



# DECISION

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

**Steve Hardacre**

**v**

**Highway Enterprises Pty Ltd T/A Taings Noodles**  
(U2023/884)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 5 MAY 2023

*Application for an unfair dismissal remedy – sales manager – performance – date dismissal took effect – whether out of time – small business – whether cultural respect for mature aged employees mitigates need for formal communication of dismissal or warnings – dismissal not Code compliant – fairness – valid reason – procedural unfairness – compensation ordered*

[1] On 3 February 2023 Steve Hardacre (the applicant or Mr Hardacre) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy. Mr Hardacre says he was dismissed on 13 January 2023 with his dismissal taking effect on 16 January 2023.

[2] Mr Hardacre claims his dismissal was harsh, unjust or unreasonable. He seeks compensation.

[3] The respondent is Highway Enterprises Pty Ltd (Highway Enterprises, the employer or the respondent).

[4] Highway Enterprises oppose the application. It raises a jurisdictional issue. It contends that the application is four days out of time because the dismissal took effect on 9 January 2023. It opposes an extension of time. In the alternative and on merit, Highway Enterprises says that its conduct was not unfair because it was a small business employer and complied with the Small Business Fair Dismissal Code (Code) and, to the extent the dismissal was a redundancy, it was a genuine redundancy. In the further alternative, it submits that the dismissal was not unfair and no issue of remedy applies.

[5] Mr Hardacre replies that his application is not out of time, but if it is, then an extension of time should be granted. He contests the proposition that Highway Enterprises was a small business employer or that his dismissal was anything but unfair.

[6] Conciliation was conducted on 3 March 2023 but the matter did not settle.

[7] I issued directions on 10 March 2023.

[8] In advance of the hearing, I received materials from Mr Hardacre and Highway Enterprises and, by consent, some additional material from the employer at the hearing.

[9] I heard all issues (whether out of time, whether small business employer, whether genuine redundancy, whether dismissal unfair and remedy) by determinative conference on 21 April 2023.

[10] I granted permission for Mr Hardacre to be legally represented. Highway Enterprises was represented by its General Manager Mr Taing.

[11] I heard evidence from Mr Hardacre on a statement filed in his name.<sup>1</sup>

[12] I heard evidence from Mr Hardacre's legal representative Mr Paul Crawford on a statement filed in his name.<sup>2</sup>

[13] I heard evidence from Mr Taing on a statement filed in his name<sup>3</sup> and on a second statement extracted from within the content of the Employer's Response (Form F3).<sup>4</sup>

[14] Documentary material submitted by both parties is also in evidence.

## **Facts**

[15] Somewhat surprisingly given the breadth of issues to be determined, the facts (other than contested views about Mr Hardacre's conduct and performance) are largely not in dispute.

[16] Both Mr Hardacre and Mr Taing were respectful and conscientious witnesses. Mr Hardacre had reasonable recall though was somewhat unsure on certain issues. Mr Taing had good recall though in at least one respect (his purpose in visiting Mr Hardacre on 6 February) his evidence was a gloss on his intention.

[17] Mr Crawford's evidence was factual as to company searches and is not contentious.

[18] I make the following findings noting that in the body of this decision further findings are made on particular subject matters.

## *Highway Enterprises*

[19] Highway Enterprises is a manufacturer of noodles located at Wingfield in suburban Adelaide. It is owned by two brothers Mr Sin Chai and Mr Joseph Chai who are joint directors and sole shareholders. It trades as Taings Noodles.

[20] The business was co-founded in the early 1980's by interests associated with its current General Manager Mr Taing. Mr Taing is of Chinese ethnicity. Mr Taing ceased involvement many years ago, only to resume active involvement at the request of the owners when its then General Manager died suddenly in June 2022.

[21] Whilst Mr Taing has been General Manager since June 2022 he retains other unrelated business interests that occupy about twenty percent of his time.

*Mr Hardacre*

[22] Mr Hardacre was first employed in 2006. At the date of dismissal he had more than sixteen years of continuous service and was seventy-two years of age.

[23] Mr Hardacre commenced as Sales and Customer Relationship Manager. At the date of dismissal he was National Sales Manager. He was the next most senior person in the business after Mr Taing, and reported to Mr Taing.

[24] He is a resident of Adelaide, South Australia.

*Performance concerns*

[25] Upon assuming the role of General Manager, Mr Taing reviewed the performance of the business and its employees.

[26] He came to the view that the business was in some difficulty and he sought and received capital support from one of the directors. He also came to be concerned about Mr Hardacre's performance.

[27] Shortly prior to returning from leave, on 12 August 2022 by email Mr Hardacre asked Mr Taing to advise on "the direction and expectation ... for my role with the company ... moving forward". Mr Taing replied on 15 August:<sup>5</sup>

"Good morning Steve,

I can see the 2 weeks break is already doing you good.

In my short time, 1 month, managing the Taings Noodles. I can see many areas in the business that is wrong.

I started in the factory floor and move to the office.

With you so far, I found that your attitude towards work is very poor, especially for a person in sale position.

I found the quality of your work is low, and this may be related to your attitude towards it. I have had to rectify and correct your works.

Your overall performance is below acceptable level.

In moving forward, I would like to give you an opportunity to improve and have an import role with the business.

Give that you are specialized in sale, I would like to you prepare a quick 10mins presentation to me by 10am today.

In your presentation, you are the product and I'm the customer you are trying to convince to buy.

BTW, great to you see you can correctly spell my name.

Regards,

Hoi Taing  
Taings Noodles"

[28] Mr Hardacre made the presentation to Mr Taing, as requested, at which Mr Taing provided direction and guidance on areas where improvement in his performance could be achieved and business goals met.

[29] Until September 2022 Mr Hardacre was provided a company car, a company credit card and a company phone. In September, in part due to views Mr Taing formed about excessive use, he decided that the credit card be returned and that the company car be used by Mr Hardacre only at the discretion of the company. Mr Hardacre returned the credit card and continued to use the car but on this more conditional basis.

[30] Over the following four months, Mr Taing informally monitored Mr Hardacre's performance. As issues arose, he developed further concerns about whether Mr Hardacre was up to the job. There is a dispute as to whether and, if so, how those concerns were raised with Mr Hardacre. I deal with this in the body of this decision.

[31] Mr Hardacre went on leave over Christmas / New Year from 14 December 2022 until 9 January 2023.

[32] In the week prior to his return Mr Taing became aware that Mr Hardacre had committed the company to a \$14,300 promotional expenditure with a retailer. Mr Taing considered this to be unauthorised and unbudgeted. In the context of the financial pressures on the business he considered it wasteful.

*9 January meeting (Monday)*

[33] On the morning of 9 January 2023 Mr Taing decided that the business could not continue to afford to employ Mr Hardacre given the cost of doing so and Mr Taing's concerns with his performance. Mr Taing asked Mr Hardacre for a private discussion away from the business premises. They went to a nearby coffee shop.

[34] There is a dispute over precisely what was said. Mr Taing says that he told Mr Hardacre that he could no longer be employed for the hours he was working and asked Mr Hardacre what his plans or intentions might be. For his part, Mr Hardacre says that he did not necessarily agree with the employer's concerns but pointed out that the job and income were important to him and that the aged pension would not provide the same income. They agreed to go back to the office and examine the pension rules.

[35] That they did. Back in the office Mr Taing sat with Mr Hardacre as they looked at a website and video about pension entitlements. The meeting concluded on the basis that Mr Hardacre would by the end of the month consider his position and options.

[36] Whether Mr Taing also told Mr Hardacre on 9 January that he would pay him for the following four weeks without requiring him to work or come into the office, and thereafter pay him an honorarium to supplement the pension up to what he was paid by the employer so he was not out of pocket is in dispute. Mr Taing says this was said. Mr Hardacre does not recall it being said. I make findings on this in the body of this decision.

[37] On 9 January 2023 Mr Taing also asked for the return of keys to the company car being used by Mr Hardacre as he wished to use the car for his purposes as, according to his evidence, his had broken down. Mr Hardacre handed back the keys. Mr Hardacre was not at that time asked to hand back the company supplied mobile phone and did not do so.

*10, 11, 12 and 13 January*

[38] Mr Hardacre attended the workplace and worked on 10, 11 and 12 January 2023. Mr Taing does not recall seeing Mr Hardacre at work on these days but does not dispute that he was there.

[39] On the evening of 12 January Mr Hardacre and Mr Taing had the following text exchange:<sup>6</sup>

Mr Hardacre: “Hi Hoi, I will not be in tomorrow, please book it in as an annual leave day. Thanks Steve.”

Mr Taing: “Ok, per our discussion on Monday, you don’t need to come in anymore.”

Mr Hardacre: “Are you dismissing me?”

[40] There was no reply from Mr Taing.

*Period 13 January to 6 February*

[41] Mr Hardacre did not attend work after 12 January.

[42] He remained home on 13 January, as he had advised.

[43] On the morning of 14 January Mr Hardacre and Mr Taing had the following text exchange:<sup>7</sup>

Mr Hardacre: “Hello Hoi. You have not answered my question. What does “you do not need to come in any more” mean? Are you terminating my employment?”

Mr Taing: “We did discussed on Monday morning, in detail that your role is reduced to an honorary role, that only need us to meet once or twice a month. You said that you can’t be at home, so you welcome to come in, but you not required to come. You seem to be selective hearing/reading. I am happy for you to pass my contact to your lawyer to contact me on your behalf. You will receive 4 normal pays and then reduced to \$300

per fortnight, as discussed and per the video which I have shown you, this payment would not impact your pension payment.”

Mr Hardacre: “What is an honorary role supposed to mean? Either I am employed or not. There was no mention of this only a reduction in my working hours.”

[44] Mr Taing did not reply.

[45] Although in evidence Mr Taing was not able to precisely recall the date, in the week following 12 January and based on the fact that Mr Hardacre remained at home, Mr Taing deactivated Mr Hardacre’s access to the company server and deactivated his company email account.

[46] On or about 20 January Mr Hardacre first noticed that his company email account had been deactivated.

[47] Mr Hardacre remained at home between 13 January and 6 February inclusive but was not working from home. During this period he received two or three incoming phone calls on company business on the company supplied mobile phone. He suggested to the callers that they speak to someone in the company office. He did not transact their business or make calls to the workplace to advise that he had received the calls.

[48] During this period Highway Enterprises paid Mr Hardacre his normal weekly wage each payday. Those payments were made on 16 January, 23 January, 30 January and 6 February through the employer’s regular payroll system.<sup>8</sup> The payments were described on the payslips as “earnings” for a designated weekly pay period.

#### *Legal action*

[49] In November 2022 Mr Hardacre had become concerned about his employment security and employment rights. He says he contacted “fair work” and made an enquiry. He also communicated with a solicitor, Mr Crawford and followed up with texts to Mr Crawford in December 2022.<sup>9</sup>

[50] In the period of absence from the workplace after 12 January 2023 Mr Hardacre further communicated with Mr Crawford including on the afternoon of 9 January.

[51] On or about 1 February 2023 Mr Hardacre instructed Mr Crawford to lodge an unfair dismissal claim.

[52] On 3 February these proceedings were filed in the Commission.

#### *6 February*

[53] On 6 February 2023, having become aware of the unfair dismissal application, Mr Taing sent Mr Hardacre a text:<sup>10</sup>

“Good morning Steve. Want to chat. Up for coffee?”

[54] Mr Hardacre did not reply.

[55] Mr Taing decided to go to Mr Hardacre's house. He arrived without notice. He asked Mr Hardacre whether any of the personal belongings in the car were his. Some were, some were not. Mr Hardacre took what was his. Mr Taing asked Mr Hardacre to return the company mobile phone. Mr Hardacre did so and passed it over to Mr Taing. Mr Taing left.

[56] In his evidence Mr Taing said he sent the text of 6 February and went to Mr Hardacre's home out of concern for Mr Hardacre and his health. I do not accept this was the sole motivation. Whilst Mr Taing was in a general sense concerned at Mr Hardacre's state of health given his concerns about Mr Hardacre's performance (which, in part, he put down to his health and age), I find that Mr Taing visited Mr Hardacre that morning because he had sued the company days earlier and because he wanted the phone back.

[57] I also find that whilst, until the unfair dismissal claim was made, Mr Taing had intended to pay Mr Hardacre an honorarium of \$300 per fortnight in line with his text message of 14 January, Mr Taing changed his mind in light of the business being sued.

[58] Consequently, the fourth week of pay made on 6 February 2023 was the final payment Highway Enterprises made to Mr Hardacre.

[59] No honorarium was paid to Mr Hardacre.

## **Submissions**

### *Mr Hardacre*

[60] Mr Hardacre submits that that his application is not out of time. He says he was dismissed on 13 January 2023 when he asked Mr Taing by text if he was being dismissed and Mr Taing failed to respond. He says the dismissal came into effect on his next working day (16 January) after Mr Taing had told him (on 14 January) that he was not required to come in to work anymore.

[61] Mr Hardacre says he was not dismissed on 9 January and nor did any dismissal take effect that day because he worked on 10, 11 and 12 January.

[62] In the alternative, Mr Hardacre submits that if a dismissal occurred and took effect on 9 January then time should be extended because the employer's conduct and communication was ambiguous such that he could not reasonably have been aware of the fact of dismissal. Mr Hardacre also points to the fact that he was concerned about his employment rights over this period and took active steps to seek and obtain advice and promptly provide instructions to file proceedings when those instructions were sought.

[63] Mr Hardacre submits that the respondent is not a small business employer because at the date dismissal took effect the employer has not been able to establish that less than fifteen persons were employed by it and associated companies.

[64] Mr Hardacre submits that his dismissal was unfair because his performance was not materially deficient, he was not warned in any formal sense either orally or in writing that he

was at risk of being dismissed, and because he was not paid his entitlements on termination nor paid the promised continuing honorarium.

[65] In the alternative, Mr Hardacre submits that if the Code applies, then the Code was not complied with because grounds for dismissal did not exist and because he was not warned as required by the Code.

[66] Mr Hardacre submits that he should be paid an amount of compensation that fully compensates him for his economic loss arising from dismissal.

### *Highway Enterprises*

[67] Highway Enterprises submit that Mr Hardacre's application is four days out of time because the dismissal was communicated and took effect on 9 January 2023 when Mr Hardacre was spoken to by Mr Taing on Mr Hardacre's return from leave.

[68] In the alternative, Highway Enterprises opposes an extension of time on the ground that Mr Hardacre had been in contact with his solicitor and 'fair work' about his legal rights since at least November 2022 and in those circumstances could have and should have filed an application within time.

[69] In the further alternative and on merit, Highway Enterprises says that its conduct was not unfair because it was a small business employer and complied with the Code. It says it was a small business employer because no persons are employed by the associated entities and the number of employees employed by the respondent on the date the dismissal took effect (or even on the date claimed by Mr Hardacre) was thirteen, and as such within the statutory rule of less than fifteen. It says that no directors were working directors, and that a casual employee engaged from a labour agency only came to be employed later in January 2023.

[70] It says that it complied with the Code because formal written warnings are not required by the Code and that the multiple discussions Mr Taing had with Mr Hardacre about his performance in the months prior to dismissal reasonably put Mr Hardacre on notice that his employment was at risk, including the fact that credit card usage had been removed and car usage made conditional.

[71] Highway Enterprises submit that respect for older persons in the ethnic Chinese culture meant that it was inappropriate for Mr Taing, being a younger person, to use direct or formal language by way of warning to Mr Hardacre, an older person.

[72] In the further alternative, Highway Enterprises submit that genuine economic reasons existed for not continuing to employ Mr Hardacre and to the extent the dismissal was a redundancy, it was a genuine redundancy.

[73] In the further alternative, Highway Enterprises submit that the dismissal was not unfair because Mr Hardacre was underperforming and making mistakes in a senior position that the business could not continue to afford being made. It says that he was aware of these concerns, evidenced by the fact that he sought legal advice on his rights in November 2022.



[74] Highway Enterprises submit that it took all reasonable steps to cushion the blow of dismissal by agreeing to pay wages for four weeks without Mr Hardacre being required to do any work, and then was willing to pay a discretionary fortnightly honorarium to top-up fortnightly aged pension payments so Mr Hardacre was not out of pocket as a result of no longer being employed.

[75] Highway Enterprises submits that it was Mr Hardacre's choice to take legal action against the employer which necessarily meant that the employer no longer was willing to pay the discretionary honorarium.

### **Consideration**

[76] I am satisfied that Mr Hardacre was a person protected from unfair dismissal within the meaning of s 382 of the FW Act. He served the required minimum employment period (s 382(a)). His annual rate of earnings did not exceed the high-income threshold (s 382(b)(iii)). His employer was a "national system employer" within the meaning of s 14 of the FW Act.

[77] Sections 394(2) and (3) provide a time limit for the filing of applications.

[78] Section 394(3) of the FW Act provides:

#### **"394 Application for unfair dismissal remedy**

...

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position."

*Is the application out of time?*

[79] Having made his application on 3 February 2023, if dismissal occurred and took effect on or after 13 January 2023 the application is within time. If conversely the dismissal occurred and took effect on any date prior to 13 January 2023 the application is out of time and, in order to proceed, would require an extension of time.

Was there a dismissal?

[80] The first question is whether Mr Hardacre was dismissed and when.

[81] Applications under s 394 require a dismissal to have occurred as a jurisdictional fact (s 385(a)).

[82] It is not contested by either Mr Hardacre or Highway Enterprises that Mr Hardacre was dismissed. There is no doubt that Mr Hardacre's employment relationship with Highway Enterprises came to an end.

[83] The matter in dispute is when the dismissal occurred and when it took effect.

[84] "Dismissal" for these purposes (and other purposes of the FW Act) is defined in s 386(1):

**"386 Meaning of dismissed**

(1) A person has been dismissed if:

- (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

[85] Section 386(1)(a) requires that a person "has been terminated" on the employer's initiative. The use of the present perfect tense ("has been") with the past participle of the verb terminate ("terminated") means, on ordinary principles of construction, that termination of the employment relationship needs to have occurred as a matter of fact for there to be a "dismissal" within the meaning of the provision.

[86] A mere allegation that a person has been dismissed will not establish this as fact.<sup>11</sup>

[87] A subjective belief even one genuinely held is not evidence of a fact. The fact of dismissal is to be objectively assessed against all relevant circumstances and not simply the subjective belief of a business owner or manager or the allegedly dismissed employee.

[88] Nor is an intention to dismiss sufficient for a dismissal to have occurred and taken effect.

[89] When was Mr Hardacre dismissed?

[90] Before I deal with that question, I make some further findings of fact.

[91] I am well satisfied on the evidence that by the morning of 9 January 2023 Mr Taing, aware that Mr Hardacre was returning from leave that day and having formed a view in the post-Christmas period that the business could no longer afford what he considered to be underperformance, mistakes and unauthorised expenditures by Mr Hardacre, that he needed to secure and manage Mr Hardacre's exit from the business.

[92] Mr Taing's view was triggered by his discovery during the post-Christmas period that Mr Hardacre had committed the business to a \$14,300 promotional expenditure which Mr Taing had not known about and which he considered an error on Mr Hardacre's part. Whilst this was the triggering factor, Mr Taing's decision was also formed by his knowledge of the financial difficulties of the business, the cost to the business of Mr Hardacre as its second most senior employee and the concerns of underperformance and mistakes Mr Taing had formed over the previous six months.

[93] Whilst Mr Taing had made a decision that Mr Hardacre should no longer be employed, he wanted to manage that process in an agreeable and fair fashion. To Mr Taing, this included showing respect for Mr Hardacre by having the discussion away from the workplace (at a nearby coffee shop) and negotiating post-employment terms that might require the business to top-up an aged pension by a regular discretionary payment (honarium) so Mr Hardacre was not out of pocket.

[94] I find that Mr Taing's desire to show respect was borne of two factors:

- That Mr Hardacre was a long serving employee; and
- That the business, being owned and managed by persons of Chinese ethnicity, had a cultural duty to show respect to aged persons especially by younger (in relative terms) managers (such as he) and not be spoken to rudely, abruptly or condescendingly.

[95] I now turn to when Mr Hardacre was dismissed and in particular whether his dismissal occurred on 9 January 2023 as the employer contends.

[96] It is a well-established principle that a dismissal does not occur nor take effect until it is communicated to the person dismissed in plain and unambiguous terms<sup>12</sup> or where communication in those terms is reasonably accessible to the person dismissed.<sup>13</sup>

[97] Was the dismissal communicated in plain and unambiguous terms by Mr Taing on 9 January 2023?

[98] I think not.

[99] Firstly, Mr Taing referred only to the fact that Mr Hardacre could no longer be employed for the hours he was working. This is not a statement ending employment.

[100] Secondly, whilst I find that general mention was made by Mr Taing of continuing performance concerns during the coffee shop meeting, and to that extent Mr Hardacre knew why the employer was wanting him to no longer be employed on the current arrangement, there was no finality to that proposition. The discussion that day concluded by the parties, after going

back to the office and looking at aged pension details, agreeing that Mr Hardacre would consider his position by the end of the month.

[101] Was the possibility of a discretionary honorarium being paid after employment ended also discussed? In this respect I prefer Mr Taing's evidence to the limited recall of Mr Hardacre. I find that Mr Taing told Mr Hardacre on 9 January that the business would pay him for the following four weeks without requiring him to work, and would consider paying him thereafter an honorarium to supplement the pension up to what he was being paid by the employer so he was not out of pocket.

[102] This notwithstanding, that discussion was not a plain and unambiguous communication of dismissal. It was part of a managed negotiation, not a statement of the terms on which dismissal had occurred.

[103] I find that dismissal was not communicated in plain and unambiguous terms by Mr Taing on 9 January 2023.

[104] The subsequent conduct of the parties in the days that followed supports this finding. Mr Hardacre attended for work and worked on 10, 11 and 12 January 2023. Whether or not Mr Taing knew Mr Hardacre was in an adjoining office working those days matters little as Mr Hardacre was not asked by the employer to leave work on those days.

[105] I take fully into account the reasons, including the cultural reasons advanced by the respondent, as to why Mr Taing communicated with Mr Hardacre in indirect and non-specific terms when seeking to manage Mr Hardacre's exit from the business. Mr Taing is not to be criticised for respecting his cultural norms nor respecting persons of experience and age. However, as repeated below when considering whether warnings were given, the obligations under Australian law, including to communicate important matters concerning a person's employment directly and clearly, do not make an exception for cryptic, riddled or inferential communication no matter how well intentioned or culturally awkward.<sup>14</sup> Some things need to be clearly communicated and the termination of one's employment is one such matter. It is to be noted that this was not a discussion between two persons of Chinese ethnicity where it might be argued (and I put it no higher) that the true meaning of inferential communication could be better understood.

[106] When then was Mr Hardacre dismissed?

[107] Although it is tolerably arguable that this did not occur until 6 February 2023 when Mr Taing went to Mr Hardacre's home and retrieved the company mobile phone and when the final of the four weekly salary payments were made, on balance I consider the better conclusion to be that Mr Hardacre was dismissed on 14 January 2023 after:

- Mr Taing told Mr Hardacre on the evening of 12 January "you don't need to come in anymore";
- Mr Taing received Mr Hardacre's text on 13 January asking "are you terminating my employment?" and a further text the next day repeating the same question; and

- Mr Taing’s text reply on 14 January wherein he stated that “your role is reduced to an honorary role”.

[108] The statement on 14 January 2023 that Mr Hardacre’s role was honorary only was sufficiently plain and clear to mean that the former role (of an employment relationship) had been (in the words of the text) “reduced” to an honorary role.

[109] I take into account that Mr Taing prefaced his text on 14 January by referring to what “we did discuss (sic) on Monday morning” and to that extent I accept that Mr Taing believed that what he stated on 14 January was a summation of what he believed had been said or agreed on 9 January. However, as noted, subjective belief does not establish the fact of dismissal. I have not found that the words used on 9 January were as clear as those stated in the 14 January text.

[110] For these reasons I find that Mr Hardacre was dismissed on 14 January.

On what day did Mr Hardacre’s dismissal take effect?

[111] There was no express statement by the employer as to when dismissal was to take effect.

[112] Having noted that it is arguable that this did not occur until 6 February 2023, the better finding I make is that it took effect on 16 January 2023. I do so having regard to the surrounding circumstances and for the following reasons.

[113] Firstly, Mr Hardacre was on leave on 13 January. The day he next would have worked had he not been dismissed was Monday 16 January. He did not work that day or on any day that week. In the intervening period came Mr Taing’s text message of 14 January 2023.

[114] Secondly, Mr Hardacre was not required to and did not in fact transact any company business in the weeks that followed. He dealt with the few calls he received on the company mobile phone in that period by simply advising the caller to direct their enquiries to the company office.

[115] Thirdly, Mr Hardacre neither worked on 16 January or thereafter because he had been told by Mr Taing in the week prior not to come in anymore, except on an honorary basis.

[116] Fourthly, there is no evidence that Mr Hardacre was on leave (approved or not approved) on or after 16 January 2023.

[117] I take into account that Highway Enterprises paid Mr Hardacre four weekly payments of earnings between 16 January and 6 February (inclusive). The fact that payments were made weekly and not as a lump sum at the time of termination points somewhat to an employment relationship continuing, but the fact of a payment of four weeks without work being required is also consistent with those weeks being payment in lieu of notice. Mr Taing’s evidence was that these were payments to ease the burden of dismissal on Mr Hardacre and were in lieu of notice. I accept that evidence. In fact Mr Taing said that he now believes that Mr Hardacre was owed five weeks in lieu of notice and not the four he paid.

[118] In context, I do not find that the fact of these weekly payments on and after 16 January disturb a finding that dismissal took effect that day.

Conclusion on out of time

[119] As the application was filed within 21 days of the dismissal taking effect on 16 January 2023 it is within time. No extension is required.

[120] Had I found that Mr Hardacre's dismissal took effect on 9 January 2023 (or at any time prior to 13 January 2023) the issue of whether time should be extended for the late lodgement would have arisen.

[121] Whilst not necessary to decide this point, I observe that having regard to the considerations in s 394(3) strong grounds would have existed for time to have been extended. In particular my finding that the employer's conduct and in particular Mr Taing's communication on 9 January was at the very least ambiguous and left Mr Hardacre in a state of uncertainty (evidenced by his text questions on 12 and 14 January) as well as the subsequent weekly wage payments would have weighed heavily in favour of exercising a discretion to extend time. Those factors would have weighed more heavily than the fact that Mr Hardacre had access to and was taking advice in this period.

*Small business employer*

[122] As the application is within time, I now deal with whether the dismissal was unfair.

[123] A dismissal is not unfair if it is consistent with the Code (s 385(c)).

[124] However the Code only applies if Highway Enterprises was a small business as defined by the FW Act.

[125] "Small business employer" is defined in s 23 of the FW Act:

**"23 Meaning of *small business employer***

(1) A national system employer is a ***small business employer*** at a particular time if the employer employs fewer than 15 employees at that time.

(2) For the purpose of calculating the number of employees employed by the employer at a particular time:

(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and

(b) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer.

(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.

(4) To avoid doubt, in determining whether a national system employer is a *small business employer* at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):

- (a) the employee who is being dismissed or whose employment is being terminated; and
- (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.” (emphasis added)

[126] In this matter, the relevant time for this assessment is the time of the dismissal.

[127] Highway Enterprises, being the party advancing the affirmative proposition that the employer is a small business employer, carries the onus of proving the facts required to make that finding.

[128] The evidence before me is that the levels of employment in the business were variable. Mr Taing's evidence was that in the week of 9 January 2023 thirteen persons were employed including Mr Hardacre<sup>15</sup> and that in the week of 16 January 2023 eleven persons were employed not including Mr Hardacre.<sup>16</sup>

[129] Given my finding as to the date dismissal took effect, the evidence concerning 16 January is the relevant evidence. Under the FW Act Mr Hardacre is to be included in the count. That takes the count to twelve.

[130] Mr Hardacre submits that this count should be enhanced by two persons – being the directors, and also by a casual sourced from a labour agency. I do not agree. There is no evidence that either of the directors were working directors. At its highest one of the directors remotely authorised Mr Taing to make payments of payroll from company accounts. Further, the evidence of the additional casual is that she did not come onto the books until the week of 23 January. She cannot be included in the count. Hence even if the director approving payroll was a working director (not a finding I make) the count remains less than fifteen.

[131] Mr Hardacre submits that persons employed by associated entities take this number above fifteen.

[132] As noted, s 23(3) provides that the number of persons employed by a small business employer includes persons employed by an “associated entity”.

[133] Section 12 of the FW Act states that an “associated entity” has the meaning given by s 50AAA of the Corporations Act. I have regard to but need not set out that provision (nor the related provision in s 50AA).

[134] The evidence before me, including the corporate searches conducted by Mr Crawford, is that two entities fall within the definition of associated entities due to common directorships: Highway Trading Pty Ltd and Highway Meat SA Pty Ltd.

[135] However, the evidence of Mr Taing, which was not controverted, was that neither currently employ persons. Mr Taing attested to the fact that Highway Trading Pty Ltd

effectively operated as the landlord of the premises on which Highway Enterprises conducted its business. His evidence was that Highway Meat SA Pty Ltd had been sold over two years ago.<sup>17</sup>

[136] Given this, I cannot safely make a finding that the associated entities employ persons such that the count of persons employed by the respondent on 16 January 2023 is increased.

[137] Accordingly, I find that Highway Enterprises was a small business employer.

#### *Code compliance*

[138] Given then that the Code applies, the next question is whether the dismissal was consistent with the Code.

[139] The Code is provided for in s 388:

#### **“388 The Small Business Fair Dismissal Code**

- (1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.
- (2) A person’s dismissal was *consistent with the Small Business Fair Dismissal Code* if:
  - (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person’s employer was a small business employer; and
  - (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.”

[140] The terms of the Code are:

#### **“The Code**

##### **Summary Dismissal**

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee’s conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

##### **Other Dismissal**



In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

### **Procedural Matters**

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity. A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."

[141] Mr Hardacre was not summarily dismissed. The issue then is whether the provisions of the Code dealing with "Other Dismissal" were complied with.

[142] I do not consider the Code was complied with.

[143] Firstly, I do not find that Mr Hardacre was given a reason for dismissal. At its highest, the reason was inferential and not express. Mr Hardacre was aware of his employer's performance concerns and reasonably knew after the 9 January discussion that that was the reason why his employer had lost confidence in him. However, a reason given by inference and not in plain or clear terms does not constitute compliance with the Code.

[144] Secondly, whilst the Code provides some flexibility in that it contemplates verbal warnings for performance-based dismissals and does not compel written warnings, I do not find that Mr Hardacre was warned within the meaning of the Code. As the Code expressly states, the required warning needs to be such that the employee is on notice that "he or she is at risk of being dismissed".

[145] I take into account and accept the employer's evidence that Mr Hardacre had been spoken to by Mr Taing on multiple occasions in the months preceding (and in particular following the meeting of 15 August 2022) about concerns with performance and mistakes. However, aside from the 15 August email and meeting, which was structured, these were informal and conducted in the course of daily business. They did not have the character of a warning. At their highest they were counselling tempered with guidance.

[146] I take into account that the 15 August 2022 email was written advice from Mr Taing to Mr Hardacre that his performance was "below acceptable level". In that sense the spirit of the

Code was complied with and a warning was given five months prior to dismissal though it did not expressly advise Mr Hardacre that dismissal may be the consequence of continuing underperformance, as the Code requires.

[147] In making these findings I again take into account the evidence and submissions by Highway Enterprises as to the cultural sensitivities associated with directly or bluntly warning or counselling an older and experienced person or telling them that they are at risk of being dismissed. However, for the reasons I have expressed, the obligations under Australian law (including the Code) to communicate this in warnings concerning a person's employment do not make an exception for cryptic, riddled or inferential communication no matter how well intentioned or culturally awkward.

[148] I observe that I do not make a finding of non-compliance with the Code by reference to the Code's obligation to provide a "valid reason" based on conduct or capacity. In light of the aforementioned findings, it is unnecessary to do so. I deal with valid reason below.

[149] For these reasons the dismissal was not, in a technical sense, consistent with the Code.

*Was the dismissal unfair?*

[150] I now consider whether the dismissal was unfair.

[151] Section 387 of the FW Act provides:

**"387 Criteria for considering harshness etc.**

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

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

- (h) any other matters that the FWC considers relevant.”

#### Valid reason

[152] Valid in this context is generally considered to be whether there is a “sound, defensible or well-founded” reason for dismissal and one that is not “capricious, fanciful, spiteful or prejudiced.”<sup>18</sup> In considering whether a reason is valid, the requirement is to be applied in the practical sphere of the relationship between an employer and an employee where each has rights, privileges, duties and obligations.

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

[154] I have found that Mr Hardacre was dismissed because of two operating factors in Mr Taing’s mind:

- Financial pressures on the business; and
- Performance of Mr Hardacre.

[155] These were not mutually exclusive. Mr Taing did not consider that the business was getting value out of Mr Hardacre in light of the view he had formed about Mr Hardacre’s performance.

[156] Were these valid reasons individually or collectively?

[157] On financial issues the evidence is sparse. Mr Hardacre may have been the second most senior employee but his earnings were relatively modest for his title. There is no evidence that the business was in such a state that it could not, in a strict sense at least, continue to pay his salary. That said, I accept Mr Taing’s evidence that taking the cost of Mr Hardacre’s salary (and any errors resulting in unproductive expenditure) out of the business eased financial pressures.

[158] However, whilst there is no evidence that Mr Hardacre was replaced in the role, the dismissal was not expressed to be a redundancy nor has the employer led sufficient evidence of operational (or financial) changes or circumstances that warranted dismissal when it occurred. Thus, whilst accepting that the business was under financial pressure and had been for some months, I do not find the dismissal to have been a redundancy or a genuine redundancy as defined by the FW Act (s 389).

[159] The performance concerns are of a different character. The evidence clearly establishes that Mr Hardacre made errors and as time passed was not as attentive to all aspects of the role or building the sales capability of the business as had been required and directed by Mr Taing.

[160] Mr Taing’s evidence<sup>19</sup> of fourteen areas of Mr Hardacre’s performance or conduct deficiency were not all accompanied by supporting material or explanation in oral evidence, and some were expressed in general terms only. A degree of caution is required in making the findings the employer sought.

[161] However, at least with respect to two matters serious failures have been established.

[162] In November 2022 Mr Hardacre failed to accurately process a customer order where the customer had ordered noodles without colouring. Due to error on his part, Mr Hardacre had not made this clear when submitting the order for production. The noodles produced and shipped were coloured, contrary to the order. As a result the customer rejected the order. This cost the business \$10,000 plus freight and a dumping fee.

[163] I also accept Mr Taing's evidence that expenditure on promotional expenses of the type he discovered over the Christmas / New Year period had been a misjudgement and at the very least ought to have been raised with him by Mr Hardacre before the expenditure of \$14,300 was committed.

[164] In these circumstances, and given the other matters raised with Mr Hardacre by Mr Taing in the months following 15 August 2022, I conclude that the employer had legitimate concerns about performance issues and that a deterioration in performance had objectively occurred and not improved since the 15 August 2022 meeting such that by January 2023 material or sustained improvement was neither imminent nor likely.

[165] A valid reason existed in the context of this business and the role held by Mr Hardacre.

[166] This weighs against of a finding of unfair dismissal.

#### Notification of reason for dismissal

[167] Notification of a valid reason for dismissal should be given to an employee protected from unfair dismissal before a decision is made to terminate their employment<sup>20</sup> and in plain and clear terms.<sup>21</sup>

[168] I have found that whilst Mr Hardacre was notified by the text message he received on 14 January 2023, the employer's conduct was generally ambiguous and the reason for dismissal was only inferentially but not expressly stated.

[169] This weighs somewhat in favour of a finding of unfairness.

#### Opportunity to respond

[170] An employee protected from unfair dismissal should be provided an opportunity to respond to a reason for dismissal relating to their conduct or capacity. An opportunity to respond should be provided before a decision is taken to terminate an employee's employment.<sup>22</sup>

[171] The opportunity to respond is an element of procedural fairness but does not require formality. Where an employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, that is enough to satisfy this consideration.<sup>23</sup>

[172] Mr Hardacre was aware of the employer's concerns about his performance from at least 15 August 2022. He had the opportunity to respond at that time and in the months that followed.

I have found that those concerns were repeated on 9 January 2023 at the coffee shop meeting. Mr Hardacre had a further opportunity to respond, and did so briefly at that time.

[173] Given that this consideration is to be applied in a common sense way to ensure the employee is treated fairly<sup>24</sup>, I am satisfied that, in practice, Mr Hardacre had the opportunity to explain and respond to the employer's concerns about his conduct and performance.

[174] This weighs against a finding of unfairness.

#### Opportunity for support person

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

[176] No requests were made by Mr Hardacre. The employer did not unreasonably refuse Mr Hardacre a support person.

[177] This is a neutral consideration.

#### Warnings concerning performance

[178] I have found that informal counselling occurred but no formal warnings, oral or written, were given.

[179] Given this, but taking into account the nature of the relationship in this small business, the absence of formal warnings weighs somewhat but only somewhat in favour of a finding of unfair dismissal.

#### Size of enterprise and human resource capability

[180] Although the employer's conduct was not compliant with the Code, it was a small business with no specialist capacity on human resource issues. This, together with the aforementioned cultural issues, explain in part the reasons why the employer failed to act in the strict letter of the Code and afford Mr Hardacre the full measure of procedural fairness.

[181] This consideration weighs somewhat against a finding of unfairness.

#### Other matters

[182] Mr Hardacre was paid four weeks in lieu of notice.

[183] However he contends that his dismissal was also unfair because he was not paid other entitlements on termination, and also not paid what he says was a promised honorarium.

[184] I have made no findings as to whether Mr Hardacre was paid statutory entitlements owed (except the agreed fact that an extra week of notice in lieu was payable but not paid). I was advised at the hearing that he has commenced action in the South Australian Employment Tribunal to recover sums due. That is the appropriate forum for such matters to be determined

if they remain in dispute. Given the absence of specific evidence on the topic, the payment or non-payment of entitlements is not a basis on which I find the dismissal unfair.

[185] Nor do I find the dismissal unfair on the basis that an honorarium was not paid by the employer. Whilst the arrangement foreshadowed by Mr Taing on 9 January and in his text of 14 January 2023 was certainly unusual, there is no evidence that it constituted a contractual promise let alone a binding promise for all purposes or all times. The evidence strongly points to it having been a proposal for a discretionary payment to top-up the aged pension designed to ease the burden of dismissal on Mr Hardacre. That it was not paid once Mr Hardacre commenced legal action is not a basis for finding the dismissal unfair.

#### Conclusion on unfairness

[186] Unfair dismissal matters are multifactorial.<sup>25</sup> Each of the matters in s 387 are to be considered to the extent relevant<sup>26</sup> and applied in a practical, common-sense way.<sup>27</sup> The objective is to provide a “fair go all round”.<sup>28</sup>

[187] Considered overall, and whilst taking into account that performance concerns existed and provided a valid reason, an appropriate measure of procedural fairness was not afforded despite informal counselling and an earlier warning.

[188] For this reason (but this reason only) I conclude that the dismissal was harsh.

[189] In making this finding I acknowledge the difficult situation in which Mr Taing found himself. He had an underperforming senior employee and had been unexpectedly brought in to manage a business in the family name that was under financial pressure with a view to keeping it operating as a going concern. He also had to exercise sensitivity to his cultural norms and tried to show respect to Mr Hardacre and ease the burden of dismissal on him.

[190] Nonetheless, in managing the myriad of circumstances he faced, the dismissal of Mr Hardacre was harsh.

[191] I will proceed to consider remedy.

#### **Remedy**

[192] Remedies available to the Commission under s 390 of the FW Act are reinstatement (in the same or other position) or (but only if reinstatement is inappropriate) compensation (within statutory limits).

[193] Whether to order a remedy is a discretionary matter.

[194] I consider it appropriate to order a remedy but only on the terms outlined below.

[195] I conclude that reinstatement is inappropriate. The employment relationship is beyond repair given the small size of the business and the issues that brought the relationship to an end.

[196] I turn to the issue of compensation. Section 392 provides:

### **“392 Remedy—compensation**

#### *Compensation*

- (1) An order for the payment of compensation to a person must be an order that the person’s employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

#### *Criteria for deciding amounts*

- (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
  - (a) the effect of the order on the viability of the employer’s enterprise; and
  - (b) the length of the person’s service with the employer; and
  - (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
  - (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
  - (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
  - (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
  - (g) any other matter that the FWC considers relevant.

#### *Misconduct reduces amount*

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer’s decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

#### *Shock, distress etc. disregarded*

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person’s dismissal.

#### *Compensation cap*

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.”

**[197]** I now consider each of the criteria in s 392.

*Viability: s 392(2)(a)*

**[198]** Noting that this was a business under general financial pressure, there is no specific evidence before me to suggest that a compensation order of the sum provided for in this decision will adversely affect its viability.

*Length of service: s 392(2)(b)*

**[199]** Mr Hardacre had lengthy service. He had worked for Highway Enterprises for approximately sixteen years.

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

**[200]** The performance concerns I have found were real. In all probability they would have continued and, given the gradual deterioration in performance, potentially accentuated. Had those performance concerns and the dismissal been managed with the necessary measure of procedural fairness the dismissal would have been fair.

**[201]** I do not consider that Mr Hardacre would have been employed for more than another six weeks had the performance concerns and the dismissal been appropriately managed.

*Mitigating efforts: s 392(2)(d)*

**[202]** Mr Hardacre mitigated his loss of employment some ten weeks later (27 March 2023) when he commenced alternate work.



*Remuneration earned or likely to be earned : ss 392(2)(e) and (f)*

[203] Mr Hardacre's alternate work paid \$2,500 per annum less than what he was paid by the respondent. However, the period of the compensation order does not extend into this period of alternate employment. Further, the compensation sum is calculated by reference to the full amount of his former earnings. I will not make a deduction from or add to the compensation sum on this account.

[204] I will take into account that Mr Hardacre was paid four weeks in lieu of notice but given his age and years of service I will also take into account that he ought to have been paid five weeks under the FW Act's National Employment Standards.

*Other matters: s 392(2)(g)*

[205] I do not take into account the non-payment of the honorarium as I have not found it to have been an entitlement in the post-dismissal period.

[206] Other than the extra week in lieu of notice, I do not take into account any other sums allegedly due on termination. If they are due and payable, and if they have not been paid, they should be paid in addition to the compensation sum I order.

*Misconduct: s 392(3)*

[207] Mr Hardacre was underperforming but I have not made any findings of misconduct.

[208] I make no deduction on this account.

*Shock, Distress: s 392(4)*

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

*Compensation cap: s 392(5)*

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

*Conclusion on compensation*

[211] The compensation order will be for a six week period 16 January 2023 (the date dismissal took effect) until 27 February 2023 less the four weeks in lieu of notice paid in this period. This sum includes allowance for the extra week of notice Mr Hardacre should have been paid but was not paid. If that extra week has been paid since the date of the hearing, then the compensation sum ordered and payable should be reduced by the value of that one week.

[212] Mr Hardacre's gross pay was \$1,009.61 per week (net \$841.61).

[213] Accordingly, the compensation sum is a gross sum of \$2,019.22 less tax plus the applicable superannuation percentage payable on earnings on this sum.

## Conclusion

[214] I find that Mr Hardacre, a person protected from unfair dismissal, was dismissed by Highway Enterprises Pty Ltd on 14 January 2023 (taking effect on 16 January 2023) and that his dismissal was unfair.

[215] I consider it appropriate to order a remedy by way of compensation. The amount of compensation payable by Highway Enterprises Pty Ltd under s 392 of the FW Act will be \$2,019.22 less tax plus the applicable superannuation percentage payable on earnings on this sum.

[216] Payment of the sum will be required within fourteen days of the date of this decision.

[217] I issue an order to this effect in conjunction with its publication.<sup>29</sup>



DEPUTY PRESIDENT

### *Appearances:*

Mr P Crawford, *with permission*, on behalf of Mr S Hardacre

Mr H Taing, *of and on behalf of* Highway Enterprises Pty Ltd T/A Taings Noodles

### *Hearing details:*

2023

Adelaide (in person, by determinative conference)

21 April

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<sup>1</sup> A2

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<sup>2</sup> A1

<sup>3</sup> R1

<sup>4</sup> R2

<sup>5</sup> R7

<sup>6</sup> A2 SH1

<sup>7</sup> A2 SH1 as supplemented by oral evidence of Mr Taing

<sup>8</sup> R5

<sup>9</sup> R3

<sup>10</sup> Recording of Determinative Conference, 21 April 2023, 2:23:30 – 2:23:36

<sup>11</sup> *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 at [54]

<sup>12</sup> *Mihajlovic v Lifeline Macarthur* [2013] FWC 9804; *Goodenough v CXN Transport Pty Ltd* [2023] FWC 715, [32] and [34]

<sup>13</sup> *Ayub v NSW Trains* [2016] FWBFC 5500, [50]

<sup>14</sup> *Green v KS United Pty Ltd* [2022] FWC 3228, 94 and 95

<sup>15</sup> R1 and R4 page 2

<sup>16</sup> R4 page 3

<sup>17</sup> Recording of Determinative Conference, 21 April 2023, 3:07:30

<sup>18</sup> *Sydney Trains v Hilder* [2020] FWCFCB 1373 at [26]

<sup>19</sup> R2

<sup>20</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 at [73]

<sup>21</sup> *Previsic v Australian Quarantine Inspection Services* Print Q 3730 (AIRC, 6 October 1998)

<sup>22</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 at [75]

<sup>23</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7

<sup>24</sup> *RMIT v Asher* (2010) 194 IR 1 at 26-30

<sup>25</sup> *Jones v Brite Services* [2013] FWC 4280 at [24]

<sup>26</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR 915674 at [69] (AIRC, 21 March 2002)

<sup>27</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 as cited in *Potter v WorkCover Corporation* (2004) 133 IR 458 per Ross VP, Williams SDP, Foggo C and endorsed by the Full Bench in *Industrial Automation Group Pty Ltd T/A Industrial Automation* [2010] FWAFB 8868, 2 December 2010 per Kaufman SDP, Richards SDP and Hampton C at [36]

<sup>28</sup> Section 381(2) FW Act

<sup>29</sup> [PR761614](#)