breach of policy.

[48] The Applicant's reasoning or explanation as to how the two shifters remained inside his backpack for three days, the period between checking them out of the DBS Warehouse and the Applicant being found in possession of the two shifters at the airport, was that he forgot they were inside his backpack.

[49] I am inclined to accept the Applicant's argument regarding his forgetfulness.

[50] There is no evidence before the Commission that could lead me to a finding, on the balance of probabilities, that the Applicant intentionally stole the shifters. Such a conclusion could only be made by relying on inferences that the Applicant intended to steal the property.

[51] A safer conclusion would be that, in consideration of the evidence and on the balance of probabilities, the Applicant foolishly and absentmindedly failed to return the shifters.

[52] Regardless, the evidence shows the conduct occurred and the shifters were improperly handled and removed from site.

[53] Accordingly, the conduct, although I am not satisfied it is theft in the sense that it would attract the label of serious misconduct, still gives rise to dismissal in these circumstances.

[54] The Respondent also notes the Applicant's dishonesty when initially approached regarding the matter.

[55] An employee's dishonesty may constitute misconduct and a valid reason for dismissal.¹⁴ However, dishonesty does not automatically make the dismissal of an employee one that is not unfair.¹⁵

[56] I am satisfied that the content of the phone call initially made to the Applicant, seeking information regarding the incident, does not constitute any dishonesty that would give rise to a valid reason, nor does it elevate the misconduct of the Applicant to the level of serious misconduct.

[57] Instead, the evidence of Mr Whitehead shows that he asked the Applicant about what had occurred, and the Applicant did not readily volunteer the information until specifically prompted about the incident. This evidence does not lead me to the conclusion that the lack of explanation from the Applicant amounts to any dishonesty or misconduct.

[58] Having regard to the matters I have referred to above, I find that there was a valid reason for the dismissal related to the Applicant's conduct.

Was the Applicant notified of the valid reason?

[59] Proper consideration of section 387(b) of the Act requires a finding to be made as to whether the applicant "*was notified of that reason*". Contextually, the reference to "*that reason*" is the valid reason found to exist under section 387(a) of the Act.¹⁶

[60] In the context of this matter, the valid reason is, as above, the conduct of the Applicant in removing the shifters.

[61] 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,¹⁷ and in explicit,¹⁸ and plain and clear terms.¹⁹

Submissions

[62] The Applicant submits that he was not notified of the valid reason on the basis that the Respondent did not provide the Applicant with any information that his employment with the Respondent's business was in jeopardy until after the decision to terminate the Applicant's employment had been made.

[63] The Respondent submits that the Applicant was notified of the valid reason as the parties had several discussions between the Applicant and the Respondent between 15 and 19 April 2022.

[64] The Respondent provides the below timeline in relation to the correspondence between the parties prior to the dismissal:

- On 15 April 2022, the Applicant was notified, by Mr Whitehead, that the incident on 12 April 2022 was being treated as theft by their client and that the Applicant had been banned from site by the client.
- Following this notification, and further communication between the parties on 16 April 2022, it was reasonable that the Applicant understood his employment was at risk with the Respondent due to the incident of 12 April 2022.
- That the Applicant's email on 16 April 2022, was a clear indication that the Applicant understood his employment was at risk due to the incident of 12 April 2022. The email correspondence on 16 April 2022 includes the Applicant's response to the client's accusation of attempted theft.

[65] Furthermore, as confirmed in the statement of Mr Whitehead, it is clear that, on the 15 April 2022, the client had already made a decision to revoke the Applicant's access to their site and effectively banned him from working at that location.

[66] The phone calls between the Respondent and the Applicant, from the information provided by the parties, only dealt with the Applicant's ability to work for the Respondent at the Client Site. There is no indication that, during these phone calls, the Respondent put the Applicant on notice that his employment with the Respondent was at risk, instead it was only explained that his employment at the Client Site was at risk.

Findings

[67] The Respondent decided to terminate the Applicant's employment based on the practical implications of the decision of their client to revoke the Applicant's access to site.

[68] The Respondent did not provide the Applicant with notice that his employment with the Respondent was at risk and could be terminated.

[69] The Applicant was not provided with procedural fairness in relation to notification of the reason.

[70] The Respondent appears to have accepted the decision of the client and then made a decision to terminate the Applicant's employment without considering their obligations to provide their employee with notice of the reason prior to termination.

[71] The Applicant was aware that his access to the client site was at risk due to the incident in question.

[72] I accept the evidence of the Respondent, that members of the Respondent's management team discussed the incident of 12 April 2022 with the Applicant, on 15 and 16 April 2022.

[73] Although the Respondent clearly informed the Applicant of the issues regarding his access to the client site as a result of the taken shifters, at no point was it clearly communicated to the Applicant by the Respondent that the conduct was the reason upon which the Respondent was considering terminating him prior to his termination.

[74] However, the Respondent never discharged their duty to provide the Applicant with proper notification until the moment he was dismissed.

[75] In all the circumstances, I find that the Applicant was not notified of the reason for his dismissal prior to the decision to terminate him being made in explicit, plain, and clear terms. The notification occurred at the time of dismissal and, consequently, is likely to affect the following consideration.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[76] 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.

[77] An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.²⁰

[78] 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.²¹

[79] 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.²²

[80] The Applicant submits that he did not have an opportunity to respond to any valid reason, as outlined below:

- The Respondent followed the direction of their client, without providing the Applicant with any form of procedural fairness.
- The Respondent never directed the Applicant to provide any detail response or issued the Applicant with any form of “*show cause*” letter.
- The Applicant was not put on notice that his employment with the Respondent was at risk, only that his ability to work with the Respondent’s client was over.

[81] The Respondent submits that the Applicant did have an opportunity to respond to the valid reason, as outlined below:

- The Applicant was not forthcoming or honest when speaking to Mr Grohs or Mr Whitehead on 15 April 2022 about the incident on 12 April 2022. This was an opportunity to respond.
- It was only once Mr Whitehead informed the Applicant that the incident was being treated as theft that the Applicant disclosed what had occurred to the Respondent.
- The Applicant contacted the client directly and provided an explanation for the events that occurred on 12 April 2022.
- By 15 April 2022, the Applicant was clearly aware of the investigation and aware that his employment was at risk.
- That the Respondent considered the email sent by the Applicant on 16 April 2022, prior to making the decision to formally terminate his employment on 19 April 2022.

Findings

[82] I accept the Respondent’s evidence that there were phone calls between the Respondent and the Applicant in relation to the incident of 12 April 2022.

[83] However, consistent with the above, I do not accept these phone calls fulfilled the notification requirement.

[84] The phone calls were focused on the Respondent trying to get information from the Applicant about the incident and not in relation to the Respondent pondering the Applicant’s termination.

[85] I am not satisfied that any of the communications highlighted by the Respondent contained a notification of the reason, except for the notification that occurred at the time of the dismissal itself.

[86] The Respondent, in its submissions, asserted that the Applicant did respond, and it was considered by the Respondent. I am not satisfied that the Respondent’s reliance on the Applicant’s email, that was written in relation to his conduct and the ban from the client site, could be considered him taking the opportunity to respond to the reason for dismissal.

[87] I make this conclusion in consideration of the fact that the Applicant was not notified of the reason or the Respondent's pondering of his dismissal until the time it occurred. Therefore, the response of the Applicant could not have been in response to the notification of the reason the Respondent was considering dismissing him, as a notification of that nature did not exist at the time.

[88] To reiterate, a single foolish, dishonest act may not always, in the circumstances of a particular case, justify summary dismissal.²³ I highlight this again to assert that, in the circumstances of this matter, I am satisfied the conduct gave rise to a valid reason for dismissal but not summary dismissal. The Applicant should have been afforded proper prior notice of the reason.

[89] Consistent with the findings above, that the Applicant was not properly notified of the valid reason prior to his termination, I find that the Applicant was not given the opportunity to respond to the allegations from the Respondent.

[90] The Applicant attempted to explain his story to the Respondent and its client, however at this point he was only aware that his access to site had been revoked and he could not return to the client site.

[91] The Respondent never took the time to provide the Applicant with the opportunity to explain why his employment with the Respondent's business should not be terminated.

[92] Instead, the Respondent took the explanation the Applicant provided their client and relied upon this as his *show cause*.

[93] From the statement provided of Mr Whitehead, there was a meeting of the Respondent's management team held on 19 April 2022, in which the decision was made to terminate the Applicant's employment. However, at no point during this meeting was the Applicant asked to provide an explanation as to why his employment with the Respondent's business should not be terminated.

[94] In all the circumstances, I find that the Applicant was not given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

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

[96] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer

unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”²⁴

[97] The Applicant did not make any submissions in relation to this point.

[98] The Respondent submits that it did not unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal on the basis that the Applicant never asked for a support person to be present in any discussions between the Respondent and the Applicant in relation to the incident on 12 April 2022.

[99] The Respondent submits that as the Applicant did not ask for a support person and there is no positive obligation on the Respondent to offer a support or make the Applicant aware that he can have a support person present that this factor is not relevant.

[100] In all the circumstances, I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[101] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent’s enterprise and the absence of dedicated human resource management specialists or expertise in the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[102] The Respondent submits that the size of its enterprise was likely to impact on the procedures followed in effecting the dismissal.

[103] The Respondent submits that it is a large employer in the labour hire industry and has a full suite of policies, procedures, and training programs to ensure all employees (including the Applicant) are aware of, and understanding of, their obligations and responsibilities when working for the Respondent at client sites.

[104] The Applicant was aware of, and trained in, the applicable standards, policies, and procedures. As well as the applicable client policies and procedures.

[105] The Respondent submits that they followed their own policies and procedures for dealing with the incident in question and that this factor should be considered as neutral.

[106] The Applicant did not make any submissions in relation to this point.

Findings

[107] I am not persuaded by the Respondent’s submission that they followed their own policies and procedures. There is no evidence that the Respondent conducted any sort of

impartial investigation and, as I have found previously, the Applicant was not provided the opportunity to respond as to why his employment should not be terminated.

[108] The Applicant was inducted to the client site and confirmed that he was aware that being caught in possession of any client equipment would be grounds for losing his access to site.

[109] In all the circumstances, it appears that the Respondent was lacking in dedicated human resource management specialists with the knowledge to correctly action a dismissal. This deficiency likely had an impact on the procedures followed in effecting the dismissal as demonstrated by the Respondent failing to address several vital steps on the process.

[110] It is understandable that the Respondent wanted to remedy the issue promptly and sternly to please its client and ensure the Applicant was appropriately disciplined. However, in doing so, the Respondent was overly eager and bold in actioning the Applicant's dismissal. Accordingly, the Respondent did not afford the Applicant with the procedural fairness he was owed in the circumstances.

[111] Had the Respondent involved an experienced Human Resources Management professional in the process, that professional would likely understand the distinction between the Applicant's site access being banned by the Respondent's client and the Respondent's responsibility to the Applicant to provide him a procedurally fair process prior to terminating his employment with the Respondent.

What other matters are relevant?

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

[113] The Respondent submits that the following other matters are relevant to the Commission's consideration of whether the dismissal was harsh, unjust or unreasonable:

- The seriousness of the misconduct and dishonesty of the Applicant during the investigation. The Respondent submits this outweighs any consideration of the Applicant's personal situation or other factors.
- That continued employment between the Applicant and the Respondent was not possible despite the tenure of 2 years and 8 months service, due the misconduct involved.

[114] Along with the two items raised by the Respondent, I consider that the following matters are relevant to my consideration of whether the dismissal was harsh, unjust, or unreasonable:

- The Applicant's decision to disregard the direction of the Respondent and return to site on 18 April 2022 despite previously being instructed not to return to site by the Respondent.
- Lack of any investigation into the incident by the Respondent separately to the investigation of its client.

Findings

[115] The Respondent's claim that they had lost all trust and confidence in the Applicant, and therefore the status of his ongoing employment was in question, has merit.

[116] The Respondent had instructed the Applicant that he was not to return to site. Despite this, the Applicant boarded his flight and returned to site in an attempt to clear things up directly with the Respondent's client.

[117] Whilst the Applicant may have had good intentions in his reasoning to do this, he still ignored a direction from the Respondent not to return to site.

[118] The Applicant's conduct throughout the process, although I am not satisfied it was done with any negative intention, reflects a level of carelessness which could understandably cause issues in his ongoing employment.

[119] The Respondent, given the conduct of the Applicant, reasonably held concerns over if sending him to another client was the appropriate course of action.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[120] I have made findings in relation to each matter specified in section 387 of the Act as relevant.

[121] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.²⁵

[122] Having considered each of the matters specified in section 387 of the Act, I am satisfied that the dismissal of the Applicant was harsh and unreasonable.

[123] Whilst I have found that there was a valid reason for the termination of the Applicant, the process that brought about the dismissal was procedurally flawed:

- The Respondent failed to provide the Applicant with a procedurally fair process. Specifically, the lack of notification and opportunity to respond prior to making the decision to terminate the Applicant from the Respondent's business. The failure to do this was fundamentally flawed and denied the Applicant procedural fairness.
- The Respondent's failure to undertake a separate investigation regarding the Applicant's conduct is a matter of concern. The Respondent instead relied upon the incident investigation of its client, rather than directly initiating an investigation with its employee over its concerns for his ongoing employment. The absence of this distinct investigation process has heavily contributed to the unfairness of the termination and flaws in the procedure.

Conclusion

[124] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the Act.

[125] Directions for a hearing in relation to remedy will be issued in due course.



COMMISSIONER

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<PR761549>

¹ [PR746811].

² The application was made within the relevant time period (s.394(2)). The Applicant is a person protected from unfair dismissal (s.386) The Applicant's dismissals were not cases of genuine redundancy (s.389). The *Small Business Fair Dismissal Code* is not applicable (ss.385; 388(1)).

³ [2011] FWAFB 7498, at [14]; PR915674 (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), at [69].

⁴ (1995) 62 IR 371, at 373.

⁵ Ibid.

⁶ (1996) 142 ALR 681, at 685.

⁷ [1999] FCA 1836, at [7].

⁸ Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), at [24].

⁹ Ibid.

¹⁰ [2007] FCA 1903 (7 December 2007), at [61]; [(2007) 168 IR 375].

¹¹ (1938) 60 CLR 336.

¹² Ibid.

¹³ *Fair Work Regulations 2009* (Cth), reg 1.07.

¹⁴ [2011] FWAFB 5230, at 56; [(2011) 209 IR 351].

¹⁵ Ibid.

¹⁶ [2020] FWCFCB 6429, [19]; [2020] FWCFCB 533, at [55].

¹⁷ (2000) 98 IR 137, at 151.

¹⁸ Print Q3730 (AIRC, Holmes C, 6 October 1998).

¹⁹ Ibid.

²⁰ Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), at [75].

²¹ (2010) 194 IR 1, at 14-15.

²² (1995) 60 IR 1, at 7.

²³ [2007] FCA 1903 (7 December 2007), at [61]; [(2007) 168 IR 375].

²⁴ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), at [1542].

²⁵ (2002) 117 IR 357, [51]; See also: [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), at [92]; [1999] FCA 1836, at [6]–[7].