



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Umit Deniz**

v

**Alvaro Transport Pty Ltd**

(U2022/9596)

DEPUTY PRESIDENT MILLHOUSE

MELBOURNE, 30 MAY 2023

*Application for an unfair dismissal remedy*

[1] Mr Umit Deniz has made an application to the Commission for an unfair dismissal remedy under s 394(1) of the *Fair Work Act 2009* (Cth) (Act). Mr Deniz alleges he was unfairly dismissed from his employment with Alvaro Transport Pty Ltd.

[2] The respondent denies that Mr Deniz was unfairly dismissed.

[3] For the reasons that follow, I have concluded that Mr Deniz's dismissal was unfair.

## **Hearing and witnesses**

[4] Mr Deniz's application was the subject of a hearing before me on 1 March and 7 March 2023.<sup>1</sup> Mr Deniz gave evidence on his own behalf, and a character reference was provided on his behalf by Mr Russell Watson (Mr Deniz's neighbour).<sup>2</sup> On each occasion, Mr Deniz appeared together with an interpreter of the Turkish language.

[5] The respondent led evidence from Ms Melissa Thatcher - National HR & WHS Manager, Mr Vince Trombi - Victorian State Manager, and Ms Teresa Ifo - Operations Supervisor.

## **Initial matters**

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

[7] It is not in dispute, and I am satisfied that the application was made within 21 days of the dismissal taking effect; Mr Deniz was protected from unfair dismissal within the meaning of s 382 of the Act; the *Small Business Fair Dismissal Code* did not apply to Mr Deniz's dismissal; and the dismissal did not arise by way of redundancy and so it was not a case of genuine redundancy.

## **Background and factual findings**

### ***Employment***

[8] The respondent provides transport and logistics services.

[9] Mr Deniz commenced employment with the respondent in the role of Grade 4 HR Truck Driver on 15 February 2022.<sup>3</sup> Mr Deniz operated out the respondent's site in Laverton, Victoria.<sup>4</sup> His role involved the delivery of goods by truck to customers of the respondent on its behalf.<sup>5</sup>

[10] Upon the commencement of Mr Deniz's employment, a payroll error occurred which meant that Mr Deniz did not receive his salary on the date payment fell due. The error arose when Mr Deniz's details were being submitted to the payroll system. Mr Deniz telephoned Ms Thatcher at approximately 6:00pm to advise that he had not been paid that day. Ms Thatcher instructed Mr Deniz to wait until 9:00pm on the basis that business banking is "not instant." At 9:00pm, Mr Deniz again telephoned Ms Thatcher to advise that he remained unpaid. Mr Deniz was advised that the issue would be addressed the following day.<sup>6</sup> Despite attempts to resolve the matter, the error was not identified and Mr Deniz's salary remained unpaid for approximately three days. Ms Thatcher gave evidence that Mr Deniz yelled at her and was "telling me it was my fault and how could we not get it right. And I did have to tell him, at that stage, stop yelling at me."<sup>7</sup> When the payment issue was resolved, Ms Thatcher said she telephoned Mr Deniz to admit that the issue arose on account of her mistake and apologised for it.

[11] On 18 March 2022, Mr Deniz was paid a bonus for his work and was sent an email from Ms Thatcher which thanked him for his hard work and commitment.<sup>8</sup>

### ***20 April 2022 incident***

[12] On 20 April 2022, an incident occurred while Mr Deniz was completing a delivery to a regular customer of the respondent (Customer). Mr Deniz described the incident as "the argument."<sup>9</sup> While deliveries to the Customer were not ordinarily a part of Mr Deniz's delivery route,<sup>10</sup> Mr Deniz had delivered to the Customer on several occasions.

[13] Mr Deniz gave evidence that issues consistently arose when he was tasked with delivering products to the Customer. Mr Deniz said that the Customer never had a forklift driver available to unload the delivery, the empty pallets Mr Deniz was required to pick up were not prepared, and the Customer would make degrading remarks about Mr Deniz in front of her daughter.<sup>11</sup> Mr Deniz contends that these issues hindered his capacity to complete his delivery route in a timely way and offended him personally.

[14] On 20 April 2022, Mr Deniz recalls being yelled at and being called "bad names" by the Customer.<sup>12</sup> Mr Deniz does not provide a detailed account of the moments leading to this incident, but indicates that an argument occurred as a result of there being no forklift driver available to facilitate the delivery.<sup>13</sup> Mr Deniz said that the Customer called him "faceless," and said that Mr Deniz would "never smile or laugh."<sup>14</sup> Mr Deniz gave evidence that he did not want to "stoop to her level" and "communicate in that manner" as he considered that the

Customer was under pressure which she took out on him.<sup>15</sup> Mr Deniz gave evidence as to the following exchange occurring:<sup>16</sup>

“ I was in front of their roller door, and - and I had said to them, Look, you know, I will assist you, because, you know, I can operate the forklift, and to help you out', and - and that's where the - I was being abused and everything, too. And the daughter even questioned me, saying, you know, 'Okay, can I see your licence?' But, I mean, look, I said to them, 'You're taking up my time. I'm trying to be helpful here, and you just - you guys aren't cooperating.’”

[15] Mr Deniz says that “...[t]he actual complaint itself was made on the spot, and we - we lacked communication, and then she started yelling and saying that 'I'm going to call the - make a complaint'.”<sup>17</sup>

[16] Mr Deniz left the Customer’s site and telephoned Mr Trombi. Mr Deniz said to Mr Trombi that the Customer is “screaming and yelling at me.”<sup>18</sup> Mr Trombi advised Mr Deniz to leave the Customer’s site without unloading the goods. Mr Deniz recalls being distressed after the situation and crying.<sup>19</sup> Mr Deniz attempted to make two more deliveries but was too upset to do so, and Mr Trombi advised him to return the goods to the respondent’s Laverton site and finish work for the day.<sup>20</sup> Mr Deniz’s account in this respect is consistent with Mr Trombi’s evidence, as follows:<sup>21</sup>

“...on the day of the delivery that Umit did on [sic] 21 April he did call me in a very distressed state saying that, you know, the lady there was sort of attacking him and so on. I was very concerned over Umit at that time because, you know, he was very distressed and so on, and I just wanted to make sure that he got back to work safely and he didn't have an accident on the way back, and so on.”

[17] Ms Ifo gave evidence that Mr Deniz approached her in the car park when he was on his way home after the incident. Mr Deniz told her that he was terrified during the altercation and that the Customer had thrown a box at him.<sup>22</sup> However, Mr Deniz did not give any direct evidence about the Customer throwing a box during the hearing.

[18] Ms Thatcher gave evidence that she received a telephone call from the Customer on 20 April 2022.<sup>23</sup> There is no evidence before the Commission as to what was said during this call. However, the termination letter issued to Mr Deniz by the respondent summarises the phone call in the following way:<sup>24</sup>

“As discussed, on 20th April 2022 we received phone call from [the Customer] to lodge a formal complaint in relation to your alleged treatment of one of their staff members that day. We were advised that you were very rude and aggressive towards a staff member to the point where you yelled at them and made them cry. On that day you were turned away from the site and were not able to complete your delivery. They had also banned you from site effective immediately.”

[19] Ms Thatcher contacted Mr Trombi to advise him of the Customer complaint. Mr Trombi alerted Ms Thatcher to his conversation with Mr Deniz.<sup>25</sup>

### *Meeting on 21 April 2022*

[20] A meeting was convened at the respondent's worksite on 21 April 2022, the day following the incident. The meeting was attended by Mr Deniz, Mr Trombi and Ms Ifo.<sup>26</sup> Ms Thatcher did not attend the meeting as she is based in Sydney.<sup>27</sup> Mr Trombi described the meeting as a "chat."<sup>28</sup>

[21] During the meeting, Mr Deniz requested not to return to the Customer's site. Mr Trombi said that he advised Mr Deniz that he would not be required to attend the Customer's site in the future and informed Mr Deniz that the Customer had made a complaint.<sup>29</sup> Mr Trombi said that Mr Deniz denied the allegations made by the Customer about his conduct,<sup>30</sup> and recalls Mr Deniz being upset.<sup>31</sup> Mr Deniz said that during the meeting, Mr Trombi advised him that "[t]here's no issue."<sup>32</sup> Mr Trombi accepted that he said "don't worry about it" to Mr Deniz because the respondent gets complaints from customers "all the time."<sup>33</sup>

[22] Mr Trombi gave evidence that he considered that to be the end of his involvement in the matter.<sup>34</sup>

[23] Mr Deniz said that after the 21 April 2022 meeting, the respondent did not speak to him about the 20 April 2022 incident again.<sup>35</sup> I accept this evidence, which is consistent with the respondent's position. Mr Deniz said that he considered that the respondent believed or understood him, and that "everything was okay" with his employment.<sup>36</sup> Mr Deniz was not required to return to the Customer's site for the remainder of his employment.<sup>37</sup>

[24] Mr Deniz subsequently returned to normal duties.<sup>38</sup> The respondent contends that it took this step because the Customer's allegations and Mr Deniz's version of events were not consistent and there was no proof, or prior complaints, in relation to Mr Deniz's conduct.<sup>39</sup> However, Ms Thatcher gave evidence that the respondent awaited a written complaint from the Customer before investigating further.<sup>40</sup>

### *The workplace injury*

[25] On 2 May 2022,<sup>41</sup> Mr Deniz was involved in a workplace incident at a customer's worksite. Mr Deniz suffered a serious injury.

[26] The injury occurred while Mr Deniz was facilitating a delivery. A forklift was being driven by an employee of the customer. Mr Deniz gave evidence that he identified a safety issue and said to the forklift driver, "stop, I will move the truck more so you can safely pull the pallets out." Mr Deniz said he moved the truck and walked to the side of the truck where the forklift was stationed to remove the pallet. It appears that Mr Deniz was struck by the customer's forklift and his leg was "crushed."<sup>42</sup>

[27] As a consequence of the injury, Mr Deniz's leg was in plaster for two months,<sup>43</sup> and he was unable to perform his normal duties as a truck driver.<sup>44</sup> Mr Deniz lodged a workers' compensation claim<sup>45</sup> which was accepted. Mr Deniz's workers compensation payments were ongoing at the time of the hearing.<sup>46</sup>

*Customer's written complaint*

[28] On 20 May 2022, while Mr Deniz remained in hospital following the workplace injury, the respondent received a written complaint from the Customer regarding the incident with Mr Deniz on 20 April 2022.

[29] The complaint was sent to Ms Thatcher by email and states as follows (formal parts omitted, text otherwise unedited):<sup>47</sup>

“I am sorry for my late reply

Our issues with your drive occurred over several months  
I only started with the company back in December, I believe this started around February, as he was not our first drive I can remember

He was VERY unfriendly

Every order he would complain

- 1) You are so unorganised – Can I let you know we are never informed that your driver will be doing a deliver
- 2) You never have a Loscam pallet - As I explained to him on several occasions, we are unable to get an account with Loscam - Due to Loscam having a lack of pallets
- 3) I always have to wait - This only happened once when I was off site and I could not get hold of someone to remove the pallet - He had to wait 9 minutes - This was the first time he made one of the staff cry from his aggression

We are only a small company and he had insulted the owner of the company, myself and 3 of the staff

The last time he did a delivery to us was the time he made one of my staff cry and was very aggressive, therefore I turned him away as I was not going to have the staff or myself spoken to like that by him

All your other drivers have been very lovely, and I would love to have [redacted employee name] back any time

I hope this helps and if you need more information, please feel free to contact me”

[30] On one reading of the complaint, it suggests that Mr Deniz caused employees of the Customer to cry on two occasions. The email is, in my view, ambiguous in this respect. However, the parties have only addressed a single incident occurring on 20 April 2022 and there is no evidence of a second altercation between the Customer and Mr Deniz of this kind. Accordingly, I proceed on the basis that there is only one incident in which an employee of the Customer cried, this being the altercation that occurred on 20 April 2022.

[31] Mr Trombi gave evidence that he understood from Ms Thatcher that the Customer complaint was “fairly strong” because the Customer “apparently got something physically thrown at her” by Mr Deniz.<sup>48</sup> However, there is no evidence that supports a finding that Mr Deniz threw an item (at the Customer or otherwise) during the 20 April 2022 incident. Rather, the respondent submits as follows:<sup>49</sup>

“The matter of the box being thrown at the customer was not brought up in his termination, because the customer had only merely mentioned that to [Ms Thatcher] over the phone. When the written complaint came through there was no mention of the box and therefore we did not refer to that as we only had a phone conversation regarding that.”

[32] The Customer’s written complaint makes no reference to such an event, nor does the evidence of Ms Thatcher. On the contrary, Ms Ifo’s evidence is that she was advised by Mr Deniz that the Customer had thrown a box at him on 20 April 2022. Accordingly, I do not find that Mr Deniz threw an item during the 20 April 2022 incident.

[33] Upon receipt of the complaint on 20 May 2022, the respondent did not raise the complaint with Mr Deniz or take any further action. The respondent contends that it refrained from taking further steps because it “did not want to provoke further negative behaviour from him.”<sup>50</sup> Mr Deniz was absent from work at the time the complaint was received, on account of the workplace injury. The respondent’s concerns regarding Mr Deniz’s behaviour are explored below.

#### *Concerns regarding Mr Deniz’s behaviour*

[34] Ms Thatcher, Mr Trombi and Ms Ifo each gave evidence that they held concerns about Mr Deniz’s behaviour following his workplace injury on 20 April 2022.<sup>51</sup>

[35] Ms Thatcher gave evidence that Mr Deniz became “very aggressive, his behaviour was very erratic, he was very abusive, and he was...threatening towards me.”<sup>52</sup> Ms Thatcher said that Mr Deniz refused to deal with her on the phone, would yell at her and would request to deal only with Mr Trombi.<sup>53</sup> When Ms Thatcher attempted to progress matters concerning Mr Deniz’s workers compensation claim, Ms Thatcher says that Mr Deniz would “yell over the top of me, tell me that I’m never to call him again, tell me that he was going to come and find me in Sydney...This behaviour continued throughout the whole of the claim.”<sup>54</sup>

[36] Ms Thatcher said that the respondent arranged for a third-party provider, Workers Risk, to speak with Mr Deniz due to concerns about his behaviour. Ms Thatcher said that the representative from Workers Risk declined to further deal with Mr Deniz because the representative was being yelled at by Mr Deniz,<sup>55</sup> although there is no direct evidence of this before the Commission. Ms Thatcher also referred to Mr Deniz being offered assistance through Nabenet but Ms Thatcher understands that Mr Deniz “went through” five different case managers.<sup>56</sup> Ms Thatcher expressed concern to Nabenet that the respondent could not “run the risk” of allowing a person demonstrating “mental health issues and very erratic behaviour – quick to anger – into a heavy vehicle.”<sup>57</sup>

[37] Ms Thatcher’s evidence is that the behaviour described in the Customer complaint was “very consistent” with her observation of Mr Deniz’s behaviour after the workplace injury.

When asked to describe the specific behaviour that gave rise to concern, Ms Thatcher provided the following examples to illustrate Mr Deniz's behaviour with others:

- (a) Mr Deniz was "very abusive" to the respondent's female employees who answered the phone in the office but was "more calm" when speaking with a male.<sup>58</sup>
- (b) Mr Deniz is alleged to have sent emails to payroll staff of the respondent "telling them how...he wanted to speak to Mario Alvaro, and that I was unfairly treating him."<sup>59</sup> Ms Thatcher said that she contacted the police regarding the harassment.<sup>60</sup> It is noted that the police advised Ms Thatcher that there was nothing that they could do as Mr Deniz had not "actually acted out."<sup>61</sup>

[38] The respondent has produced a series of redacted emails which variously refer to concerns that have been raised by unknown persons in relation to Mr Deniz's manner of engaging with them.<sup>62</sup> However, the emails are, for the most part, not dated and the author of each email is unclear. In the absence of any explanation from the respondent as to the context of these emails, I do not place any weight on their content.

[39] Ms Thatcher considered that Mr Deniz had "a very personal vendetta" against her and made threats to her that caused her to feel "fearful."<sup>63</sup> When asked to explain the threats that were made to her, Ms Thatcher said that Mr Deniz did not generally make threats in writing but would do so by telephone.<sup>64</sup> Ms Thatcher provided the following examples to illustrate her concerns:

- (a) Mr Deniz said to Ms Thatcher during a telephone call on an unidentified date prior to 25 May 2022 to "just wait until he sees me in Melbourne next."<sup>65</sup>
- (b) During a telephone call on 25 May 2022, Ms Thatcher said that Mr Deniz "told me he was going to come to Sydney to find me."<sup>66</sup> Ms Thatcher said that she responded by sending Mr Deniz a text message at 4:16pm that day which stated, amongst other things.<sup>67</sup>

"As I also clearly expressed in today's conversation as well as in earlier conversations dating back to 11/05/22, I will not tolerate you yelling at me, being abusive and aggressive towards me, swearing at me or using threatening language towards me when I am trying to help and explain your legislative requirements as per Workers Compensation requirements and legislation.

Based on the above behaviours now occurring on multiple occasions, any correspondence between you and I can be done through the insurer, or via email, or text messages.

Also, as discussed with you, please do not call or text me outside of business hours. I am available by the above mentioned communication methods Monday to Friday, between 8.30am to 5.00 only."

- (c) Ms Thatcher said that at the conclusion of a meeting regarding Mr Deniz's return to work assessment Mr Deniz said, "I'll deal with Mel later" in reference to Ms Thatcher. Ms Thatcher regarded this as a further threat.<sup>68</sup>

**[40]** Ms Thatcher says that she was contacted by Mr Deniz outside of business hours on the following occasions:<sup>69</sup>

- |                                |  |
|--------------------------------|--|
| (a) Monday 28 February 2022    | 1 text message at 6:38am                   |
| (b) Wednesday 2 March 2022     | 3 text messages between 9:16pm and 9:27pm  |
| (c) Thursday 3 March 2022      | 1 missed call at 7:44am                    |
| (d) Tuesday 24 May 2022        | 2 text messages at 6:55pm                  |
| (e) Wednesday 10 August 2022   | 3 text messages at 5:50pm                  |
| (f) Saturday 17 September 2022 | 1 text message at 12:12pm                  |
| (g) Sunday 18 September 2022   | 34 text messages between 8:24am and 4:31pm |

**[41]** The specific text messages sent by Mr Deniz to Ms Thatcher on each of the occasions set out at [40] above are not in evidence. Instead, Ms Thatcher produced a document which extracts the content of four text messages that were sent to her by Mr Deniz on 17 September, 18 September, 7 October and 14 October 2022.<sup>70</sup> Ms Thatcher has highlighted certain aspects of those text messages although I have reviewed the messages in their entirety.

**[42]** While I accept that the 14 October 2022 message in particular uses foul and offensive language to describe Ms Thatcher, each of the four text messages post-date the dismissal on 15 September 2022. Accordingly, these text messages are not demonstrative of facts that existed at the time of Mr Deniz's dismissal.<sup>71</sup> Similarly Ms Thatcher's concerns with respect to the contact she received from Mr Deniz outside of working hours on 17 and 18 September 2022 are also matters that post-date the dismissal.

**[43]** I understand that the respondent relies upon the matters at [40] above to demonstrate that Mr Deniz sent text messages and made a telephone call to Ms Thatcher outside of ordinary working hours. However, I am unable to give this contact any meaningful weight in circumstances where:

- (a) Mr Deniz was not specifically requested by Ms Thatcher not to contact her outside of business hours until 25 May 2022 (see [39](b) above);
- (b) Ms Thatcher was Mr Deniz's nominated contact person for matters concerning his workers compensation claim; and
- (c) there is no evidence before the Commission regarding the content of these text messages.

**[44]** Mr Trombi gave evidence that he did not personally experience any erratic, abusive or aggressive behaviour by Mr Deniz, but he had been advised by Ms Thatcher that she was in receipt of abusive texts from Mr Deniz.<sup>72</sup> Mr Trombi said that he advised Mr Deniz to "try and work with us and not be abusive" to Ms Thatcher.<sup>73</sup>

**[45]** Ms Ifo's evidence as to her personal experience of Mr Deniz's behaviour is similarly limited. Mr Ifo said that she saw Mr Deniz following the conclusion of a meeting that Mr Deniz attended with Ms Thatcher, Mr Trombi and a representative from Nabet (an injury



management and occupational services provider) regarding the performance of a return-to-work assessment. Following this meeting, Ms Ifo said that Mr Deniz came into her office and was a “bit aggressive” in his tone and said, “why don't you answer my calls?” and “you're my manager, you should be answering my calls.”<sup>74</sup> Ms Ifo acknowledged that she had not answered Mr Deniz's telephone calls because she had been busy.<sup>75</sup> In these circumstances, Ms Ifo's evidence as to this exchange with Mr Deniz does not demonstrate any relevant concern regarding Mr Deniz's behaviour.

### *Events following the workplace injury*

[46] Mr Deniz gave evidence that he was struggling in his personal life because of the injury, the workers' compensation claim and his concerns about his financial situation. The injury did not heal well, in part due to Mr Deniz having diabetes and the surgical choices made in treating the injury, and the pain subsisted longer than initially anticipated.<sup>76</sup>

[47] Mr Deniz said his wife, who had experienced her own serious health issues, indicated that she may go to her parents' home which caused Mr Deniz to feel like he would be “deserted.”<sup>77</sup> Mr Deniz said that his wife “left eventually and I was alone.”<sup>78</sup>

[48] In or about August 2022, Mr Deniz's workers compensation payments were reduced to 80% of his full-time salary. The respondent relies upon an email which suggests that Mr Deniz was “threatening” to return to work, but the email does not identify the author and there is no evidence before the Commission as to the nature of this “threat.”<sup>79</sup>

[49] On 8 September 2022, Mr Deniz was issued with a certificate by his general practitioner which certified him as fit for pre-injury employment.<sup>80</sup> This led to the meeting referred to at [45] above between Mr Deniz, Ms Thatcher, Mr Trombi and a representative from Nabetnet for the purposes of a return-to-work assessment.<sup>81</sup> While the parties could not identify the date of this meeting,<sup>82</sup> I find that the meeting occurred between 8 September and 14 September 2022, as Mr Deniz's employment ended on 15 September 2022.

[50] Ms Thatcher gave evidence that she was scared to travel from Sydney for this meeting in Melbourne with Mr Deniz. She arranged for two male employees to pick her up and drive her to the office.<sup>83</sup> Mr Deniz's capacity to return to work was discussed at the meeting but it became apparent that the certificate from Mr Deniz's general practitioner was insufficient. Mr Deniz was required to obtain a fitness for work certificate from his treating practitioner at Footscray hospital. The hospital did not certify Mr Deniz as fit to return to work, and at the time of the hearing of this matter on 1 March 2023 Mr Deniz was yet to be cleared to return to work in any capacity.<sup>84</sup>

### *The dismissal*

[51] Mr Deniz was dismissed by the respondent on 15 September 2022. It is not in dispute that Ms Thatcher telephoned Mr Deniz prior to sending him the termination letter to advise him of the respondent's decision. Mr Deniz gave evidence that he had expected the call from Ms Thatcher to be about his return to work, but it was “quite the opposite.”<sup>85</sup>

[52] Ms Thatcher said that while the respondent understands that “just a phone call is not the right procedure,” the respondent proceeded in this way because “if we had called him and given him notice that we were setting up a meeting to discuss these matters and his employment – that [Ms Thatcher] would have been non-stop harassed on the phone in the lead-up to that meeting.”<sup>86</sup>

[53] Mr Deniz gave evidence that during the telephone call he said to Ms Thatcher, “I’m glad you called because, you know, I’m ready to go back to work.” Mr Deniz recalls Ms Thatcher saying words to the effect of, “we are actually going to be terminating you.” Mr Deniz said that he was advised that he had been terminated on account of the complaint made by the Customer about him and his “attitude.”<sup>87</sup> Mr Deniz said he attempted to explain the 20 April 2022 incident, but he felt that Ms Thatcher did not want to listen to him.

[54] Mr Deniz received a termination letter by email the same day. The termination letter provides as follows:<sup>88</sup>

“We refer to the discussion on 15th September 2022 and advise that your position of HR Driver with Alvaro Transport Pty Ltd, ABN 13 100 431 632 has been terminated.

As discussed, on 20th April 2022 we received phone call from Topcat Healthcare to lodge a formal complaint in relation to your alleged treatment of one of their staff members that day. We were advised that you were very rude and aggressive towards a staff member to the point where you yelled at them and made them cry. On that day you were turned away from the site and were not able to complete your delivery. They had also banned you from site effective immediately.

You were asked about the alleged incident by Vince Trombi and Terisa Ifo the following day on the 21st April 2022 where you denied being aggressive towards the customers staff member.

On the 20th May 2022, the customer sent an email to myself in relation to the above mentioned complaint. They also noted in the email that your behaviour during each visit was very unfriendly, and you would always complain to them stating they were “so unorganised”, that they “never had a Loscam pallet” and that you “always had to wait”.

It has been noted that upon your employment with Alvaro Transport Pty Ltd, you were made aware of AHR 008 Employee Policy and Induction Handbook Section 4; CODES OF BUSINESS CONDUCT, sub-section 4.1; EXPECTED BEHAVIOURS (copy attached)

Umit, based on AHR 008 Employee Policy and Induction Handbook we have decided to terminate your employment for the following reasons:

- Breaches of Alvaro Transport policies and procedures
- Acts of violence, bullying, harassment or discrimination; including use of foul or abusive language

You may seek information about minimum terms and conditions of employment from the Fair Work Ombudsman. If you wish to contact them, you can call 13 13 94 or visit their website at [www.fairwork.gov.au](http://www.fairwork.gov.au).”

(emphasis omitted)

[55] Ms Thatcher’s evidence is that when Mr Deniz obtained the fitness for work certificate from his general practitioner on 8 September 2022, the respondent “then had to make a decision on what we needed to do. And based on the evidence that we received from the customer complaining and the behaviours that matched that complaint, we terminated his employment.”<sup>89</sup>

### *Reasons for dismissal*

[56] The termination letter specifies the reasons for dismissal as “breaches of Alvaro Transport policies and procedures” and “acts of violence, bullying, harassment or discrimination; including use of foul or abusive language.” It is apparent that these reasons are generic statements. The termination letter only refers to the incident with the Customer on 20 April 2022 as the fact giving rise to the reasons for the dismissal.

[57] The respondent submits that it dismissed Mr Deniz for misconduct.<sup>90</sup> Consistent with the letter of termination, it submits that the misconduct comprised of:<sup>91</sup>

- breaches of Alvaro Transport policies and procedures; and
- acts of violence, bullying, harassment or discrimination; including use of foul or abusive language.

[58] The respondent’s Employee Policy and Induction Handbook (Policy) applied to Mr Deniz throughout his employment. The respondent relies upon the Policy in support of its contention that Mr Deniz breached its policies and procedures. The respondent has not identified which aspects of the Policy Mr Deniz was non-compliant with. Nevertheless, section 4 of the Policy deals with “codes of business conduct.” It identifies at section 4.1 “[b]ehaviour that is considered serious misconduct and could lead to instant dismissal” including “[a]cts of violence, bullying, harassment or discrimination; including use of foul or abusive language.”<sup>92</sup> I find, having regard to the termination letter, that the respondent relies upon this specific aspect of section 4.1 of the Policy in support of its contention that Mr Deniz’s conduct breached its policies and procedures.

[59] The respondent submits that Mr Deniz’s misconduct occurred “20/04/2022 and ongoing.”<sup>93</sup> When asked why the termination letter referred only to the 20 April 2022 incident when the respondent’s position was that Mr Deniz’s misconduct was “ongoing” after that date, Ms Thatcher gave the following evidence:<sup>94</sup>

“We found with Umit that if we gave him too much information he got very confused. We did not want to confuse him with his injury. We didn't want him to think that we had terminated him because of the injury, because we didn't terminate him because of the injury. And with Umit we found that we had to find the one reason and focus on that one reason.”

**[60]** The following further exchange took place with Ms Thatcher regarding the reason(s) for Mr Deniz's dismissal:<sup>95</sup>

Deputy President: And so if you were asked today to explain what the reason for termination was, what would you say to that?

Ms Thatcher: It was the behaviours that he expressed when he dealt with the customer. So it was – it was not following our policies and procedures and for the acts of violence, for the harassment.

Deputy President: Against the customer?

Ms Thatcher: For this particular one, yes. So, yes, that's what we did tell him, but if I was to say to you now why he was terminated it was that, and then the evidence that backed up that was this – the behaviours that he displayed towards myself and others. So that was basically – because when we had the conversation with Umit he denied it, we hadn't had a customer complaint before, so we had to take it on fact value. So, what we did was we removed him from that site, we spoke to him about it. And then we said, at the time, we had said that we were waiting on the customer to come back with their formal written complaint and then we'd investigate. During that time Umit had the accident, was off work, and that's when the behaviours that he displayed were - matched what the customer had said to us. So that, for us, was enough evidence..."

**[61]** Consistent with Ms Thatcher's evidence, the respondent's submissions address both the Customer complaint following the 20 April 2022 incident, and Mr Deniz's behaviour following his workplace injury. The respondent contends that Mr Deniz's behaviour during this time was consistent with the Customer complaint "and based on this, we believed that this was sufficient evidence to determine the complaint was legitimate."<sup>96</sup> The respondent also submits that Mr Deniz's "behaviour was getting worse which in turn lead to his termination for misconduct."<sup>97</sup>

**[62]** The respondent further submits that it made a decision to terminate Mr Deniz's employment to ensure the safety and well-being of (a) its employees, in particular Ms Thatcher,<sup>98</sup> and (b) the community at large, in light of the respondent's obligation to ensure that a person it regards to be demonstrating "mental health issues and very erratic behaviour – quick to anger" does not operate a heavy vehicle.<sup>99</sup>

**[63]** Having regard to the above matters, I find that the reasons for Mr Deniz's dismissal relied upon by the respondent were the following:

- (a) The 20 April 2022 incident which the respondent regarded to be substantiated by Mr Deniz's subsequent behaviour and resulted in a breach of the respondent's policies.

(b) Mr Deniz's behaviour, which made him a risk to the safety and welfare of the respondent's employees, in particular Ms Thatcher.

(c) Mr Deniz's mental health which made him a risk to others, particularly if driving a truck.

[64] These reasons will be considered in turn in the analysis that follows.

### **Was the dismissal harsh, unjust or unreasonable?**

[65] The matters that must be taken into account in assessing whether the dismissal was harsh, unjust or unreasonable are set out in s 387 of the Act at paragraphs (a) to (h). My consideration of each is addressed below.

#### ***Section 387(a) - Was there a valid reason for the dismissal related to Mr Deniz's capacity or conduct (including its effect on the safety and welfare of other employees?)***

[66] The principles that are relevant to the consideration of whether there was a valid reason for the dismissal related to an employee's capacity or conduct are well established. A valid reason is one that is "sound, defensible or well founded" and should not be "capricious, fanciful, spiteful or prejudiced."<sup>100</sup>

[67] The reason for a dismissal need not be the same reason as was given to the employee at the time of dismissal.<sup>101</sup>

[68] The Commission does not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer.<sup>102</sup> The question the Commission must address is whether there is a valid reason, in the sense both that it was a good reason and a substantiated reason.

[69] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination:<sup>103</sup>

"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."

[70] As earlier stated, I have found that the reasons relied upon by the respondent for Mr Deniz's dismissal were those set out at [63] above.

#### *20 April 2022 incident*

[71] The first reason relied upon by the respondent is that Mr Deniz breached its policies and procedures by reason of his conduct during the 20 April 2022 incident. The respondent also relies on Mr Deniz's subsequent behaviour to substantiate the Customer complaint because it regarded Mr Deniz's behaviour to be consistent with the allegations in the complaint.

[72] A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. A substantial and wilful breach of a policy will often, if not usually, constitute a valid reason for dismissal.<sup>104</sup>

[73] The respondent relies upon section 4.1 of the Policy.<sup>105</sup> While Mr Deniz's employment contract is not before the Commission, I accept that a breach of section 4.1 of the Policy is a matter of significance in determining the validity of the reason for dismissal. The references in the termination letter to breaches of "policies or procedures" and "acts of violence, bullying, harassment or discrimination, including use of foul or abusive language," are examples of behaviour in section 4.1 of the Policy that "is considered serious misconduct and could lead to instant dismissal." This aspect of the Policy must therefore be understood as identifying behaviour for which an employee may be summarily dismissed.

[74] In the absence of a contention otherwise, I am satisfied that there are no relevant matters which appear to undermine the validity of the Policy as a lawful and reasonable direction.<sup>106</sup> Relevantly, Mr Deniz was made aware of the Policy upon the commencement of his employment.<sup>107</sup>

[75] For the reasons that follow, I am not satisfied on the evidence that Mr Deniz's conduct during the 20 April 2022 incident gives rise to a contravention of section 4.1 of the Policy, in the manner described in the termination letter and the respondent's submissions.

[76] The respondent does not provide a lucid factual account of what it says occurred during the 20 April 2022 incident. This is a consequence, in my view, of the respondent's decision not to investigate the matter. The respondent deferred investigating the incident until the Customer provided a complaint in writing. However, when the Customer's complaint was received in writing on 20 May 2022, the respondent elected not to raise the complaint with Mr Deniz or take any further action in relation to it.

[77] Notwithstanding the above, the respondent now relies upon Mr Deniz's conduct during the 20 April 2022 incident as a reason for Mr Deniz's dismissal. The respondent refers to the Customer's written complaint of 20 May 2022 and the Customer's 20 April 2022 telephone call to Ms Thatcher (which is summarised in the termination letter) to identify the specific conduct of concern. From these documents, the contention is that while at the Customer's site on 20 April 2022:

- (a) Mr Deniz was very aggressive,<sup>108</sup> or very rude and aggressive,<sup>109</sup> and
- (b) Mr Deniz yelled at an employee of the Customer which resulted in the customer crying.<sup>110</sup>

[78] Immediately following the incident on 20 April 2022, Mr Trombi's focus was on ensuring that Mr Deniz safely returned to the Laverton worksite given his distressed state. While a meeting was arranged with Mr Deniz the following day, I am satisfied that the focus of the "chat" between Mr Trombi, Ms Ifo and Mr Deniz on 21 April 2022 was not a disciplinary discussion, and the respondent did not contend otherwise. It is not in contest that Mr Trombi said to Mr Deniz during this meeting, "don't worry about it" or "[t]here's no issue."

[79] It is not clear what Mr Deniz was told during this “chat” about the Customer’s oral complaint. However, Mr Trombi gave evidence that Mr Deniz denied the allegations. I proceed on the basis that Mr Deniz denied the Customer’s contention that he was very rude and aggressive towards an employee of the Customer, yelled at the employee and made the employee cry.

[80] Mr Deniz provided his account of the 20 April 2022 incident at the hearing and was the only witness to do so. I have no reason to doubt Mr Deniz’s evidence of the incident. It is not directly challenged or undermined by any of the evidence. It is also consistent with Mr Trombi’s account of the phone call he received from Mr Deniz immediately after the incident.

[81] On the evidence available, I find that the 20 April 2022 incident involved Mr Deniz expressing his concerns with the Customer’s preparedness for deliveries, including with respect to the availability of a forklift driver and empty pallets not being prepared, which caused delays for Mr Deniz. This is consistent with the content of the Customer’s written complaint. This caused Mr Deniz and the Customer to argue, with Mr Deniz stating that the Customer was not “co-operating” and the Customer advising Mr Deniz that she would be making a complaint about him to the respondent.

[82] It is contended that Mr Deniz was aggressive and rude and yelled at the employee of the Customer, and this resulted in the employee crying. However, the evidence before the Commission falls short of establishing these matters. There is no account of the language said to have been used by Mr Deniz, nor of any body language or gestures made to support the contention that he was aggressive. In the absence of such evidence, a general statement that Mr Deniz was “aggressive” and/or “rude,” and “yelling” cannot be meaningfully assessed, and I reject it.

[83] Nor do I regard the Customer’s allegations to be sufficiently specific so as to characterise Mr Deniz’s conduct as a breach of the identified aspects of section 4.1 of the Policy. An allegation that a person engaged in a serious act or acts of “violence, bullying, harassment or discrimination; including use of foul or abusive language” as contended by the respondent requires a degree of specificity in the facts giving rise to the allegation. The allegation itself does not identify Mr Deniz’s specific conduct, aside from a general statement that Mr Deniz was rude or aggressive and yelling. In the absence of evidence that supports this contention, I am not satisfied that Mr Deniz was violent, or that his behaviour amounted to bullying, harassment or discrimination. Further, the evidence does not support a finding that Mr Deniz used “foul or abusive language,” and the Customer does not contend that such language was involved.

[84] It was not contended, nor does the evidence otherwise support a finding that Mr Deniz’s conduct during the 20 April 2022 incident contravenes any other aspect of section 4.1 of the Policy.

[85] Contrary to the respondent’s contention, I am not persuaded on the evidence that Mr Deniz contravened the respondent’s policies and procedures by reason of his conduct during the 20 April 2022 incident. In light of this conclusion, I have determined that the 20 April 2022 incident does not amount to a valid reason for the dismissal.

*Mr Deniz's behaviour, which made him a risk to the safety and welfare of the respondent's employees, in particular Ms Thatcher*

**[86]** The second reason relied upon by the respondent is that Mr Deniz's behaviour following the workplace injury made him a risk to the safety and welfare of the respondent's employees, in particular Ms Thatcher. For the reasons that follow, I accept that the evidence establishes a valid reason of the kind identified by the respondent, but in a more confined manner.

**[87]** The respondent refers to Mr Deniz's ongoing aggressive, foul, abusive or threatening language. However, the only direct evidence of Mr Deniz's statements are those he made to Ms Thatcher.

**[88]** I am satisfied on the evidence, which is not contested by Mr Deniz, that:

- (a) Mr Deniz said to Ms Thatcher during a telephone call on an unidentified date prior to 25 May 2022 to "just wait until he sees me in Melbourne next."
- (b) During a telephone call on 25 May 2022, Ms Thatcher said that Mr Deniz "told me he was going to come to Sydney to find me." Ms Thatcher's summary of the conversation further notes Mr Deniz used threatening language.
- (c) At the conclusion of a meeting regarding Mr Deniz's return to work assessment Mr Deniz said, "I'll deal with Mel later" in reference to Ms Thatcher.

**[89]** I accept Ms Thatcher's evidence that these statements constitute threats which caused her to feel scared for her safety.<sup>111</sup>

**[90]** However, I reject the respondent's submissions and the evidence which refers generally to Mr Deniz's ongoing, repeated behaviour in vague terms. There is simply no direct evidence of any other incidents.

**[91]** When considered collectively, I am satisfied that the statements made by Mr Deniz at [88][88] above demonstrate a pattern of threatening behaviour against Ms Thatcher. In my view, the statements had an effect on Ms Thatcher's welfare and feelings of safety. I therefore find that Mr Deniz's conduct gives rise to a sound, well-founded and defensible reason for his dismissal.

*Mr Deniz's mental health which made him a risk to others, particularly if driving a truck*

**[92]** The third reason relied upon by the respondent for the dismissal relates to the respondent's concerns regarding Mr Deniz's mental health. The respondent held the view that this made Mr Deniz a risk to others, particularly if driving one of the respondent's trucks. This reason concerns Mr Deniz's capacity. It is well established that a reason will be "related to the capacity" of an applicant "where the reason is associated or connected with the ability of the employee to do his or her job."<sup>112</sup>



[93] I accept that Mr Deniz’s capacity to safely operate a truck is an inherent requirement of his role as a truck driver. However, there is no evidence before the Commission concerning Mr Deniz’s mental health and how this may bear upon the discharge of his duties. Absent cogent medical evidence, there is no basis for the Commission to consider a contention that Mr Deniz did not hold the requisite capacity to perform his role. The evidence otherwise establishes that Mr Deniz was a competent truck driver before his workplace injury on 2 May 2022.

[94] I therefore determine that this matter does not amount to a valid reason for the dismissal.

***Section 387(b) – Was Mr Deniz notified of the valid reason?***

[95] Section 387(b) requires the Commission to have regard to whether an employee was notified of *that reason*. Contextually, the reference to “that reason” is the valid reason found to exist under s 387(a) of the Act.<sup>113</sup>

[96] Notification of a valid reason for termination must be given to an employee before the decision is made to terminate their employment,<sup>114</sup> and in explicit<sup>115</sup> and plain and clear terms.<sup>116</sup>

[97] The respondent’s position, which I accept, is that Mr Deniz was only informed of the reason for the dismissal during the telephone call with Ms Thatcher on 15 September 2022.<sup>117</sup> It is not in dispute that the reason identified by the respondent in that call was confined to breaches of the respondent’s Policy arising from the 20 April 2022 incident. This discussion was then reflected in the termination letter which precedes with the statement “[a]s discussed...”<sup>118</sup>

[98] The reason Mr Deniz was required to be notified of is the matter I have found to constitute a valid reason for the dismissal. The valid reason concerns Mr Deniz’s conduct, specifically the statements he made to Ms Thatcher, which had an effect on Ms Thatcher’s feelings of safety and welfare. The respondent elected to notify Mr Deniz of “one reason” for the dismissal only, being the 20 April 2022 incident, so as not to confuse him. It is therefore not in contest, and I find, that Mr Deniz was not notified of the valid reason I have found for the dismissal prior to any decision being taken to dismiss him, as required.<sup>119</sup>

[99] In considering this matter, I have had regard to Ms Thatcher’s evidence that the respondent advised Mr Deniz “numerous times, that he needed to stop that behaviour” and that she had “sent him text messages to say that he needs to stop threatening”<sup>120</sup> The respondent relies upon a text message that Ms Thatcher sent to Mr Deniz on 25 May 2022 in support of its position.<sup>121</sup> Further, the respondent made the following submissions:<sup>122</sup>

“Mr Deniz was told on multiple occasions that his behaviour was not acceptable and would not be tolerated. We even had to get to the point of advising him not to call any more because of the abuse, threats, aggression, disrespect, and being yelled at over the phone became too much. When this did not stop we had to resort to contacting the police.”

[100] I accept on the evidence that Mr Deniz was told by Ms Thatcher to stop communicating in a manner that was threatening, abusive or disrespectful on at least one occasion, being 25

May 2022. There is no evidence that Mr Deniz was put on notice on 25 May 2022 that his threatening statements to Ms Thatcher may give rise to the termination of his employment. In any event, this is not what the enquiry in s 387(b) requires. The issue is whether Mr Deniz was notified of the reason for his dismissal found to be the valid reason at [91] above. For the reasons earlier stated, Mr Deniz was not.

[101] I therefore find that Mr Deniz was not notified of the reason for his dismissal found to be the valid reason at [91] above.

***Section 387(c) – Was Mr Deniz given an opportunity to respond?***

[102] I turn now to consider s 387(c), which is concerned with whether an employee was, in substance, afforded an opportunity to respond to the reasons for the dismissal.<sup>123</sup> An opportunity to respond is to be provided before a decision is taken to terminate the employee’s employment.<sup>124</sup>

[103] As a matter of logic, unless an employee has been notified of the reason for their dismissal, it is “difficult to envisage” that it could be found that the employee has been afforded an opportunity to respond to that reason.<sup>125</sup> Such is the case here. It is not open on the evidence to conclude that Mr Deniz was given an opportunity to respond to the reason for his dismissal when he was not notified of it.

[104] The focus of the respondent’s submissions is on the opportunity that it says Mr Deniz was given to respond to the 20 April 2022 incident.<sup>126</sup> The respondent does not contend that Mr Deniz was given an opportunity to respond to the valid reason concerning his conduct in making threatening statements to Ms Thatcher. The fact that the respondent did not rely on this reason at the time of dismissal means that the respondent will have to “contend with the consequences of not giving the employee an opportunity to respond to such reason...”<sup>127</sup>

[105] Accordingly, I find that Mr Deniz was not given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

***Section 387(d) – Was there any unreasonable refusal by the respondent to allow Mr Deniz to have a support person present to assist at any discussions related to the dismissal?***

[106] Mr Deniz was not on notice of any discussions that specifically related to his dismissal. In these circumstances, I consider that the matter identified in s 387(d) as to whether there was any unreasonable refusal to have a support person present does not arise for consideration, as no request for a support person was made.<sup>128</sup>

***Section 387(e) - If the dismissal related to unsatisfactory performance, was Mr Deniz warned about that unsatisfactory performance before the dismissal?***

[107] There is no dispute that the dismissal did not relate to unsatisfactory performance by Mr Deniz. Accordingly, I consider s 387(e) to be irrelevant.

***Section 387(f) and s 387(g) – The degree to which the size of the respondent’s enterprise, and 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?***

[108] Where an employer is of substantial size and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.<sup>129</sup>

[109] The respondent employed 90 employees at the time of Mr Deniz’s dismissal,<sup>130</sup> and has a dedicated human resources department.<sup>131</sup>

[110] The respondent’s submissions in relation to s 389(f) may be summarised as follows:<sup>132</sup>

- (a) Mr Deniz’s behaviour led to a decision to not conduct a meeting with him prior to his dismissal.
- (b) The decision to dismiss Mr Deniz was made to ensure the safety and wellbeing of employees.
- (c) Mr Deniz was given numerous opportunities to seek professional help for his mental health.
- (d) The respondent has an obligation to adhere to a chain of responsibility.

[111] I do not consider the respondent’s submissions to relevantly address s 387(f). Neither party submitted that the size of the respondent’s enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the respondent’s enterprise had no such impact.

[112] Further, I find that the respondent’s enterprise did not lack dedicated human resources management specialists and expertise. Accordingly, there are no matters to take into account when considering the procedures followed in effecting the dismissal for the purposes of s 387(g).

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

[113] Section 387(h) provides the Commission with broad scope to consider any other relevant matters. The Commission should consider all the circumstances and weigh the gravity of Mr Deniz’s conduct against any matters that might support his contention that the dismissal was harsh, unjust or unreasonable.<sup>133</sup>

***Effect of the dismissal on Mr Deniz’s personal situation***

[114] It has long been established that the effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s 387(h) of the Act.<sup>134</sup>

[115] Mr Deniz suffered a substantial workplace injury on 2 May 2022. His leg was in plaster for two months,<sup>135</sup> and at the time of the hearing some 10 months after the injury, Mr Deniz remained unfit to return to normal duties.

[116] The respondent contends that after Mr Deniz's injury, his behaviour changed.<sup>136</sup> Ms Thatcher gave the following evidence in relation to the period after the injury:<sup>137</sup>

“During that time Umit had the accident, was off work, and that's when the behaviours that he displayed were - matched what the customer had said to us. So that, for us, was enough evidence.”

[117] Ms Thatcher said that the only issue she had with Mr Deniz prior to his injury related to the issues concerning Mr Deniz's first pay discussed earlier in this decision at [10].<sup>138</sup> There was also the 20 April 2022 incident with the Customer which I address earlier in this decision.

[118] While there is no medical evidence before the Commission, I accept Mr Deniz's evidence that he was dealing with the consequences of the injury.<sup>139</sup> Mr Deniz gave evidence that he was in pain,<sup>140</sup> incapacitated<sup>141</sup> and referred to the breakdown in his relationship with his wife over this period, although the relationship appears to have resumed.<sup>142</sup> For these reasons, I am satisfied that Mr Deniz was in vulnerable position at the time of the dismissal.

[119] Mr Deniz was on Workcover in the period following his 2 May 2022 workplace injury and this continued until the hearing of this application. On 8 September 2022, Mr Deniz produced a certificate from his general practitioner which indicated that Mr Deniz had full capacity to return to work. Ms Thatcher gave evidence that the decision to dismiss Mr Deniz was made when Mr Deniz produced this certificate to the respondent.<sup>143</sup> Ultimately, the certificate was regarded to be insufficient and Mr Deniz remains unable to work.

[120] The chronology demonstrates that the decision to dismiss Mr Deniz was made shortly after the time Mr Deniz was (erroneously) certified as capable of returning to work. I regard the timing of this decision to be a relevant consideration.

[121] Notwithstanding the general practitioner's certificate purportedly gave Mr Deniz full clearance to return to pre-injury duties, it is apparent that at the meeting with Nabenet that I have found occurred between 8 September and 14 September 2022, Mr Deniz sought a transitional return to work plan in light of his ongoing pain.<sup>144</sup>

[122] The evidence demonstrates that Mr Deniz proposed a four-hour workday which the respondent said it could not accommodate given the unreliable nature of traffic conditions and customer deliveries, and the delays these may give rise to for the truck driver.

[123] It is not clear whether, at the time of the dismissal, the subsequent advice from Footscray Hospital which overturned the certification from Mr Deniz's general practitioner had been given. The facts that existed at the time of the dismissal therefore cannot be determined in this respect. In any event, the evidence demonstrates that the respondent implemented its dismissal decision on 15 September 2022 in circumstances where Mr Deniz sought a gradual return to work program, or was medically unfit to work at all pursuant to the Footscray Hospital advice.

[124] The respondent's decision to dismiss Mr Deniz was therefore implemented in circumstances where Mr Deniz's capacity would make it difficult for him – a 54-year-old truck driver in a vulnerable personal situation – to obtain suitable alternative employment.

*Mr Deniz's response to the threatening statements*

[125] During the proceedings, Mr Deniz did not deny making the threatening statements to Ms Thatcher. Mr Deniz addressed this matter in the following way:<sup>145</sup>

“All right. If you feel that threat once again I said it, I am not here as a threat to you. I'm not sure if you're understanding wrong, I'm not sure. I dropped out in Year 4 in school. This is my English and this is exactly how I can come across. Sorry if it's a threat, but my father was like that to us too. I felt like that too.”

[126] I accept Mr Deniz may have some difficulty in communicating effectively. However, the threats I found that he made to Ms Thatcher at [88] above are not a result of Mr Deniz's inability to communicate. Accordingly, I reject the relevance of this evidence as a mitigating factor to Mr Deniz's conduct.

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

[127] I have made findings in relation to each matter specified in s 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>146</sup>

[128] I have earlier concluded that there was valid reason for the dismissal relating to Mr Deniz's conduct in making threatening statements to Ms Thatcher. The following matters are also relevant in my overall consideration of whether the dismissal was harsh, unjust or unreasonable:

- (a) Mr Deniz was not notified of the valid reason for the dismissal before the decision was taken to dismiss him.
- (b) Mr Deniz was not given an opportunity to respond to the valid reason for the dismissal.
- (c) Mr Deniz was recovering from a substantial workplace injury and was in a vulnerable position, and would find it difficult to obtain suitable alternative employment as a consequence of the dismissal.

[129] The fact that the respondent did not notify Mr Deniz of the valid reason and provide him with an opportunity to respond before a decision was taken to dismiss him does not automatically render the dismissal harsh, unjust or unreasonable.<sup>147</sup> However, paragraphs (b) and (c) of s 387 are concerned with the observance of fair decision-making procedures. It is not the case that a denial of procedural fairness is significant *only* if it is firmly established that it could have made no difference to the outcome.<sup>148</sup>

[130] I accept that the statements made by Mr Deniz to Ms Thatcher were threatening. However, a consequence of the denial of procedural fairness in this case is that Mr Deniz was not on notice that these statements were being relied upon to dismiss him. It may be that an opportunity to respond to these matters would not have altered the outcome. Equally however, Mr Deniz may have addressed the effect of his conduct having regard to the personal

circumstances affecting him at the relevant time. If Mr Deniz had been given that opportunity, the respondent may not have pursued the dismissal.

[131] Further, the misconduct identified on the evidence is limited to three statements made to Ms Thatcher. While these statements give rise to a valid reason for the dismissal, Mr Deniz's personal situation is to be measured against the reason for the dismissal.<sup>149</sup> Mr Deniz was in a vulnerable situation, and the effects of the dismissal on him were significant.

[132] I therefore consider the procedural deficiencies and the personal situation of Mr Deniz to be significant in my overall assessment.

[133] In many cases, the concepts "harsh, unjust or unreasonable" will overlap.<sup>150</sup> Having considered each of the matters specified in s 387 of the Act, taking into account all of the evidence and my factual findings, I am satisfied that the dismissal was harsh because of its consequences for Mr Deniz's personal situation in circumstances where he is recovering from a workplace injury and given his age; and the dismissal was unreasonable because Mr Deniz was not notified of, or given an opportunity to respond to the valid reason for the dismissal, and such an opportunity may have altered the outcome.

[134] Accordingly, I find that the dismissal was unfair within the meaning of s 385 of the Act.

#### **Next steps**

[135] Being satisfied that Mr Deniz:

- (a) made an application for an order granting a remedy under s 394;
- (b) was a person protected from unfair dismissal; and
- (c) was unfairly dismissed within the meaning of s 385 of the Act,

the Commission may order a remedy pursuant so s 390(1) of the Act.

[136] Neither party filed the necessary evidentiary material in relation to remedy.<sup>151</sup> Accordingly, directions will be issued to enable the question of remedy to be determined.



DEPUTY PRESIDENT

*Appearances:*

*Mr Umit Deniz* on his own behalf

*Ms Melissa Thatcher* on behalf of the respondent

*Hearing details:*

1 March 2023, Fair Work Commission Melbourne

7 March 2023, by Microsoft Teams

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<sup>1</sup> *Fair Work Act 2009* (Cth) s 399(1)

<sup>2</sup> Exhibit 2

<sup>3</sup> Court Book (CB) 85 at [1.2], 144-146; Transcript of proceedings dated 1 March 2023 (1 March Transcript) at [90]

<sup>4</sup> CB 21 at [1.2]

<sup>5</sup> 1 March Transcript at [91]

<sup>6</sup> 1 March Transcript at [233]

<sup>7</sup> 1 March Transcript at [239]

<sup>8</sup> CB 77

<sup>9</sup> 1 March Transcript at [93]

<sup>10</sup> 1 March Transcript at [95]

<sup>11</sup> 1 March Transcript at [93], [95] and [109]

<sup>12</sup> 1 March Transcript at [93]

<sup>13</sup> 1 March Transcript at [96]

<sup>14</sup> *Ibid*

<sup>15</sup> 1 March Transcript at [93] and [95]

<sup>16</sup> 1 March Transcript at [96]

<sup>17</sup> 1 March Transcript at [92]

<sup>18</sup> 1 March Transcript at [97]

<sup>19</sup> 1 March Transcript at [96]-[98]

<sup>20</sup> 1 March Transcript at [99]-[102]; Transcript of proceedings (7 March 2023) (7 March Transcript) at [513]

<sup>21</sup> 1 March Transcript at [481]

<sup>22</sup> 7 March Transcript at [561] and [568]

<sup>23</sup> 1 March Transcript at [212]

<sup>24</sup> CB 194

<sup>25</sup> 1 March Transcript at [212]

<sup>26</sup> CB 144-146

<sup>27</sup> 1 March Transcript at [212]

<sup>28</sup> 7 March Transcript at [481]

<sup>29</sup> 7 March Transcript at [484]

<sup>30</sup> 7 March Transcript at [481]

<sup>31</sup> 7 March Transcript at [484]

<sup>32</sup> 1 March Transcript at [102]

<sup>33</sup> 7 March Transcript at [515]

<sup>34</sup> 7 March Transcript at [485]

- <sup>35</sup> 1 March Transcript at [107]  
<sup>36</sup> 1 March Transcript at [107] and [144]  
<sup>37</sup> 1 March Transcript at [104]-[105]  
<sup>38</sup> 1 March Transcript at [108]-[111]  
<sup>39</sup> CB 130 at [4(c)]  
<sup>40</sup> 1 March Transcript at [231]  
<sup>41</sup> 1 March Transcript at [113]  
<sup>42</sup> 1 March Transcript at [111]-[113]  
<sup>43</sup> 1 March Transcript at [115]  
<sup>44</sup> 1 March Transcript at [116]-[117]  
<sup>45</sup> 1 March Transcript at [117]  
<sup>46</sup> 1 March Transcript at [151] and [154]  
<sup>47</sup> CB 90, 151  
<sup>48</sup> 7 March Transcript at [501]-[503] and [512]-[513]  
<sup>49</sup> 7 March Transcript at [676]  
<sup>50</sup> CB 130 at [4(c)]  
<sup>51</sup> CB 144-146  
<sup>52</sup> 1 March Transcript at [214]  
<sup>53</sup> Ibid  
<sup>54</sup> Ibid  
<sup>55</sup> 1 March Transcript at [216]  
<sup>56</sup> 1 March Transcript at [216]  
<sup>57</sup> 1 March Transcript at [216]; CB 128 at [3j]  
<sup>58</sup> 1 March Transcript at [221]  
<sup>59</sup> 1 March Transcript at [239]  
<sup>60</sup> 1 March Transcript at [221] and [239]  
<sup>61</sup> 1 March Transcript at [240]  
<sup>62</sup> CB 180-189  
<sup>63</sup> 1 March Transcript at [231]  
<sup>64</sup> 1 March Transcript at [225]  
<sup>65</sup> 1 March Transcript at [228]  
<sup>66</sup> 1 March Transcript at [225]  
<sup>67</sup> CB 191  
<sup>68</sup> 1 March Transcript at [228] and [216]  
<sup>69</sup> CB 69, 191  
<sup>70</sup> CB 190-191  
<sup>71</sup> *Newton, Steve v Toll Transport Pty Ltd* [\[2021\] FWCFB 3457](#) at [99]  
<sup>72</sup> 7 March Transcript at [487]-[490]  
<sup>73</sup> 7 March Transcript at [493]  
<sup>74</sup> 7 March Transcript at [588]-[589], see also [568]  
<sup>75</sup> 7 March Transcript at [568]  
<sup>76</sup> 1 March Transcript at [122]  
<sup>77</sup> 1 March Transcript at [121]  
<sup>78</sup> 1 March Transcript at [135]



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- <sup>79</sup> CB 185
- <sup>80</sup> CB 72; 1 March Transcript at [124]-[125]
- <sup>81</sup> 7 March Transcript at [581]
- <sup>82</sup> 7 March Transcript at [571]
- <sup>83</sup> 1 March Transcript at [216]
- <sup>84</sup> 1 March Transcript at [125]-[129]
- <sup>85</sup> 1 March Transcript at [137]
- <sup>86</sup> 1 March Transcript at [221]
- <sup>87</sup> 1 March Transcript at [145]
- <sup>88</sup> CB 194
- <sup>89</sup> 1 March Transcript at [221]
- <sup>90</sup> CB 130 at [4]
- <sup>91</sup> CB 130 at [4(a)]
- <sup>92</sup> CB 169
- <sup>93</sup> CB 130 at [4(b)]
- <sup>94</sup> 1 March Transcript at [229]
- <sup>95</sup> 1 March Transcript at [230]-[231]
- <sup>96</sup> CB 130 at [4(c)]
- <sup>97</sup> Ibid
- <sup>98</sup> CB 128 at [3j]; 7 March Transcript at [678]
- <sup>99</sup> 1 March Transcript at [221]; CB 184 and 187
- <sup>100</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373
- <sup>101</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWCFCB 4185](#) at [45] citing *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 377-8
- <sup>102</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685
- <sup>103</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24]
- <sup>104</sup> *B, C and D v Australian Postal Corporation t/a Australia Post* [\[2013\] FWCFCB 6191](#) at [36]
- <sup>105</sup> CB 110, 194
- <sup>106</sup> See, *Construction, Forestry, Maritime, Mining and Energy Union (105N) & Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [\[2021\] FWCFCB 6051](#)
- <sup>107</sup> CB 179 and 194
- <sup>108</sup> CB 90
- <sup>109</sup> CB 194
- <sup>110</sup> CB 90
- <sup>111</sup> CB 191; 1 March Transcript at [216], [221], [225], [228] and [231]
- <sup>112</sup> *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]
- <sup>114</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151
- <sup>115</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998)
- <sup>116</sup> Ibid
- <sup>117</sup> CB 125 at [3(e)]
- <sup>118</sup> CB 194
- <sup>119</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFCB 6429](#) at [19] and [21]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFCB 533](#) at [56]-[57]
- <sup>120</sup> 1 March Transcript at [221]

<sup>121</sup> CB 191

<sup>122</sup> 7 March Transcript at [671]

<sup>123</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7; *Central Queensland Services Pty Ltd v Tara Odgers* [\[2020\] FWCFB 304](#) at [42]; *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41]

<sup>124</sup> *Bartlett v Ingleburn Bus Services Pty Ltd t/as Interline Bus Services* [\[2020\] FWCFB 6429](#) at [19] and [21]; *Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)* (2000) 98 IR 137 at [75]

<sup>125</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#) at [19]

<sup>126</sup> CB 125 at [3(f)]

<sup>127</sup> *APS Group Placements Pty Ltd v O'Loughlin* [\[2011\] FWAFB 5230](#) at [51] per majority

<sup>128</sup> *Explanatory Memorandum, Fair Work Bill 2008* (Cth) at [1542]

<sup>129</sup> *Jetstar v Meetson-Lemkes* [\[2013\] FWCFB 9075](#) at [68]

<sup>130</sup> CB 86 at [1.7]; 127 at [3(i)]

<sup>131</sup> CB 128 at [3(k)]

<sup>132</sup> CB 128 at [3(j)]

<sup>133</sup> *B, C and D v Australian Postal Corporation T/A Australia Post* [\[2013\] FWCFB 6191](#); 238 IR 1

<sup>134</sup> *Ricegrowers Co-operative v Schliebs* [PR908351](#) (AIRCFCB, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001) at [26]

<sup>135</sup> 1 March Transcript at [115]-[118]

<sup>136</sup> CB 132 at [4(f)]; 1 March Transcript at [214] and [231]

<sup>137</sup> 1 March Transcript at [231]

<sup>138</sup> 1 March Transcript at [214], [231], [233] and [239]; CB 144-146

<sup>139</sup> 7 March Transcript at [633]

<sup>140</sup> 1 March Transcript at [122]; 7 March Transcript at [703]

<sup>141</sup> 7 March Transcript at [706]

<sup>142</sup> *Ibid*

<sup>143</sup> 1 March Transcript at [221]

<sup>144</sup> 1 March Transcript at [216]

<sup>145</sup> 7 March Transcript at [708]

<sup>146</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357 at [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [92]; *Edwards v Justice Giudice* [1999] FCA 1836 at [6]-[7]

<sup>147</sup> *Etienne v FMG Personnel Services* [\[2017\] FWCFB 3864](#) at [33]

<sup>148</sup> *Bartlett, Mark v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services* [\[2020\] FWCFB 6429](#) at [25]

<sup>149</sup> *Bartlett, Mark v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services* [\[2020\] FWCFB 6429](#) at [41]

<sup>150</sup> *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 131 ALR 422; (1995) 69 ALJR 797; (1995) 185 CLR 410 at [128]

<sup>151</sup> See, eg, *AI Distributions v Humphries* [\[2016\] FWCFB 7206](#) at [28]