



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Deleece Bowen

v

Cape York Grassroots Aboriginal Corporation
(U2022/11362)

COMMISSIONER SPENCER

BRISBANE, 19 MAY 2023

Application for relief from unfair dismissal – improper completion of tender documents - serious misconduct – significant breach of trust and confidence – valid reason – application dismissed.

[1] Ms Deleece Bowen (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 pursuant to section 392 of the Act. She stated she had been unfairly dismissed from her employment with Cape York Grassroots Aboriginal Corporation (the Respondent). The Applicant sought compensation for lost wages in the amount of 19 weeks in lieu of reinstatement.¹

[2] The Respondent is an Aboriginal Corporation providing training, support and community services to Traditional Owners² and is a registered training organisation.³ During the Applicant's employment, the organisation applied for State Government grants to fund some of these services. The Applicant was engaged in preparing grant documents to seek such funding, as part of her role. The main allegation related to the Respondent's reasons for the Applicant's termination of employment was the manner of the completion, filing and execution of grant applications (Grant 1 and 2). The Respondent alleged the Applicant's conduct in relation to Grant 2 amounted to fraud and serious misconduct. The circumstances relevant to Grant 1 formed the context of this consideration also. The Applicant denied the allegation. Two other allegations in relation to the Applicant's conduct also formed part of the termination of employment. These will be set out in more detail later.

[3] The Applicant commenced employment with the Respondent on 6 September 2021 and worked as a Community Engagement Officer on a full-time basis, until the termination of her employment on 8 November 2022.

[4] Section 390 of the Act provides that the Commission may order a remedy, if satisfied that the Applicant was protected from unfair dismissal, at the time of being dismissed, and that the Applicant has been unfairly dismissed. Both limbs must be satisfied. It is therefore necessary to consider whether the Applicant was protected from unfair dismissal, at the time of being dismissed and, whether the Applicant has been unfairly dismissed.

[5] 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.

[6] Section 382(a) and (b) are met as the Applicant was employed by the Respondent for 14 months under the *Clerks Private Sector Award* and her salary at the time of the dismissal was \$100,000 per annum plus superannuation, being less than the high income threshold.

[7] In accordance with section 396 of the Act, it must also be determined:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and
- (d) whether the dismissal was a case of genuine redundancy.

[8] The application was made within the 21-day period required by section 394(2) of the Act. It was not disputed between the Parties that the Respondent was a Small Business Employer, as defined in the Act.⁴ However the Respondent did not argue a jurisdictional objection based on compliance with the Small Business Fair Dismissal Code.⁵ Further, the termination of employment was not a case of genuine redundancy. Accordingly, the Applicant was a person protected from unfair dismissal.

Permission to appear

[9] Both the Applicant and the Respondent applied to be legally represented at the Hearing. Pursuant to section 596(2)(a) permission was granted for both parties to enable the matter to be dealt with more efficiently, considering the complexity of the matter and the mutual representation request.

[10] The matter was heard at the Cairns Courthouse. The Applicant was represented by Ms Sharon Giardina, Solicitor of Osbourne Butler Lawyers, whom the Applicant briefed late in the proceedings, and the Respondent was represented by Mr Thomas Allen, Solicitor of Allan Bullock Solicitors, who had appeared earlier in the proceedings. As will be set out later, the Applicant had previously sought alternative representation prior to the dismissal.

BACKGROUND

[11] The Applicant stated that the Respondent terminated her employment by correspondence on 8 November 2022, due to serious misconduct. The Applicant's employment was summarily dismissed, without payment of notice. She argued that the dismissal was harsh, unjust or unreasonable.

[12] The Respondent submitted that the application for unfair dismissal remedy should be dismissed, on the basis that the termination was fair, there was a valid reason for the dismissal, the Applicant was notified of this reason and was provided the opportunity to respond.

[13] In summary terms, the Applicant, in her submissions, denied the allegations put to her in the Show Cause letter, in particular that she had not improperly completed the grant application or engaged in the alleged fraud. She submitted that she had obtained the assistance of a consultant of the Respondent, Ms Helen Penrose on two occasions to write applications for grants from the State Government. The Applicant did not respond to the Show Cause correspondence by the required time (as will be set out later), despite being represented at the time.

[14] As part of her role as a Community Engagement Officer, the Applicant applied on behalf of the Respondent for 'Grant 1' in early 2022. This grant was entitled 'Community Sustainability Action Grant.' The Applicant's completion of the Grant 1 application document was not entered into evidence. However, the Applicant's conduct in completing it and the way she sought electronic signatures (from the receptionist for the Chairman) for the execution of Grant 1, formed background to the issues that were related to her submission of the Grant 2 application, which was relied on for the termination. The Respondent stated that given the dissatisfaction with the Applicant's conduct in finalising the documentation for Grant 1, they organised for the Applicant to undertake grant writing training, that also included training on the related administrative steps for grant approvals.

[15] On 15 June 2022, the Applicant was informed by a representative of the Grants team (Community Sustainability Action Grants) that the application for Grant 1 had been approved and signatures were required to execute the grant. The Applicant provided a printed copy of the grant agreement to Ms Deborah Symonds, Chief Executive Officer ('CEO') of the Respondent the same day, for her signature. Ms Symonds signed the hardcopy of the document and retained it, stating she would get Mr Michael Ross, Chairperson of the board of the Respondent, to also sign it.

[16] On 20 June 2022, the Applicant approached Ms Akarere Maretu, Receptionist at the Respondent's workplace, for a digital signature of Mr Ross to be applied to the grant agreement. Ms Maretu denied her request. Ms Gernika Warren, a second employee on Reception at the time, overheard the conversation and said she would speak with Ms Symonds about the Applicant's request for the electronic signature of the Chairperson.

[17] The Respondent submitted they held concerns about the Applicant's competency with following grant processes after the execution of Grant 1, however determined to organise for the Applicant to attend training in grant writing workshops in lieu of any formal warning.

[18] On 23 June 2022, the Applicant received an email from Ms Symonds asking to speak with her about some issues that she understood the Applicant had allegedly raised, with regard to fraud and the Grant 1 tender document:

Good Morning

I would like to meet and talk over issues that you have raised around fraud and Grassroots and myself. I need to understand why this has been brought up and the need to speak with everyone besides me.

I am disappointed and concerned. Can we have an hour on Friday 11am.

I would appreciate it. I don't think I want my name on a funding agreement when there is mistrust before the funds even hit an account.⁶

[19] The Applicant responded to the email refuting she had made an allegation of fraud and seeking a face to face meeting. On the same day, the Applicant approached Ms Symonds in person seeking to clarify that she had not made allegations of fraud. Later, Ms Symonds visited the Applicant's office and had another conversation.⁷ The Applicant submitted, she thought she was doing the right thing in asking for Mr Ross' digital signature for the grant.⁸ Later, the Applicant spoke with Mr Ross, to clarify the request for his signature. The Applicant submitted Ms Symonds entered the conversation and said it was 'all sorted.'⁹

[20] The Applicant submitted that there was no further discussion with her regarding the suggested allegations of fraud, after that time, nor any issues raised with her regarding her conduct, until the receipt of the Show Cause correspondence. In the interim, however, the Respondent submitted that in response to the Applicant's lack of understanding of grant processes and the earlier event, she was sent to several grant writing workshops held by the State Government Department of Environment and Science.

[21] These workshops took place on 21, 28 and 29 June 2022.¹⁰ The Respondent's representative relied on Grant 1 in confirming that the training organised for the Applicant, was to ensure grant procedures were understood by her. The Respondent argued that the conduct leading to the termination was not due to the Applicant's lack of understanding, but due to the Applicant engaging in an intentionally subversive process.¹¹

[22] In August 2022, the Applicant, with the assistance of consultant Ms Helen Penrose, completed a second grant application. 'Grant 2' was entitled 'Looking After Country Grant Program,' and was for the provision of cultural workshops to get people back on 'country' and provide the opportunity for intergenerational knowledge exchange by connecting the youth with elders from several local groups.

[23] The Respondent refuted that it was the work of Ms Penrose to assist the Applicant with grant applications. They stated her consultancy was to assist with the general administrative duties, and assist in identifying opportunities for the groups being supported, including grants that may be of assistance.¹²

[24] In the Grant 2 application, the Applicant, in response to the prompt to 'provide a summary of the project activities and outcomes', wrote:

*...this project will be coordinated and conducted in partnership with Cape York Weeds and Feral Animals Inc. and the Buubu Gujin Aboriginal Corporation (representing the Dharrba, Nhirrpan, Juuju, Balngarra and Muundhi Clan groups of south eastern Cape York Peninsula).*¹³

[25] The Applicant is a member of Buubu Gujin Aboriginal Corporation, a native title body corporate for five different organisations.¹⁴ The Applicant is also the chairperson of Dhaarba Land Trust.¹⁵ This is not in dispute between the parties. Nor is it in dispute that this was known to the Respondent during the Applicant's period of employment with the Respondent.

[26] On 25 August 2022, the Applicant submitted the application for Grant 2 online. The Applicant stated she believed Ms Symonds, the CEO, was aware of the application for Grant 2, and the Applicant believed her to be in support of an application, for the grant being made, on behalf of the Respondent corporation.¹⁶ However, she did not refer to any direct knowledge or communication about the grant to the CEO. The Respondent submitted Ms Symonds had no knowledge of the application until 19 September 2022, when she received an invoice for Ms Penrose's services, for assisting the Applicant to complete this grant.¹⁷

[27] On 23 September 2022, Ms Symonds mentioned her knowledge and dissatisfaction of the Applicant's conduct, in an email to the Applicant:

"Your last funding application you didn't even send me a copy before submitting but you put my name on it.

*I will set up a meeting with HR for you and I to work out next steps. I would like to find a way forward.*¹⁸

[28] On 26 September 2022, the Applicant responded, stating:

*"The last grant, we added your name as a contact from CYGR. This was a rash decision from my behalf to submit this application, following the attempts at getting funding for a project that was dismissed by a few funders/stakeholder that I have had meetings with to support what I have been trying to achieve along with traditional owner groups. This grant if successful would allow me to support a few traditional owner groups to have some ongoing work on their country.*¹⁹

(Emphasis added)

[29] On 29 September 2022, the Applicant emailed a group of people, including Ms Symonds, seeking that her concerns with the office culture be addressed. Ms Symonds responded and on 4 October 2022, provided the Applicant more information on how she could make her complaint and have it investigated.

[30] On 4 October 2022, the Applicant informed Ms Symonds she had a medical certificate stating she was fit to work from home and would be doing so until its expiry on 31 October 2022:

“Following last week’s email, I will be working from home until HR Meeting is arranged and more importantly to meet with the Board.

I have a medical certificate till the end of the month. This is related to the unnecessary stress this whole situation has caused me, my doctor has advised to take 4 weeks for my well being.²⁰“

[31] On 6 October 2022, Ms Symonds responded to the Applicant’s medical certificate and intention to work from home:

“...I have spoken with HR this morning and due to the current investigation and the allegations of fraud and bullying that are presently raised against you, it is not viable that you work from home for the duration of this medical certificate.

In a communication last week you mentioned that you were stressed, as such, we believe that for the duration of the medical certificate you take this time as personal leave with no input from the workplace to allow you to focus on your health and well-being. To assist with this we will remove your access to our computer systems and then upon your return, we will reactive your full access.²¹“

[32] Further to this correspondence, the Applicant sought the contact information for the HR consultant (engaged by the Respondent to investigate her complaint), and more information on the investigations currently underway into her conduct. Ms Symonds provided the name of the investigator, Ms Rachel Corcoran an independent HR consultant, who had been engaged to investigate her complaint.

[33] The Applicant subsequently contacted Ms Corcoran and during that call, queried whether she was independent or connected to Blackstone HR, the Human Resource consultants the Respondent engaged for other matters.²² There was no sufficient evidence put by either party to demonstrate that Ms Corcoran was not an external, independent third-party investigator, as she said she was.

[34] On 13 October 2022, Ms Symonds received a report from Ms Corcoran, alleging the Applicant had been “aggressive and...derogatory²³“ toward her during this call. In her witness statement, the Applicant refuted this assertion,²⁴ however this material was not before the Respondent at the time of dismissal as the Applicant did not respond to the Show Cause correspondence by the deadline.

[35] On 24 October 2022, the Applicant was issued with the following Show Cause correspondence:

Dear Deleece

RE: Your employment – serious concerns in relation to your conduct

I am writing to inform you that Cape York Grassroots Corporation holds serious concerns in relation to your conduct and ability to fulfil the expectations of your employment with Corporation.

An investigation into your recent conduct was ongoing and prior to a meeting being scheduled to allow you to respond to these allegations, you subsequently went on personal leave due to a medical condition.

Notwithstanding, these conduct concerns ultimately need to be addressed.

Given the seriousness of the allegations, you were not approved to work from home whilst covered by a medical certificate. This was communicated to you on 7 October 2022 via an email from the CEO.

Cape York Grassroots Corporation has not had an opportunity to consider the allegations and is concerned that you have engaged in conduct that amounts to serious misconduct.

The purpose of this letter is to provide you with particulars of those allegations so that you can consider them and provide a response.

Before Cape York Grassroots Corporation makes a decision about your employment, you will be provided with a full opportunity to respond to the concerns and explain, given the allegations and particulars in this correspondence, why you think Cape York Grassroots should not terminate your employment.

This letter also contains important directions regarding confidentiality and your conduct during this period. It is very important that you comply with those directions.

No decision has been made and no decision will be made until we have met with you and/or consider your responses.

Your position

Your role is one that requires you to act in Cape York Grassroots Corporations' best interests, maintain a professional standard of conduct and performance in all matters relating to Cape York Grassroots Corporations' operations and, at all times, act in a manner which will protect and enhance Cape York Grassroots Corporations' reputation.

As an employee of Cape York Grassroots Corporation, you need to be able to support management's decisions to effect change as deemed necessary to protect its reputation, viability and performance and not be fighting against it.

It is critical that you behave in a courteous, polite, and respectful manner to other staff, customers, contractors, external parties and suppliers.

I need to have our utmost trust in you with regards to your conduct and ability to perform your role and to act in the best interests of Cape York Grassroots Corporation and its stakeholders.

Particulars of concerns

Serious allegations have come to my attention in relation to your conduct that relate to fundamental obligations on you to perform your role that need to be addressed immediately.

The allegations brought to Cape York Grassroots Corporation's attention generally relate to:

- (a) Your failure to act in Cape York Grassroots Corporations' best interests;*
- (b) your lack of ability to work with others.*
- (c) engaging in fraudulent behaviour;*
- (d) engaging in intimidating and demeaning conduct of another employee that constitutes bullying and harassment;*
- (e) your failure to follow reasonable and lawful directions; and*
- (f) Your failure to follow the company's policies and procedures.*

In particular, it appears that you:

- (a) Have demonstrated a lack of respect towards others, failure to communicate appropriately and insubordinate behaviour.*

Cape York Grassroots Corporations' concerns arising out of the allegations

In light of the allegations, it appears that you have:

- (a) put your own interests ahead of those of Cape York Grassroots Corporation and others which adversely impacts or has the potential to adversely impact, Cape York Grassroots Corporations reputation;*
- (b) failed to demonstrate honesty and integrity;*
- (c) damaged the trust and confidence that Cape York Grassroots Corporation can have in you to fulfil the inherent requirements of your role;*
- (d) failed to comply with your contractual obligations; and*
- (e) breached your contract of employment.*

The conduct outlined above, if substantiated, amounts to serious misconduct.

You need to be aware, that if I am satisfied that you have engaged in the conduct alleged against you, without reasonable excuse, that Cape York Grassroots may terminate your employment summarily for misconduct.

Response required

Given your fundamental failure to meet the expectations of the position and conduct which has and has the potential to adversely impact on Cape York Grassroots Corporation, I am considering termination of your employment.

Before making a decision about your employment, Cape York Grassroots Corporation would like to give you the opportunity to:

- (a) consider the allegations; and*

(b) provide a response to the allegations including why, if the allegations are proven, your employment should not be terminated.

*I propose that you provide a response in writing to these allegations before **close of business 5pm, Tuesday 2nd of November 2022**. This response may be submitted to me by email [redacted].*

Once again, no decision has been made with regards to your employment at this stage and no decision will be made until you have had an opportunity to provide your response. Before the board and I make a decision about your employment, I would like to give you the opportunity to respond to the concerns in writing and explain the allegations and given the allegations and particulars in this email, why you think Cape York Grassroots Corporation should not terminate your employment.

The allegations against you are outlined below.

Allegation 1: On the 20th of September 2022, it came to the attention of Cape York Grassroots Corporation management that you had fraudulently acknowledged/declared that the CEO had submitted a funding application with “smarty grants” with the Queensland State Government for an amount of \$75,000.

This came to the attention of Management when an invoice was received for this grant submission, the CEO contacted the contractor to question the invoice as the CEO was unaware of the application and that such application had been submitted as the CEO had not signed off or approved the application. The contractor confirmed that the grant had been submitted.

When investigating the matter, you informed the CEO that in the interest of saving time you have added her name to the application and submitted the application after clicking the digital declaration of the digital document.

Due to the background information listed below, it is specifically alleged that you are aware of the correct approval and submission process and as such, you have knowingly submitted an application for state government funding on a fraudulent basis.

Background: On the 19th of July 2022, you were involved in an incident in which you asked a new employee (employed approximately 2 days) to add the Chairmans digital signature to a contractual document so that it could be submitted. Gernika (a fellow employee on the reception desk) overheard this and has said that the new employee was not to do that as such an action without the approval of the signatory was considered to be fraudulent.

On the 25th of August 2022, an application that had been flagged as “rejected” came to the attention of Cape York Grassroots Corporation Management, this application for funding had been rejected on the basis that that it had not been signed off by an office holder of the organization. Following this you were reminded of the importance of making sure that the correct submission and approval process from management was strictly followed.

Allegation 2: On the 20th of September Cape York Grassroots Corporation received an official complaint against you alleging conduct of an intimidating, demeaning nature which is defined in our company policies as conduct that is of a bullying and harassing nature.

Specifically, it is alleged that since the 19th of July when an employee (Gernika) informed you that you were not to add a board members signature to a document without approval, you have engaged in, and continued to engage in, inappropriate behaviour such as yelling, making undermining/sarcastic comments in front of other employees, making obvious exclusion towards the other employee in front of other staff including at team meetings.

It is further alleged that when the other employee asks you work related questions or makes work-related requests of you such as timesheets you are not co-operating with this employee, and you are intentionally making the process difficult.

It is also further alleged that you have engaged in conduct that constitutes harassing and intimidating behaviour towards management, namely, the CEO position. Specifically, it is alleged that the CEO has on a number of occasions provided you with reasonable management instructions, however, you have failed to follow such instructions and when a decision has not gone your way you have engaged in conduct of an undermining nature, threatening to “call a board meeting” and to “contact members and stakeholders directly”.

After providing specific instructions to you to follow, you have continued to send a number of texts and emails to the CEO even though you have been provided clear answers and instruction/direction on all matters.

Such conduct has had a negative effect on the CEO’s.

Allegation 3: *It is alleged that you have treated an external consultant in an aggressive and derogatory manner.*

Background: *On Tuesday the 11th of October Cape York Grassroots Corporation has provided you the opportunity to speak with an external HR consultant that was a neutral 3rd party to seek to gain more information from you regarding your email dated Friday 23rd of September 2022 addressed to the CEO in which you listed a number of concerns.*

Prior to this opportunity, on several occasions the CEO instructed you to provide additional details to our external HR resource as more information and specific information was required from you so that we could investigate your concerns as we take all concerns raised with the organisation seriously, however, you failed to do so. Therefore, our HR provider gave us the details of an external HR provider who would take your statement and investigate your concerns as a neutral 3rd party. You were informed who this party was, and you agreed to speak with this party before confirming an agreed time. (Confirmed via email).

Allegation 3 Continued: Specifically, it is alleged that when you contacted the consultant, you spoke to the consultant in a tone that was rude, aggressive, and derogatory. The consultant reminded you that she was there to support you and that she was there to assist you.

It is alleged that you demanded that the meeting be held face-to-face, and you questioned the pedigree and credibility of the consultant. The consultant provided you with the information and also noted that you became aggressive when she would not provide you with advice regarding matters outside of the investigation and your allegations.

The call was ended, and the consultant contacted Cape York Grassroots Corporation to inform us of your conduct during that call. As a result of your conduct and unwillingness to cooperate in the process during the call the consultant informed us that she would not be engaging further with you.

As a representative of the Organisation, it is alleged that such conduct by you reflects badly on Cape York Grassroots Corporation and has the potential to impact the Organisation's reputation and therefore it impacts the mutual trust that Cape York Grassroots Corporation has with you.

This is in breach of your employment obligations to exhibit a professional and courteous attitude when dealing with the Employer, its employees, clients, suppliers and members of the public. Such conduct has the potential to impact on harmonious relationships and morale in the workplace.

*We require your written response by no later than **close of business 5pm, Tuesday 2nd of November 2022** to [redacted].*

I then propose that you meet with a representative of Cape York Grassroots Corporation Management to discuss your response. You may bring a support person with you to this meeting if you require. A time and date will be provided.

The support person should not be connected with Cape York Grassroots Corporation or your employment. Please let me know when you submit your written response, who this person will be.

No decision has been made with regards to your employment and no decision will be made until you have had an opportunity to provide your response. It is therefore very important that you participate in this process. If you do not do so, We will consider all relevant information and decide on the information available to me.

To ensure your own interests and those of Cape York Grassroots Corporation are protected, I also confirm my previous direction that these matters are personal to you and are confidential. As such, we require that you keep these matters confidential and not raise this matter with any person, other than with me, the CEO, your immediate family, your support person, or any professional adviser.

If you do not comply with the directions set out in this letter or the requirements in relation to this direction, we may treat your failure to comply as an indication that you no longer intend to be bound by your employment contract. You should therefore take this matter very serious.

It is very important that you participate as part of this process. If you do not do so, Cape York Grassroots Corporation will decide based on the information before it. You will appreciate that the allegations are very serious and subject to hearing your response, if proven, may give rise to termination of employment for serious misconduct.

I understand that this may be a difficult time for you. If you require further support and assistance, I can make arrangements for confidential counselling for you.

*If you have any questions, please do not hesitate to contact HR otherwise I look forward to receiving your response on or before **5pm, Tuesday 2nd of November 2022.***

Yours sincerely,

Debbie Symonds

Debbie Symonds
Executive Officer²⁵

(emphasis added)

[36] On the same day, the Applicant replied, stating her intention to respond to the allegations by the deadline of 2 November 2022, saying:

...
*"I will be addressing all allegations you have listed amongst others by the due date 2nd November 2022 as outlined."*²⁶
...

[37] The Applicant submitted that she contacted Supportah Australia trading as Industrial Relations Claims ('Supportah') on 25 October 2022, to assist with her Show Cause response.²⁷ She submitted that on 2 November 2022, her assigned representative handed over her case to another officer and a first draft of her response was only provided to her for comment on 4 November 2022, after the deadline had passed.²⁸

[38] In the meantime, on 1 November 2022, the Applicant notified the Respondent that Supportah were commencing to act for her, and she was raising an industrial dispute:

Deleece Bowen notifies Cape York Grassroots Aboriginal Corporation of an Industrial Matter & Appointment of Representative

Dear Ms. Symonds,

I am formally writing to advise you that I am raising an industrial dispute under the relevant industrial instrument and/or raising an industrial matter as a workplace right pursuant to s 3(e) of the Fair Work Act 2009 (Cth) which states it is primary purpose is:

“Enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.”

I have exercised my right to appoint a representative to represent me in this dispute. My agents representing me in all matters raised in this matter are Supportah Australia Pty Limited t/a Industrial Relations Claims.

My representatives can be contacted directly below and are my primary contact point me relating to the industrial matter until I advise in writing to the contrary. The specifics of the industrial matter and other complaints or inquiries, as the case may be, will be provided by my representatives by separate cover.

I request that you do not directly contact me with relation to the Industrial matter. They can be contacted as follows:

*Mr Stephen Dryley-Collins
Director - Lay Advocacy Services
Supportah Australia Pty Limited t/a Industrial Relations Claims
Level 9, 388 Queen St
Brisbane QLD 4000*

Otherwise, Industrial Relations Claims can be contacted on +61731300920.

*Yours sincerely,
Deleece Bowen*

(Emphasis added)

[39] It is not in dispute that neither the Applicant or Supportah (her original representatives) submitted a response to the Show Cause letter by the deadline of 2 November 2022. Nor did the Applicant or her representative seek an extension for her response.

[40] On 3 November 2022, having received no response to the Show Cause correspondence, Ms Symonds convened a meeting with Mr Ross, the Chairperson and determined allegation 1, (alleging that the Applicant had “fraudulently acknowledge/declared that the CEO, Ms Symonds had submitted a funding application with “smarty grants” to the Queensland Government for \$75,000”), could be substantiated, and the Applicant’s employment would be terminated.²⁹

[41] On 7 November 2022, the Respondent responded to the correspondence from Supportah via their solicitor:

Dear Ms Bowen

Non-acceptances of purported “industrial dispute” and “appointment of representative”

Preliminary

- 1. We act for Cape York Grassroots Corporation (our client). All related correspondence in this matter should be directed to our offices.*
- 2. We refer to your letter dated 1 November 2022 to our client (the Letter).*

Provision of particulars of industrial matter by your purported representative

- 3. You have stated in your Letter that Supportah Australia Pty Ltd t/a Industrial Relations Claims (Supportah) described therein your “agent” or “representative” will provide particulars of the “industrial matter”/ “industrial dispute”.*
- 4. As it stands, we do not accept that any “industrial dispute” has been raised by your letter given, the definitions of workplace right and process or proceedings under a workplace law or workplace instrument under section 341 of the Fair Work Act 2009(Cth) (FWA).*

We must determine whether you are self-represented

- 5. You do, of course, have a right to appoint a representative. To be clear, we understand this to be a general right, not the exercise of a workplace right. In any event, we do not seek to limit your exercise of that right.*
- 6. Ordinarily however, persons in your position typically engage a person or entity entitled to engage in legal practice. It is unclear how you can be represented by Supportah, where:-*
 - a. Agency as a matter of law does not include the providing of legal services such as the foreshadowed issuance of contentious correspondence by Supportah on your behalf;*
 - b. There is no matter before the Fair Work Commission for which Supportah could then be considered a “paid agent” within the meaning of the FWA in circumstances where you have not stated they are or will be a “paid agent”; and*
 - c. Supportah is not an incorporated legal practice within the meaning of the Legal Profession Act 2007 (Qld) (LPA), and it is not clear from our inquiries that any persons employed by it are persons who are Australian legal practitioners entitled to engage in legal practice as those terms are defined by the LPA and where Supportah is potentially acting in contravention of section 24 of the LPA that prohibits engaging in legal practice when not entitled.*
- 7. If you wish, you may direct Supportah to respond to the above and outline in correspondence to us why we should not, as solicitors bound by the Australian Solicitors Conduct Rules 2012 (Qld)(ASCR), regard you as self-represented and discharge our obligations accordingly pursuant to the ASCR.*

8. *In the interim and pending any substantive response to the above, or correspondence from a solicitor or a law practice, we will correspond with you directly.*

Yours faithfully
Thomas Allan
*Principal*³⁰

[42] On 8 November 2022, Supportah responded to the Respondent’s above correspondence on behalf of the Applicant:

Representation Framework

1. *Section 15AA of the Acts Interpretation Act 1901 (Cth) provides that:*
“In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.”
2. *Section 3(e) of the FW Act provides the objects of the FW Act as being, inter alia:*
“enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms”
3. *The interpretation of section 3(e) of the FW Act, with regard to the framework that exists in interpreting section 3(e) of the FW Act, is clear in that representation for an employee in the workplace, where such an employee is covered by the FW Act.*
4. *This is further outlined by the stated exception at section 387(d) of the FW Act, which states:*
“any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal”
5. *It is clear that the FW Act has contemplated a single exception to representation in the*
6. *workplace, in that where such discussions or interactions involve the dismissal of an employer, representation is not permitted. This construction was confirmed in Victorian Association for the Teaching of English Inc v De Laps [\[2014\] FWCFCB 613](#) where it was stated at [52]:*
“Under the FW Act, in considering whether a dismissal was harsh, unjust or Unreasonable, the Commission is required to take into account “any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal”. Given that legislative provision and in the absence of any other obligation to allow an advocate, we do not think a refusal by VATE to allow Ms de Laps an advocate at the meeting on 17 December 2012 can be regarded as constituting an element of procedural unfairness.”
7. *It is in this framework that our client has a right to representation, under s.3(e) of the FW Act.*

8. *Our client has sought to exercise this right by instructing our firm and seeking our representation.*
9. *By way of additional clarity, given the raised objections, we further note:*
 - a. *The explanatory memorandum of the Fair Work Bill 2008 (Cth), in addition to confirming the language that such right of representation is at the workplace, further goes on to confirm that representation is for workplace and industrial rights; and*
 - b. *The explanatory memorandum of the Fair Work Bill 2008 (Cth), (at 1333) outlines that the workplace protections are considered a key part of the bill ensuring fairness and representation at the workplace.*
10. *Neither the Industrial Relations Bill 1996 (Cth) nor the Industrial Relations Act 1996 (Cth) as it was retitled) contained a provision for representation in this matter but did include representation before the Commission.*
11. *The addition of Object 3(e) was to create an additional right for employees while still at the workplace, not an ancillary right given such further rights to representation already existed.*
12. *We again remind you that our client has a right to representation under section 3(e) of the Fair Work Act 2009 (Cth), and it is expected her employer, and their representation, respect such rights when it is lawfully required to do so.*
13. *The suggestion that representation in these circumstances requires a lawyer, and more specifically one with a practicing certificate, is misconceived.*
14. *There is no limiting statutory provision that, in an industrial matter, only a lawyer, with or without a practicing certificate, irrespective of a belief of what is 'ordinarily' done.*
15. *Attempting to circumvent such representation by creating such a threshold requirement, and then contacting a represented client directly, is inappropriate.*
16. *We look forward to engaging with you directly regarding our client, Ms Deleece Bowen.*

Please contact our office if we can assist further with any matters raised herein.

Regards,

Supportah Australia Pty Ltd t/a Industrial Relations Claims³¹

[43] It is noted that Supportah were given permission pursuant to section 596(2)(a) to represent the Applicant in the early stages of the application to the Commission.

[44] Whilst the Applicant's right to seek Supportah to represent her is recognised, no response to the allegations or an extension of time to provide such was sought by the Applicant or her representative. On 8 November 2022, the Respondent issued a termination letter to the Applicant:

Dear Deleece

***Re: Disciplinary investigation:- Notice of outcome:-
Termination of your employment due to serious misconduct***

Preliminary

1. We refer to our letters to you dated 24th October 2022.

Status of Workplace Investigation

2. We note that you have elected not to participate in the disciplinary investigation and have not provided a substantive response to our letter dated 24 October 2022 to show cause in relation to the allegations made against you nor provided the information requested by the Company under its policies.
3. On the 3 November a meeting was held to consider the allegations that were raised against you - these specific allegations were outlined in the letter presented to you, dated 24 October 2022, at the meeting held on the 3 November 2022, CYGRH considered all available evidence regarding the allegations that were raised against you.
4. At the meeting it was noted that you chose not to provide responses to the allegations against you, it was further noted that you had previously been informed that should you not provide responses to the allegations within the required timeframe, the Employer (CYGRH) may make a decision regarding these matters with the evidence that was available to them.
5. At the meeting held on the 3 November, and after reviewing the available evidence and discussing the evidence/allegations with a representative of the CYGRH board, it was concluded that all three (3) allegations of Serious Misconduct against you were capable of substantiation.
6. These allegations are extracted in short form for your reference:-
 - a. Allegation 1:- That on 25 August 2022 at 7:11PM, you did fraudulently acknowledge/declare that the CEO of CYGRH submitted a funding application with "smarty grants" with the Queensland State Government for an amount of \$75,000.
 - b. Allegation 2:- By an official complaint dated 20 September 2022. that since 19 July 2022 you have engaged in conduct of an intimidating and demeaning nature in breach of the Company policies constituting bullying and harassment.
 - c. Allegation 3:- That on 11 October 2022, you did engage in conduct that was aggressive and derogatory toward an external consultant of the Company.
7. For full details of the allegations against you, please refer to the correspondence issued to you on 24 October 2022.

Termination of your employment due to serious misconduct

8. Due to the allegations of serious misconduct being capable of substantiation, this letter is to formally advise you that your employment with CYGRH is terminated effective immediately (without notice) as of today's date 8 November 2022.

Your final payment & superannuation

9. Your final pay will include an amount for any unused accrued leave entitlements, outstanding pay, less applicable taxes.
10. Your superannuation will be paid on your behalf to your complying fund, calculated as of 8 November 2022.

Your obligations after you cease employment

11. *After your employment ends, you will continue to be bound by certain post-termination obligations as set out in your contract of employment.*
12. *Please contact us to arrange a time within the next 7 days for you to return all company property in your possession.*

*Yours faithfully,
Debbie Symonds
CEO³²*

Witnesses

[45] The matter was heard at the Cairns District Court. Directions were set for the filing of evidence and submissions. The Applicant, Mr Keron Murray, a former director and employee of the Respondent and Mr Leon Bowyer (the Applicant's husband) provided witness statements on the Applicant's behalf. Mr Bowyer was not required by the Respondent for cross examination and his witness statement was tendered and marked as an exhibit. Ms Deborah Symonds, Director and CEO of the Respondent provided evidence on behalf of the Respondent. All of the witnesses except Mr Bowyer were cross examined at the hearing.

SUMMARY OF THE EVIDENCE AND SUBMISSIONS

Threshold issues – objection to witness statements.

[46] The Respondent sought to have several paragraphs of the Applicant's witnesses' statements struck out, prior to cross examining the witnesses. Each objection was dealt with at the hearing, and reasons provided. Some paragraphs were struck out by consent, after hearing from both representatives. Other paragraphs were maintained, with the ability to cross-examine on the matter and no determination of weight to be attributed was made until that examination. The objections were largely due to the alleged lack of relevance of some of Applicant's paragraphs, as the Respondent submitted they did not specifically relate to the events leading to the termination.

[47] The objections in relation to the witness statement of Mr Keron Murray were all overruled, as the paragraphs were found to be relevant to the Applicant's case and the Respondent had the opportunity to deal with the relevance of the matters, during the cross examination of that witness.³³

[48] The objections in relation to the witness statement of the Applicant were two-fold; largely, they were in relation to the presentation of matters related to Grant 1 and the period between June and July 2022. It was determined that as matters related to obtaining the electronic signature for Grant 1 were raised as background by the Respondent in the Show Cause correspondence for allegation one, they were determined to be relevant matters to be considered,³⁴ and the objections were withdrawn.³⁵ The Respondent was at liberty to rely on this prior warning or disciplinary matter.³⁶

[49] The remainder of the objections raised by the Respondent related to matters not raised in the Show Cause correspondence. They mainly related to incidents the Applicant considered showed a pattern of conduct relevant to the bullying investigation the Applicant had sought the

Respondent undertake. The objections were overruled as the Respondent had the ability to deal with their relevance through cross-examination and to provide a closing submission on these matters.³⁷

[50] The Applicant conceded paragraphs [85]-[91] and [102]-[103] of her witness statement could be struck out.³⁸

Summary of Applicant's submissions and evidence

[51] In addition to those matters set out in the 'background' above, in support of her application for an unfair dismissal remedy, the Applicant, with her representative provided written submissions in response to the directions, outlining the events she believed lead to the termination of her employment and included submissions on the harsh, unjust and unreasonable nature of the dismissal.

[52] The Applicant alleged her dismissal was unfair because it was not for a valid reason. She submitted the allegations raised by the Respondent were easily disprovable and the conclusions reached were nothing more than "*pointing with a wavering finger to an affirmative conclusion*."³⁹ The Applicant's submissions made reference to the case of *Briginshaw v Briginshaw*,⁴⁰ and stated that a determination on the 'balance of probabilities' test is not a mechanical or mathematical test.⁴¹ The Applicant submitted that the Respondent had failed to adequately satisfy itself on the balance of probabilities, by a lack of consideration of the persuasive nature of the evidence for and against the allegations, and therefore had erroneously reached a conclusion of substantiation of the allegations.⁴²

[53] With regard to allegation 1, the Applicant also briefly referred to the requirement of a higher standard of evidence being necessary to substantiate more serious allegations. No further submission of substance was made as to the evidence that may have been required to substantiate the allegations, nor an analysis of how the evidence before the Respondent was incorrectly considered, so as to be able to substantiate the allegations on the balance of probabilities. In fact, the Applicant conceded that no response was provided in response to the Show Cause notice.

[54] The Applicant went on to make submissions regarding mitigating circumstances, on the lack of policies and procedures of the Respondent, making her role and the correct processes to follow for the grant applications unknown and confusing.⁴³ Further, the Applicant argued that the Respondent had no evidence before it to 'soundly and reasonably' justify that the Applicant was 'truly responsible' for the matters raised in the allegations due to the lack of formal or written guidance.⁴⁴ She submitted there was no training specifically on the use or application of digital signatures provided by the Respondent, during the course of her employment. She stated she had concluded that there were no policies in place and no way for her to know what the expectations were relating to the work required of her position.⁴⁵

[55] Mr Keron Murray gave general evidence in his witness statement and at the hearing in support of the Applicant's assertion of the lack of processes the Respondent had during his employment.⁴⁶ Mr Murray worked in the same role as the Applicant for a period of three months, however, was not employed at the time of the material events leading to the Applicant's

dismissal. This had occurred more than 7 months after his resignation from the organisation in March 2022.⁴⁷

[56] Mr Leon Bowyer is the Applicant's husband. Mr Bowyer's evidence was based on his attendance at the Respondent's premises on 23 June 2023 for a separate corporate meeting. He stated he received a text message from the Applicant regarding the CEO alleging the Applicant had called her a fraud,⁴⁸ and the later conversation between the Applicant, Mr Ross and Ms Symonds.⁴⁹ The Respondent did not seek to refute the evidence in cross examination, and it went unchallenged.

[57] Further, the Applicant submitted that there was no satisfactory material before the Commission to confirm the elements of fraud for the Respondent to rely on.⁵⁰ She also stated that no particulars as to the mechanics or timeline of the investigation have been provided.⁵¹ Overall, the Applicant submitted that this suggested a lack of procedural fairness for the Respondent to have reached the conclusion of substantiation of fraud.

[58] With regard to allegation 2, being that she allegedly engaged in intimidating and demeaning conduct towards Ms Gernika Warren in seeking the Chairperson's electronic signature for Grant 1, the Applicant submitted that as the substance of the complaint was not provided with the Show Cause correspondence for her review and response, there were insufficient particulars to afford procedural fairness in the Show Cause process.⁵² In her witness statement, the Applicant refuted the alleged conduct.⁵³ However, this material was not before the Respondent at the time of dismissal. The Applicant's evidence at the Hearing did not alter the basis on which the Respondent had reached the dismissal decision.

[59] With regard to allegation 3, being that she allegedly engaged in aggressive and derogatory behaviour towards an external HR consultant, the Applicant submitted that no particulars or evidence were provided to support the allegation and therefore again, she argued procedural fairness was not afforded to her.⁵⁴ In her witness statement, the Applicant refuted the allegation of this behaviour,⁵⁵ however she conceded this response was not made before the Respondent terminated her employment.

[60] There is no evidence that either of the above alleged breaches of procedural fairness issues were raised by or on behalf of the Applicant before the termination of her employment. Sufficient detail of the allegations was provided to allow for a response from the Applicant.

[61] In all of the above circumstances, the Applicant generally concluded that due to the failures of the Respondent in the process, and the lack of particulars of some allegations, that the conduct, if substantiated, should have only amounted to a warning, or a plan to address the deficiencies, not termination.⁵⁶

[62] Despite the matters being set out in the Show Cause correspondence and the termination letter, the Applicant submitted that she was not properly notified of the reason for her dismissal. She argued this was also due to the lack of notification of the reason for termination prior to the decision to terminate. The Applicant relied on *Crozier v Palazzo Corporation Pty Ltd*⁵⁷ in this regard. Further, the Applicant submitted that there was not sufficient opportunity to respond due to the lack of time or information provided to her during the Show Cause process.⁵⁸ These matters were not raised with the Respondent by her or her representative at the time.

[63] The Applicant conceded she did not submit a response to the Show Cause correspondence for consideration, however stated this was because documents were requested to be disclosed by the Respondent which did not occur in a timely manner.⁵⁹ Neither party provided further evidence to support that this disclosure was requested or provided. The Applicant went on to outline mitigating circumstances, being the Applicant's engagement and reliance on Supportah as her initial representative, and that Ms Symonds had held a meeting with the Chairperson and determined to terminate her employment the day after the deadline for her response. The Applicant stated this demonstrated there was a lack of procedural fairness.

[64] To the matter of other relevant considerations, the Applicant stated she had a nearly unblemished record with the Respondent, and expected to remain employed for a significant period of time, despite the alleged bullying and harassment claim she submitted she had been subject to.⁶⁰ Mr Murray in support of the Applicant, stated he had not observed any conduct, behavioural or disciplinary issues with the Applicant during his period of employment with the Respondent.⁶¹ The Applicant submitted that it was open for the Respondent to properly engage HR specialists or obtain employment law advice for guidance during the Show Cause process which they did not do. The Respondent submitted otherwise.

Summary of the Respondent's submissions and evidence

[65] In addition to those matters set out in the 'background' above, the Respondent submitted that there was a valid reason for the dismissal as the Applicant engaged in fraudulent conduct in relation to allegation 1. It was argued that the dismissal was a proportionate response to this significantly serious conduct, in applying to the State Government for the Grant 2 monies, without prior confirmation by the CEO.⁶² The fraudulent conduct included the Applicant selecting 'yes' to the acknowledgement and/or declaration on the Grant 2 application; that Ms Symonds was, on behalf of the Respondent, submitting the application, in circumstances where the Applicant had not actually disclosed the grant application to Ms Symonds, and she had not signed off on the declarations.⁶³ The Respondent referred to the "overwhelming evidence" to support this conclusion of serious misconduct.⁶⁴

[66] The Respondent submitted that, based on the above outlined evidence, it considered allegation 1 had been substantiated. They argued that as the conduct amounted to fraud, it constituted serious misconduct and therefore was grounds for summary dismissal.⁶⁵ Allegations 2 and 3 were argued as contributing factors to the termination given the related nature of the events and the profile of all of the issues in question. The Respondent set out that substantiation of allegation 1 was sufficiently serious to justify termination.⁶⁶

[67] The Respondent submitted that the Applicant was validly notified of allegation 1, the primary reason for dismissal, as outlined in the Show Cause correspondence of 24 October 2022. Further, the Respondent argued that this correspondence stated that the Applicant's termination of employment was under consideration and a failure to respond by the deadline may result in a decision being made to that effect.⁶⁷ The Applicant acknowledged receipt of the Show Cause correspondence and stated her intention to respond. Therefore the Respondent submitted she was aware of the timeframe for the response and the nature of the Respondent's concerns with her conduct.⁶⁸

[68] The Respondent submitted that no response or an extension of time request was received from the Applicant by the deadline date, and further, that the investigation into the Applicant's conduct had been delayed to allow her to make her own complaint to an external HR advisor prior to commencing the Show Cause process, which resulted in allegation 3.⁶⁹

[69] Finally, the Respondent submitted it was a small business employer with no in house HR personnel and therefore had engaged external HR advice for the disciplinary investigation and the Show Cause process with the Applicant, to ensure procedural fairness was afforded.⁷⁰

CONSIDERATION

Has the Applicant been dismissed?

[70] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[71] Section 386(1) of the Act provides that the Applicant has been dismissed if:

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

[72] There was no dispute that the Applicant's employment was terminated at the initiative of the Respondent. I am therefore satisfied that the Applicant has been dismissed, within the meaning of section 386(1) of the Act.

Was the dismissal harsh, unjust or unreasonable?

[73] 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 the following criteria:

- (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.

[74] Each of these criteria of section 387 are to be considered against the factual circumstances before the Commission.⁷¹

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct

[75] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁷² *"The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."*⁷³

[76] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"⁷⁴ and should not be "capricious, fanciful, spiteful or prejudiced."⁷⁵ 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.⁷⁶

[77] The Respondent determined that the Applicant had, in completing and filing the application for Grant 2 and not appropriately communicating it to the CEO or gaining approval, had engaged in serious misconduct. Serious misconduct is defined in the *Fair Work Regulations 2009* (Cth) ('The Regulations'):

1.07 Meaning of serious misconduct

- (1) *For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.*
- (2) *For subregulation (1), conduct that is serious misconduct includes both of the following:*
 - (a) *wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;*
 - (b) *conduct that causes serious and imminent risk to:*
 - (i) *the health or safety of a person; or*
 - (ii) *the reputation, viability or profitability of the employer's business.*
- (3) *For subregulation (1), conduct that is serious misconduct includes each of the following:*
 - (a) *the employee, in the course of the employee's employment, engaging in:*
 - (i) *theft; or*
 - (ii) *fraud; or*
 - (iii) *assault;*
 - (b) *the employee being intoxicated at work;*
 - (c) *the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.*

(Emphasis added)

[78] To justify summary dismissal on a single act, the act must be such as to show that the employee was repudiating the contract of service or one of its essential conditions.⁷⁷ There is however no clear rule of law defining the degree of misconduct justifying summary dismissal.⁷⁸ Where ‘serious misconduct’ is alleged, the test for a valid reason for dismissal does not change. The test remains whether the reason was ‘sound, defensible or well founded.’⁷⁹

[79] The Full Bench decision of *B, C and D v Australian Postal Corporation T/A Australia Post*⁸⁰ considered:

“Broadly speaking, circumstances bearing upon whether a dismissal for misconduct is harsh, unjust or unreasonable fall into three broad categories:

- (1) The acts or omissions that constitute the alleged misconduct on which the employer relied (together with the employee’s disciplinary history and any warnings, if relied upon by the employer at the time of dismissal) but otherwise considered in isolation from the broader context in which those acts or omissions occurred.*
- (2) The broader context in the workplace in which those acts or omissions occurred. [This may include such matters as a history of toleration or condonation of the misconduct by the employer or inconsistent treatment of other employees guilty of the same misconduct.]*
- (3) The personal or private circumstances of the employee that bear upon the substantive fairness of the dismissal. [This includes, matters such as length of service, the absence of any disciplinary history and the harshness of the consequences of dismissal for the employee and his or her dependents.]”*

[80] The Full Bench decision of *Sharp v BCS Infrastructure Support Pty Limited*⁸¹ stated:

“It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee’s conduct met a postulated standard of “serious misconduct”. In Rankin v Marine Power International Pty Ltd Gillard J stated that “There is no rule of law that defines the degree of misconduct which would justify dismissal without notice” and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship.”

[81] The onus is on the Respondent, in the current matter, to discharge on an evidentiary basis that the conduct provided a valid reason for dismissal. The conduct is assessed on the balance of probabilities, in accordance with the principle established in *Briginshaw v Briginshaw*,⁸² where it was considered, in the context of the conduct having occurred, that:

“The standard of proof remains the balance of probabilities but ‘the nature of the issue necessarily affects the process by which reasonable satisfaction is attained’ and such

satisfaction 'should not be produced by inexact proofs, indefinite testimony, or indirect inferences'...

[82] In relation to an allegation of fraud, in *McGlashan v The Entrance Discount Variety Pty Ltd t/a The Base Warehouse*,⁸³ Deputy President Sams stated:

"There could hardly be a more serious allegation against an employee than to be accused of fraud. If true, it would undoubtedly constitute a 'valid reason' for dismissal, including, dismissal without notice. However, before an employer starts throwing around accusations of lies, deception and fraud, he/she ought be certain they have a sound basis for such claims and more importantly understand what the meaning of 'fraud' is in a legal context, and as commonly understood in society."

[83] The issue of fraud from a legal perspective was considered in *Macleod v R*.⁸⁴ The High Court, Gleeson CJ, Gummow, Hayne JJ, said at paras [35]-[36]:

" '35. In Peters v The Queen, which concerned charges of conspiracy to defraud the Commonwealth under ss 86(1)(e) and 86A of the Crimes Act 1914 (Cth), Toohey and Gaudron JJ said that, ordinarily, fraud involves:

"the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to 'some lawful right, interest, opportunity or advantage', knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests".

36. Their Honours explained that the term "dishonestly" in a statutory offence may be employed in its ordinary meaning or in some special sense. The line of authorities concerning the statutory offence of dishonestly obtaining property by deception provides an illustration of the latter."

(Emphasis added)

[84] The Cambridge Dictionary defines fraud as 'the crime of getting money by deceiving people.' The Concise Macquarie Dictionary defines fraud as 'deceit, trickery, sharp practice or breach of confidence by which it is sought to gain some unfair or dishonest advantage.' The allegation of fraud in terms of Grant 2, was that the Applicant intentionally took deceptive action designed to provide her with a gain. While it is not the jurisdiction of the Commission to determine criminal matters, it is relevant in the circumstances where fraudulent conduct has been alleged, to also consider the relevant statutory provisions. Section 408C of the *Criminal Code Act 1899* (Qld) relevantly defines fraud as 'dishonestly gaining a benefit or advantage from a person,' or 'dishonestly causing a detriment to a person.'⁸⁵

[85] It was set out with regard to the allegation of fraud that on 25 August 2022, the Applicant submitted the Grant 2 application online. On page 4 of the grant application, the Applicant listed herself as the "preferred contact person," and provided her email and mobile contact details. The Applicant also listed Ms Symonds, the CEO as the "additional contact person" and provided email and mobile contact details for her. The Respondent submitted that the Applicant's disingenuous conduct (as set out below), in filing the grant application and in relying on the CEO's name and her undertakings in relation to the grant in the application,

without having communicated with her in any way prior to filing it, amounted to fraud as the CEO, in misleading the CEO, the Respondent organisation and the State Government. The selection of 'yes' in response to the below statement on the Grant 2 application presented that the CEO was making all the undertakings. This was a significant misrepresentation as the CEO was not only not making these declarations, she was not aware of the grant application:

DECLARATION

I declare that all information provided in this application is true and correct.

I am authorised by my organization to complete this form.

I agree that the Department of Environment and Science does not accept any liability for the project.

I understand that information provided in this project proposal may be disclosed to internal and external parties as required to undertake assessment of the application in accordance with the program guidelines.

If successful, I will:

- Ensure that all necessary permits/approvals are obtained prior to the beginning of the project*
- Ensure that the project will be covered by appropriate insurance*
- Ensure that all relevant health and safety standard will be met*
- Accept the terms of the grant agreement (copy available on request)*
- Ensure that acquittal requirements are met*
- Provide any documentation reasonably requested by DES.*

(Emphasis added)

[86] Further, the Applicant's entering of Ms Symonds' name in the box as the 'Accountable Officer' of the organisation on page 10, but herself as the Officer to be contacted was at issue. This must be viewed in combination with the alleged lack of any communication of the grant to the Respondent. Due to this, the CEO was deprived of the opportunity to comment on the contents of the application, verify if the organisation wished to pursue the projects the Applicant had outlined, or veto the grant application in its entirety.

[87] In reviewing the Applicant's cross examination, she did not provide any alternative, sufficient explanation as to why she had used the CEO's name without relevant communication or confirmation. There was also no persuasive evidence that the Applicant sought to rely on to confirm that she had clearly advised the CEO of the application or sought authority from her prior to lodgement of the application. However, there was evidence on alternative matter that when the Applicant elected to communicate, she clearly did so.⁸⁶ Her ability to engage when she chose to must be taken into contemplation when considering her utter silence on the arguably more important matter of a grant application made in the name of the Respondent. Therefore, on the balance of probabilities, taking into consideration the Applicant's admission to filing the grant application without approval,⁸⁷ the Applicant subverted basic communication of the existence of the application to the relevant person being relied on as the Accountable Officer.

[88] The Applicant's use of the CEO's name as the Applicant Accountable Officer and the false affirmation that the CEO agreed to the declaration and the undertakings being made to the State Government, was an act of deceit in a commercial setting. The Applicant chose to submit the application without the knowledge of the CEO. This was despite the CEO clearly setting

out in a conversation with the Applicant (after Grant 1) on 23 June 2022, that she specifically did not want her name associated with fraud.⁸⁸

[89] I find that the conduct provided the Respondent with sufficiently serious concern regarding the significant breach of trust and confidence in the Applicant's ability to perform her role. The conduct was exacerbated as the Respondent only became aware of the grant application when, by default she received the external consultant's (Ms Penrose) invoice. It leaves open the question as to when the Applicant would have advised the CEO of the grant application. It also had to be considered that the Applicant was connected to the Indigenous groups who were to be direct recipients for which the funding was sought. Whilst it is not irregular for employees of the Respondent to have these connections, it is irregular for grant application arrangements in such circumstances, not to be communicated.

[90] Any argument as to the intent of the Applicant should only be considered in a determination of what standard the conduct reaches. In applying *Briginshaw v Briginshaw*,⁸⁹ it is found that whilst on the evidence, the Applicant's direct misrepresentation of the grant application having been approved by the CEO has been made out, there was no satisfactory evidence of related fraud to this conduct. That is, there is no evidence, in terms of the Applicant's intention retain, misuse or deny the funds to those organisations that the grant was applied for, and that the Applicant was connected with. In *Bista v Gladd Group Pty Ltd*,⁹⁰ Vice President Hatcher (as he then was) discussed the requirement for the conduct to be of a sufficiently serious nature to justify dismissal. In the circumstances of concealing the grant, this was sufficiently serious to justify dismissal.

[91] The Respondent relied on the Applicant's lack of authority to make the grant application in isolation, on behalf of the Respondent without the requisite delegation,⁹¹ knowledge or consent of Ms Symonds.⁹² This misrepresentation and necessary withdrawal of the application impacted on the Respondent's business reputation with the State Government as a recipient of grants.

[92] The application by organisations such as the Respondent's, for Government funded grants, is a serious commercial undertaking that clearly requires the application and declarations to be completed in a transparent, honest and reliable manner. The Respondent submitted:

*"Cape York Grassroots Aboriginal Corporation...is one of the most successful Aboriginal corporations in the state of Queensland. They hold 2,478,000-odd acres of property held for the benefit of their community, community outreach and traditional owners. That does not occur by being flippant with the application of signatures to governments who provide grants and funding for Cape York Grassroots Aboriginal Corporation to provide its much-needed services to its communities....there is no excuse or justification to jeopardise the relationship with the state government departments that has taken the Respondent years and years to form – 2019 and through COVID as well and probably on the back of longstanding relationships that have gone back decades."*⁹³

"No one material, with due authorisation, had knowledge that [Grant 2] was even submitted. They don't even know what the next steps have to be and when it has to be done by because they don't know it happened. It harms longstanding relationships."

*When the state government of Queensland deals with Cape York Grassroots Aboriginal Corporation there's an expectation that's been set that we do things a certain way, we get them done and we are consistent through that.*⁹⁴“

[93] The use by the Applicant of the Respondent organisation's and CEO's name without their knowledge, was a false statement of the material facts and an active misrepresentation to the State Government to secure the \$75,000 funding.

[94] Further, given the suggested conflict of interest with the roles the Applicant held with the Respondent and the other indigenous organisations (for whom the grant was sought), whilst this appears to be a common practice in the industry for people to be members of and/or hold positions for multiple land trusts or aboriginal corporations,⁹⁵ this requires an increased level of administrative transparency.

[95] In *Blyth Chemicals Ltd v Bushnell*⁹⁶ Starke, Dixon Evatt and McTiernan JJ stated:

“Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between the employer and employee, is a ground of dismissal.”

[96] Therefore, based on the lack of submissions and evidence to the contrary, I find there was not a conflict of interest in the Applicant making an application, (if properly approved) which would benefit these organisations. Further, given her role as Community Engagement Officer was to engage and support the local indigenous community groups, which appears to have a parallel purpose to the other organisations she is involved with, therefore there was no real conflict. However, given these connections between the organisations, there was a clear need for the Applicant's compliance and transparency with the grant application.

[97] There is no evidence from the Respondent that they would not have supported the application for Grant 2, even in circumstances where the Applicant has known connections with the recipient organisations. There was no evidence that the Applicant was seeking to misuse the funds or deprive the organisation of these funds. On that basis, on the relevant tests of conduct before the Commission, the Respondent has not made out a case for fraud.

[98] In *Newton v Toll Transport*⁹⁷ it was established that “the Commission is required to conduct an objective analysis of all relevant facts in determining – on the basis of the evidence in the proceedings before it – whether there was a valid reason to dismiss.” I accept that the Respondent has established that the Applicant's conduct in respect of Grant 1 was not condoned, by addressing it in email correspondence,⁹⁸ conversations⁹⁹ and sent her to the grant workshops to increase her capacity and remedy any areas of deficit, as outlined previously. This forms the part of the factual matrix and disciplinary backdrop to the termination, though not explicitly relied on in allegation 1. The alleged conduct of allegations 2 and 3 also form part of the factual matrix and show a pattern of inappropriate engagement with stakeholders of the Respondent.

[99] Further, in *Virgin Australia Airlines Pty Ltd v Blackburn*¹⁰⁰ it was summarised that prior warnings form part of the factual matrix that existed at the time of dismissal and the Commission must consider them when determining whether a valid reason existed for the termination. This is so even if those facts do not appear explicitly in the Show Cause notice. It becomes relevant to the overall weighing exercise performed with the section 387 factors in determining whether the decision was harsh unjust or unreasonable.

[100] The conduct in allegation 2 allegedly occurred during and subsequent to the execution of Grant 1. This conduct was also linked to the Applicant's inappropriate request for the Chairperson's digital signature, which was one factor in the Respondent's decision to send her to grant training. This was not dealt with formally at the time, as a complaint was not received by the Respondent (from the receptionist) until 20 September 2022. However, this conduct was discussed with the Applicant as set out in her witness statement.¹⁰¹ The Applicant argued she was not afforded procedural fairness as there were not sufficient particulars to formulate a proper response.¹⁰² As will be discussed next, I reject this assertion; the Applicant did not raise this as a barrier to her response at the time, despite being represented. Allegation 3 is said to have occurred on 11 October 2022 when the Applicant engaged with the external HR consultant investigating her concerns of bullying. Though these two matters were not formally raised with the Applicant prior to the Show Cause notice on 24 October 2022, I accept the Respondent's evidence that they put off their own investigation into her conduct until the Applicant's own concerns were investigated.¹⁰³ Further, the Applicant had presented a medical certificate which stated she was fit to work from home, which the Respondent reasonably recognised as personal leave and did not require her to work but she was able to engage with the consultant regarding her workplace complaint. This resulted in allegation 3. Ms Corcoran, the HR advisor did not give evidence at the hearing as she was external to the Respondent's organisation. There is no available evidence before the Commission to suggest that the consultant had any ulterior motive to provide a false account of the conversation that took place with the Applicant. I find that on the balance of probabilities, this conduct occurred. These instances of inappropriate conduct and prior issues with the grant 1 procedure, were considered with allegation 1 (Grant 2).

[101] On the balance of probabilities, I find that the conduct the Applicant engaged in in allegation 1 meets the definition of serious misconduct in section 12 of the Act and in Regulation 1.07, being conduct that is deemed to be "wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment" and "conduct that causes serious and imminent risk to the reputation, viability or profitability of the employer's business."¹⁰⁴ In this case, the submission of Grant 2 and its necessary withdrawal reasonably damaged the reputation of the Respondent with the State Government for future grant applications, which is commensurate with a significant breach of the trust and confidence of the employment relationship. The conduct made ongoing employment untenable and constituted a valid reason for the termination of the Applicant's employment.

[102] Given that the Respondent was only alerted to the Grant application by the receipt of the consultant's invoice, and subsequently discontinued the application,¹⁰⁵ no absolute conclusion can be drawn as to the Applicant's intentions for the grant funds or whether the grant would have been successful. As with Grant 1 it appears that signatories other than the Applicant would have been required to execute the grant, so the Respondent would have been notified at that point, accordingly, on the facts, whilst serious misconduct was substantiated, fraud was not made out.

[103] I reject the Applicant's argument that the Respondent's failure to have documented processes mitigates her conduct to such an extent as to not constitute a valid reason for dismissal. Mr Murray's supporting evidence on this point has been considered, however (given he was a past employee), its general nature and lack specificity to the allegation at hand, minimal weight can be attributed to it. The Respondent had organised support for the Applicant in the form of administrative assistance and organised her attendance at the grant writing workshops in June 2022 to better the Applicant's understanding of the grant process. Considering this, I find that the blame cannot be laid at the feet of the Respondent, when the Applicant, in isolation and of her own volition, made the application for Grant 2 without the knowledge of the CEO. Further, the communication of the grant was a fundamental requirement of her role when dealing with grants and should have been in the Applicant's contemplation.

[104] Finally, whilst the Respondent predominantly relied on allegations 1 for the termination, as discussed, allegations 2 and 3 did form part of the disciplinary backdrop this consideration was undertaken against. The Respondent has also shown they took reasonable steps to reinforce the manner in which they expected grant work to be carried out after Grant 1, by discussing this with her and organising the grant training attendance, which the Applicant appears to have ignored in applying for Grant 2 without consultation. An objective analysis of the factual matrix shows that the conduct of allegation 1 was not a single isolated act the Respondent reacted to, but in fact part of a pattern of related acts they had identified and attempted to rectify.

[105] As set out in the above assessment, the Applicant's conduct in filing Grant 2 is considered wilful and deliberate and caused serious and imminent risk to the Respondent's commercial reputation as a grant recipient. As such, that conduct is considered a serious misrepresentation of the Respondent's knowledge of the application, inconsistent with the continuation of employment, and amounted to serious misconduct. The lack of a finding of fraud does not detract from this finding nor that there was a valid reason for dismissal.

(b) and (c) whether the person was notified of that reason and was given an opportunity to respond to any reason related to the capacity or conduct of the person

[106] A proper consideration of section 387(b) 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).¹⁰⁶

[107] The case of *Crozier*¹⁰⁷ states that the reason must be notified to the employee prior to a decision to terminate the employment. I find that there was a valid notification of the reasons, the Show Cause correspondence of 24 October 2022 clearly addressed the nature of the allegations, and with sufficient particulars. The termination predominately turned on the substantiation of allegation 1, from which there was a significant breach of trust and confidence which supports the termination. However, sufficient particulars were also provided for the other two allegations which also formed the profile of matters that contributed to the dismissal.

[108] The Show Cause correspondence was clear in terms of the required date for the Applicant's response and that if no response was received, the Respondent would determine the matter on the available information. The Applicant did not refer to any deficiency of particulars as a reason for failing to respond to the Show Cause notice. There was no material

amendment to the allegations in the 8 November 2022 termination letter. The reasons relied upon in the termination letter clearly set out the basis for the termination in the absence of the Applicant's response. The Applicant was on notice of this.

[109] The Applicant submitted she was not provided a reasonable opportunity to provide a response; however, no evidence was put to suggest the Applicant had made a formal (or otherwise) request for an extension from the Respondent. The Applicant acknowledged receipt of the Show Cause notice on the same day. The correspondence from Supportah of 1 November 2022 informing the Respondent they acted on behalf of the Applicant, the response from the Respondent on 7 November 2022, or the further response from Supportah of 8 November 2022, do not make mention of a request for an extension to provide a response to the Show Cause notice. This is despite this correspondence being exchanged at the material time of the Applicant's required response.

[110] The correspondence from Supportah on 1 November 2022 appears on its face merely to notify the Respondent of their representation of the Applicant in an 'industrial dispute' for which specifics of that and 'other complaints or inquiries' would be provided 'by separate cover.' There is no reference to a request for an extension to respond to the Show Cause correspondence, therefore I accept the Respondent's submission of its understanding of the correspondence being that the Applicant had determined to make an alternative application to the Fair Work Commission in lieu of responding to the Show Cause process.¹⁰⁸

[111] The Applicant submitted that she was only provided a draft of her response to the Show Cause notice by Supportah on 4 November 2022, after the deadline to respond had passed. This confirms the Applicant's representative's receipt of the notification of the reasons in the Show Cause

[112] It is noted that the Respondent's representative erroneously took issue with Supportah's standing to represent the Applicant as per the exchange of correspondence. The documents were included with Ms Symonds' witness statement in submissions to the Commission, and the Applicant did not address this matter in her submissions. No covering emails were submitted, as such there is no ability to confirm if the Applicant was actually in receipt of the objection to her representation by the Respondent.

[113] It is noted that representation is a matter for the Commission to determine under section 596 of the Act, not relevant to an internal employment Show Cause process. The Commission does not take issue with the Applicant's initial representation, and in fact the Respondent's representative only raised such an objection on 7 November 2022, after the deadline of the Applicant's Show Cause response. As set out earlier, Supportah was later granted leave to represent the Applicant in the early stages of the application and were able to respond to the Show Cause or seek an extension to do so.

[114] In terms of mitigating circumstances, it is accepted that the Applicant placed reliance on her representative, however it is noted the Applicant had been engaged to undertaking senior administrative duties for the Respondent (on a salary of approximately \$100,000 per annum). Therefore, the due date of her response should have been clearly understood by her from the Show Cause correspondence. Whilst some reliance is understood to have been placed on her representative to respond, it is questionable why as a senior administrative official herself, the

Applicant would not have followed up, sought to have a draft of her response to be provided to her prior to the deadline, and why there was no action to submit a response to the Respondent. Particularly as she was on notice that the Respondent was contemplating termination of her employment due to the alleged conduct and that this consideration would proceed on the material if no response was received. I find that there is no evidence of a lack of opportunity to respond to the allegations, despite the representative's failure to provide her with a timely response, as there was no extension request or action on the Applicant's part to notify the Respondent of her circumstances at any point.

[115] I do not accept the Applicant's submission that allegations 2 and 3 were lacking sufficient particulars (documented in the Show Cause correspondence), to enable her to provide an adequate response. There was sufficient description of conduct to allow the Applicant to address the allegations and defend herself if she wished. There is also no evidence of the Applicant seeking better particulars to enable a more fulsome response prior to or after the Show Cause deadline. I find this weighs in the Respondent's favor.

[116] There was a seven working day period between 24 October 2022 (Show Cause notice) and 2 November 2022 (date for response), and the Applicant did not request an extension of time to respond, nor did she submit a response to the Respondent for consideration. The Applicant was on notice that in the absence of a response the Respondent would consider the matter on the material available. The Respondent did not issue the termination letter until 8 November 2022, three working days after the response deadline. During this period neither the Applicant nor her representative sought an extension or notified the Respondent of their continuing intention to respond despite the passing of the deadline. Therefore, I find that the Applicant was validly notified of the reason and given an opportunity to respond, however she elected not to do so. The Respondent, having set out the clear process in the circumstances was able to proceed to the dismissal.

(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

[117] The Respondent clearly set out in the Show Cause correspondence that the Applicant would be afforded the opportunity to have a support person present at the meeting to be organised after receipt of her response. The Applicant was asked to set out who she elected to bring (in addition to the submission of a Show Cause response).

[118] As the Applicant did not respond, there was no subsequent meeting, I therefore find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person.

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal

[119] Ms Symonds gave evidence that as part of the Applicant's role as a Community Engagement Officer, she was expected to be competent in grant writing and the associated processes to be able to assist the groups she worked with in engaging with the grant process. However, when the Applicant commenced employment, the Respondent found she was not as competent as the Respondent expected.¹⁰⁹

[120] Ms Symonds gave evidence that there were procedural issues with Grant 1,¹¹⁰ where only part of the procedure was followed but it “fell over” on the absence of the required signature on execution of the document.¹¹¹

[121] The purpose of subsequently sending the Applicant to the grant workshops was examined for clarity. Ms Symonds gave evidence it was to ‘upskill’ the Applicant and to remedy the procedural failings and lack of understanding identified with the Applicant’s procedures in Grant 1.¹¹² Ms Symonds also gave evidence that after the completion of the workshops, she believed the Applicant should have had a greater understanding of the procedural requirements for grant applications.¹¹³

[122] The Respondent relied on the Applicant’s conduct in not following the relevant procedure in relation to Grant 1 in setting out that the grant workshop attendance was clearly organised for the prior unsatisfactory conduct. In the circumstances, the evidence was that there was a direct correlation with the completion of Grant 1 and the Applicant’s required workshop attendance.

[123] Based on Ms Symonds’ evidence, I am of the view that the Respondent considered that the Applicant would benefit from the training to remedy the failures identified in the ‘procedural’ elements of the grant process. The Respondent was able to rely on this prior conduct, and their response to it (as per *Newton v Toll Transport Pty Ltd*,¹¹⁴ as set out previously), in consideration of the reasons for dismissal.

[124] The Applicant was therefore on notice of her poor performance and conduct, via her attendance at the grant training and the discussion with the CEO in relation to Grant 1 and the Applicant’s reference to fraud at that time. The CEO clearly required her to improve the discharge of these core duties. The Applicant’s actions in submission of Grant 2 demonstrated a complete disregard for the fundamental requirements of a grant application, in clear opposition to the recent training she had received. Filing the grant application without the CEO’s awareness or approval, while representing to the State Government that she had such, provided a significant breach of trust and confidence that was damaging to the reputation and standing of the CEO and the Respondent business, and represented serious misconduct.

[125] In all the circumstances, I find that the Respondent in discussing the failings of Grant 1 and organising the grant training, did warn the Applicant of the unsatisfactory conduct before dismissal.

(f) and (g) the degree to which the size of the employer’s enterprise and 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

[126] The parties agreed the Respondent was a small business as per the definition in the Act. It is noted that in accordance with *Hart v Forex 1 Pty Ltd ATF Trading Rental Trust*,¹¹⁵ the legislative intent of the Small Business Unfair Dismissal Code is to provide a simpler procedure for small businesses to navigate the unfair dismissal jurisdiction and for dismissal decisions by small business to not be subject to the same degree of review by the Commission if the Code has been complied with at the workplace level.¹¹⁶

[127] The Respondent did not provide a jurisdictional objection in relation to compliance with the Code in the Form F3 or complete the checklist at the time of dismissal.¹¹⁷ However, in terms of reviewing the termination process (in accordance with the intent of that Code), it has been taken into account that the Respondent was a small business employer with no dedicated in-house human resource personnel. The Respondent sought external assistance and followed a process in clearly setting out the allegations and response date. The Applicant however did not respond to such, but instead sought to initiate a separate dispute. There was no clarity to the dispute in circumstances, where the Applicant was then represented. The Respondent was not obligated to set aside the Show Cause process. The Applicant and her representative were aware of the requirement to respond and chose not to respond to the reasons on the Show Cause notice.

[128] In all the circumstances, I recognise that the Respondent was a small business employer with an absence of dedicated human resource management specialists in their enterprise. However, the procedures followed by the Respondent in effecting the dismissal, were clear and reasonable and did not cause the Applicant to be disadvantaged or to be subject to an unfair process.

(h) any other matters that the FWC considers relevant

[129] Whilst the Applicant had provided a medical certificate (for 3-31 October 2022), she had done so on the basis that she was fit to work from home. The Respondent relieved her of that work from home obligation, and she continued to communicate with Ms Symonds during this period. In those circumstances she was able to communicate with the independent investigator looking into her workplace culture complaint, undertaking a telephone meeting with the consultant on 11 October 2022.

[130] The investigator complained about the Applicant's demeanour in their phone meeting. Particulars of the complaint were provided to the Applicant. The Applicant was at liberty to discuss this allegation, but again chose not to and failed to respond to the Show Cause correspondence. This non-responsive conduct, by which the Applicant did not engage in the process, in circumstances where the process presented was fair, worked against the Applicant.

[131] Mr Murray and the Applicant gave evidence that she had not been subject to any prior performance or conduct issues during her period of employment.¹¹⁸ However, the Applicant was subject to three allegations in the Show Cause process, two of which involved her alleged interactions with co-workers or stakeholders of the Respondent within 9 months of the commencement of her employment. These have already been discussed as forming part of the factual matrix of the Respondent's consideration at the time of dismissal. Further, as outlined above, I consider the Applicant should have been aware that her performance or conduct was at issue (despite the lack of a formal warning), as a result of the discussions with the CEO and by the fact of being sent to grant workshops in June 2022. Despite there being no formal warning, there were direct discussions regarding the improper channels she attempted to use to seek the Chairperson's signature for Grant 1 as well as her manner in doing so. As such, her record cannot be considered unblemished with the Respondent and cannot be weighed in support of the Applicant.

CONCLUSION

[132] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the termination of the Applicant's employment was not harsh, unjust or unreasonable.

[133] Taking into account all of the facts and circumstances of this matter, I am satisfied, on the evidence provided, that the Respondent had a valid reason for terminating the Applicant's employment and that it did so in accordance a fair process. Her failure to gain approval for the grant application prior to filing it, and failure to communicate with the CEO despite receiving training after Grant 1 was serious misconduct, breaching the trust and confidence required in her employment. Therefore, the Applicant was not unfairly dismissed in accordance with the Act.

[134] Accordingly, for all the foregoing reasons, the Applicant's application pursuant to section 394 is dismissed.

[135] I Order accordingly.



COMMISSIONER

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¹ PN1431 and PN1435.

² Respondent's outline of submissions at [2].

³ PN855.

⁴ PN846.

⁵ PN850, Respondent Outline of Submissions at [4].

⁶ Witness Statement of Deleece Bowen, DB-03.

⁷ Witness Statement of Leon Bowyer at [12]-[15].

⁸ Witness Statement of Deleece Bowen at [55].

⁹ Witness Statement of Deleece Bowen at [59].

¹⁰ Witness Statement of Ms Deborah Symonds at [13].

¹¹ Witness Statement of Ms Deborah Symonds at [11].

¹² PN908, PN940.

¹³ Witness Statement of Deborah Symonds, DLS-04; Witness Statement of Deleece Bowen, DB-01.

¹⁴ PN623.

¹⁵ PN629.

¹⁶ PN693, PN699, PN700, PN706.

¹⁷ Witness Statement of Deborah Symonds at [15].

¹⁸ Witness Statement of Deborah Symonds, DLS-07.

¹⁹ Witness Statement of Deborah Symonds, DLS-07; Witness Statement of Deleece Bowen, DB-06.

²⁰ Witness Statement of Deborah Symonds, DLS-10, Witness Statement of Deleece Bowe, BD-08.

²¹ Witness Statement of Deborah Symonds, DLS-11.

²² Witness Statement of Deleece Bowen at [112] and [115].

²³ Witness Statement of Deborah Symonds, DLS-12.

²⁴ Witness Statement of Deleece Bowen at [111]-[117].

²⁵ Witness Statement of Deborah Symonds, DLS-13; Witness Statement of Deleece Bowen, DB-04.

²⁶ Witness Statement of Deborah Symonds, DLS-14.

²⁷ Witness Statement of Deleece Bowen at [98]

²⁸ Witness Statement of Deleece Bowen at [101].

²⁹ Witness Statement of Deborah Symonds at [63]-[66].

³⁰ Witness Statement of Deborah Symonds, DLS-16.

³¹ Witness Statement of Deborah Symonds, DLS-17.

³² Witness Statement of Deborah Symonds, DLS-18.

³³ PN50, PN71.

³⁴ *Newton v Toll Transport* [\[2021\] FWCFCB 3457](#).

³⁵ PN382, PN402.

³⁶ *Newton v Toll Transport* [\[2021\] FWCFCB 3457](#).

³⁷ PN330, PN421, PN430.

³⁸ PN450, PN492.

³⁹ Applicant Outline of Submissions at [28] referring to *Briginshaw v Briginshaw* [1938] HCA 34 at [3].

⁴⁰ [1938] HCA 34.

⁴¹ Ibid.

⁴² Applicant Outline of Submissions at [30].

⁴³ Applicant Outline of Submissions at [33]-[36] and [38]-[39].

⁴⁴ Applicant Outline of Submissions at [30] and [33]-[40].

⁴⁵ Applicant Outline of Submissions at [38]-[39].

⁴⁶ Witness Statement of Keron Murray at [7], [24] and [25].

⁴⁷ PN148, PN150, PN153, PN154.

⁴⁸ Witness Statement of Leon Bowyer at [9].

⁴⁹ Witness Statement of Leon Bowyer at [12]-[15].

⁵⁰ Applicant Outline of Submissions at [37].

⁵¹ Applicant Outline of Submissions at [40].

⁵² Applicant Outline of Submissions at [42]-[43].

⁵³ Witness Statement of Deleece Bowen at [30] and [105].

⁵⁴ Applicant Outline of Submissions at [44].

⁵⁵ Witness Statement of Deleece Bowen at [116]-[117].

⁵⁶ Applicant Outline of Submissions at [46], Witness Statement of Deleece Bowen at [6].

⁵⁷ (2000) 98 IR 137 at [70]-[73] (*'Crozier'*).

⁵⁸ Applicant Outline of Submissions at [52] citing *Bi-Lo Pty Ltd v Hooper* (1994) 53 IR 224 at 229 (*'Bi-Lo'*).

⁵⁹ Applicant Outline of Submissions at [54](b).

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- ⁶⁰ Applicant Outline of Submissions at [60]-[61], Witness Statement of Deleece Bowen at [64], [74], [78], [81], [118] and [119].
- ⁶¹ Witness Statement of Keron Murray at [28].
- ⁶² Respondent Outline of Submissions at [43].
- ⁶³ Respondent Outline of Submissions at [18].
- ⁶⁴ The Respondent relied on the Applicant's documented Grant 2 application, the admission by the Applicant in an email on 26 September 2022, a further email thread of 4 October 2022 (where no mention is made of the Grant application), the Show Cause correspondence of 24 October 2022 and the 7 November 2022 correspondence from the Respondent's representative to Supportah.
- ⁶⁵ Respondent Outline of Submissions at [19]-[21].
- ⁶⁶ PN 1242.
- ⁶⁷ Respondent Outline of Submissions at [23]-[26].
- ⁶⁸ Respondent Outline of Submissions at [35].
- ⁶⁹ Respondent Outline of Submissions at [30]-[31].
- ⁷⁰ Respondent Outline of Submissions at [39]-[40].
- ⁷¹ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].
- ⁷² *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- ⁷³ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- ⁷⁴ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- ⁷⁵ Ibid.
- ⁷⁶ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ⁷⁷ *North v Television Corporation Ltd* (1976) 11 ALR 599.
- ⁷⁸ *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWC FB 1033 at [36].
- ⁷⁹ *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333.
- ⁸⁰ [2013] FWC FB 6191 at [42].
- ⁸¹ [2015] FWC FB 1033 at [34], in citing *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117.
- ⁸² (1938) 60 CLR 336.
- ⁸³ [2018] FWC 3284 at [55].
- ⁸⁴ [2003] HCA 24.
- ⁸⁵ Section 408C(1)(d) and (e).
- ⁸⁶ Witness Statement of Deborah Symonds, DLS-13 at allegation 2 and allegation 3; Witness Statement of Deborah Symonds, DLS-12; Witness Statement of Deleece Bowen, DB-07, DB-09 and DB-10.
- ⁸⁷ Witness Statement of Deborah Symonds, DLS-07; Witness Statement of Deleece Bowen, DB-06.
- ⁸⁸ Witness Statement of Deleece Bowen at [50].
- ⁸⁹ [1938] HCA 34.
- ⁹⁰ [2016] FWC 3009.
- ⁹¹ PN1163, PN1165, Witness Statement of Deborah Symonds at [16]-[17].
- ⁹² PN1190.
- ⁹³ PN1451.
- ⁹⁴ PN1458.
- ⁹⁵ PN440, PN623, PN629 and PN829; Witness Statement of Leon Bowyer at [4].
- ⁹⁶ [1933] HCA 8.
- ⁹⁷ [2021] FWC FB 3457 at [76].
- ⁹⁸ Witness Statement of Deborah Symonds, DLS-07.

⁹⁹ Witness Statement of Deleece Bowen, DB-03; Witness Statement of Leon Bowyer at [12]-[15].

¹⁰⁰ [\[2022\] FWC FB 232](#) at [78].

¹⁰¹ Witness Statement of Deleece Bowen at [53]-[56] and DB-03.

¹⁰² Applicant Outline of Submissions [42]-[43].

¹⁰³ Witness Statement of Deborah Symonds at [37]-[38]; PN1070 and PN1221.

¹⁰⁴ *Fair Work Regulations 2009* (Cth) rr1.07(2)(a) and 1.07(2)(b)(ii).

¹⁰⁵ PN978.

¹⁰⁶ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWC FB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWC FB 533](#) at [55].

¹⁰⁷ (2000) 98 IR 137 at [73].

¹⁰⁸ PN1085.

¹⁰⁹ PN1060.

¹¹⁰ PN1027.

¹¹¹ PN1059.

¹¹² PN1061, PN1046, PN1057, PN1058

¹¹³ PN1039, PN1049.

¹¹⁴ [\[2021\] FWC FB 3457](#) and *Virgin Australia Airlines Pty Ltd v Blackburn* [\[2022\] FWC FB 232](#) at [78].

¹¹⁵ [\[2018\] FWC 942](#).

¹¹⁶ *Ibid* at [75].

¹¹⁷ Respondent Outline of Submissions at [4]; PN850.

¹¹⁸ Witness Statement of Deleece Bowen at [121], Applicant Outline of Submissions at [60], Witness Statement of Keron Murray at [28].