DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Giang Son Tra

v

Prodigy Holding Pty Ltd
(U2022/11032)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 15 AUGUST 2023

Application for an unfair dismissal remedy – whether applicant engaged in serious misconduct – whether the respondent had requisite knowledge of the applicant's misconduct – whether respondent condoned the misconduct – impact of condonation and waiver principle on whether there was a valid reason for dismissal – applicant's dismissal was unreasonable and therefore unfair

[1] The applicant, Mr Giang Son Tra applied to the Commission on 17 November 2022 under s 394 of the *Fair Work Act 2009* (Act) for an unfair dismissal remedy in connection with his dismissal on 30 October 2022. The applicant was employed by the respondent, Prodigy Holding Pty Ltd from 8 May 2017 until 30 October 2022 when he was summarily dismissed because the respondent considered that the applicant had engaged in serious and wilful misconduct relating to the recording of certain financial transactions.

[2] There is no dispute that between 8 May 2017 to around 1 June 2022, the applicant was employed as a general manager with the respondent. But there is a dispute about whether the applicant had been validly appointed as managing director of the respondent from 1 June 2022. This is because there is a dispute amongst the respondent's shareholders about the validity of a member resolution purportedly made on 11 May 2022, *inter alia*, appointing the applicant as the managing director.[1] More about this later. It is also uncontroversial that at the time of his dismissal, the applicant's annual salary was $140,000.00.[2]

[3] It is necessary to spend some time distilling the background facts and the key players in a dispute that appears to be as much about the commercial interests of some of the key players as it is about whether the applicant's dismissal was unfair.

[4] The respondent was incorporated on 4 March 2015. It engages in the business of the manufacture and distribution of various baked products. And in that business endeavour it trades variously as Baked Provisions and BAKELY. The respondent has several shareholders. Chief amongst these, and the majority shareholder (with a 51% shareholding), is Trend Holdings Pty Ltd (Trend). At all times material to a $1.8 million financial transaction and to its accounting, which is said to be the reason for the applicant's dismissal, Richard Huynh and Duc Long Hoang were directors of Trend.[3] Trend relevantly operated a Perth based business

manufacturing and distributing baked products.[4] Mr Huynh also became a director of the respondent together with the applicant on or about 11 October 2016.[5] And with Trend as the respondent's majority shareholder, Mr Huynh became the chair of the respondent's board.[6] In addition to Trend, the respondent's founding shareholders and their respective shareholding were as follows:

- 13% held by TRA Brothers Pty Limited in which the applicant had a controlling interest;
- 16% held by Thai Hoang Family Pty Limited in which Trieu Thai, the respondent's managing director had an interest;
- 12% held by BNNN Pty Limited in which Bao Ngoc Anh Nguyen, the respondent's general manager of operations in New South Wales[7] had an interest; and
- 8% held by Thu Phong Nguyen.[8]

[5] These shareholders and the respondent made a shareholders' agreement on or about 3 December 2016.[9] Article 2.6(ii) thereof provides that the shareholders shall not do or effect, or agree to do or effect, any of the matters set out in Appendix C without the affirmative vote of 100% of all shareholders. One such matter in Appendix C with which article 2.6(ii) engages concerns the appointment and dismissal of the respondent's managing director. The earlier mentioned dispute about the appointment of the applicant as the respondent's managing director concerns that operation of this provision and the shareholders voting to remove Mr Thai as managing director and appoint the applicant in his place. The dispute is noted for context, but it is not one that I need resolve.

[6] There have been other shareholdings in the respondent. Relevantly, in or around November 2018, Minh Vu Le, through a corporate vehicle became a shareholder of the respondent following an issue of new shares and the provision of capital to fund growth of the respondent's business.[10] It appears that neither Minh Vu Le nor the corporate vehicle through which shares in the respondent were acquired, entered into the shareholders' agreement. No amendment to that agreement is in evidence and there is no suggestion that an amendment to the agreement to include the new shareholder was made. On or around 21 December 2022, the respondent completed the buyback of these shares.[11]

[7] In or around December 2015, the respondent started to distribute Trend's products in Sydney. But once it had completed the fit-out of a new factory at Prestons, in New South Wales, the respondent engaged in the manufacture and distribution of its own baked goods.[12] Mr Thai commenced acting as the respondent's managing director on a part-time basis in around August 2016, before assuming the role on a full-time basis later that year.[13]

[8] During 2017, the respondent established a distribution centre in Melbourne (Melbourne Operation).[14]

[9] As earlier noted, the applicant commenced employment with the respondent as general manager on 8 May 2017. His employment was prompted by the respondent's need for someone to manage the Melbourne Operation. The applicant was offered employment by a letter of engagement signed by Mr Thai dated 29 March 2017, which the applicant duly accepted on 30 April 2017.[15] Under the terms of his employment as set out in the letter, the applicant was required, *inter alia*, to use his best endeavours to promote and protect the respondent's interests

and to follow the respondent's reasonable and lawful directions, including complying with the respondent's policies and procedures.[16]

[10] The respondent initially contended, in its filed employer response, that at all material times the applicant's employment was governed by a written employment agreement dated 22 December 2017.[17] The applicant says he never received nor signed the document.[18] Mr Thai gave evidence to the effect that on 18 December 2017, Kylie Reddy, then the respondent's compliance manager, sent an email to the applicant, with a copy to Mr Thai, attaching a health and safety handbook and an employee handbook.[19] Mr Thai said that Ms Reddy gave instructions to the applicant about obtaining signed new employment contracts and returning them to her.[20] Ms Reddy was not called to give evidence, but the suggestion in Mr Thai's evidence was that the written employment agreement dated 22 December 2017 was amongst the documents the applicant was asked to sign and return. Mr Thai also said that he had read the covering letter to the employment agreement[21] and he observed that it expressly stated: "If you fail to return a signed copy of the Contract by that date it will be assumed that you have accepted its terms".[22] The obvious suggestion is that the employment agreement thereby became binding, nevertheless.

[11] By the time the respondent filed its closing submissions, it, unsurprisingly, did not contend the purported employment agreement dated 22 December 2017 was binding. Instead, it contends that the earlier mentioned letter of engagement regulated the employment.[23] To the extent that it is necessary to do so, for the following reasons, I reject any suggestion that the employment agreement dated 22 December 2017 was binding. *First*, because its terms were not accepted by the applicant either in writing by signing the document or by some acknowledging correspondence, or orally. *Second*, because silence or inaction is not acceptance despite the suggestion to the contrary in the accompanying letter. Acceptance must be clearly communicated. Silence is equivocal. And the only direct evidence I have about receipt of the correspondence and the employment agreement (as opposed to Mr Thai's self-serving suppositions) is from the applicant who says he did not see the documents – which explains the silence and is inconsistent with acceptance. *Third*, because the unsigned employment agreement dated 22 December 2017 (even assuming the wrong-headed advice in the covering letter was correct) is insufficient to vary the terms of the letter of engagement which then regulated the employment because those terms provided that the terms and conditions in the letter may only be varied by "a written agreement signed by" the applicant and the respondent.[24]

[12] The applicant gave evidence that his primary responsibility when he commenced employment with the respondent was to expand the respondent's distribution network in Victoria.[25] He says that he was not responsible for the day-to-day recording of business transactions into the respondent's accounting system, bank reconciliation and payment authorisation from the respondent's bank accounts, tax filing and preparation of the respondent's financial reports.[26] His evidence was that in about August 2019, he assumed the role of the respondent's commercial director overseeing its national business development and strategic financial management.[27] He said that this work mainly involved seeking external sources of funding to finance the respondent's rapid growth as a business and he also had oversight of the respondent's Melbourne Operations.[28]

[13] The applicant said that he did not have any responsibility for the respondent's financial operation until November 2020, when Mr Huynh ceased his involvement in the respondent's

business.[29] Thereafter, the applicant assumed responsibility for day-to-day cash management and approving payments.[30]

[14] Mr Thai gave evidence that as soon as the applicant commenced employment with the respondent, he took "almost immediate steps to manage all of [the respondent's] financial matters".[31] This is an overstatement of what happened and the responsibility that the applicant assumed.

[15] The applicant holds a Bachelor of Commerce degree, majoring in accounting and finance and was a member of CPA Australia.[32] He has experience in finance and accounting, including at Price Waterhouse Coopers (PWC), Deloitte Touche Tohmatsu and VinaCapital,[33] and he worked with Mr Huynh at PWC.[34] The applicant was involved with the inception of the respondent and he used his expertise in finance and accounting to prepare investment or business cases.[35]

[16] Monger Baker are Chartered Accountants who were engaged by the respondent since its inception to assist with the preparation and finalisation of accounting and tax compliance documents, as and when required. Marina Monger was the main point of contact for the respondent at Monger Baker.[36]

[17] Nam Phuong Nguyen commenced employment with the respondent on or about 1 May 2017 as an accounts administrator in Sydney.[37] Ms Nguyen reported to the applicant.[38] In her role as accounts administrator, Ms Nguyen undertook several duties including, customer service, processing orders, data entry on MYOB, debtor chasing, accounting administration tasks such as processing accounts payable, accounts receivable and bank reconciliation, and bookkeeping.[39] Ms Nguyen was responsible for financial recording and if she was unsure about how a particular transaction should be recorded she would seek out assistance and obtain instructions from Mr Bao Nguyen, the applicant or Mr Thai.[40] Ms Nguyen's evidence was that the applicant was responsible for financial reporting.[41]

[18] Consistent with Ms Nguyen's evidence recorded in the last sentence above, by email dated 23 June 2017 from the applicant to Ms Monger and Allan Monger at Monger Baker (cc to Mr Nguyen and Mr Thai), the applicant wrote:

> It was lovely to meet you yesterday. As discussed, I will be overseeing the financial reporting side of Prodigy Holding Pty Limited from now on and we will discuss internally on the way we can incorporate Melbourne into the system to be most efficient.
>
> . . .[42]

[19] Beyond the above email, Mr Thai produced no evidence supporting his assertion that as soon as the applicant commenced employment, the applicant took immediate steps to manage all of the respondent's financial matters. That which the applicant took on, on the evidence, was the oversight of the respondent's financial reporting, such reporting included financial statements, tax returns and business activity statements, which as Mr Thai pointed out were prepared and finalised by Monger Baker.[43] Moreover as to financial recording, Ms Nguyen's evidence was, as noted above, that she was responsible for recording and if she was unsure

about how a particular transaction should be recorded she would seek out assistance and instructions from a range of people including Mr Thai.[44]

[20] In so far as the applicant's role included oversight of the respondent's financial reporting, there is little doubt that he actively participated in the finalisation of various statements, including by suggesting amendments as various email exchanges passing between the applicant, Mr Thai, Ms Nguyen and Ms Monger in or around August 2017 concerning the respondent's assets register and the finalisation and approval of the draft financials prepared for the respondent show.[45]

[21] The applicant's role in taking line managerial responsibility for various of the respondent's activities including sales and marketing, and finance and administration, appears to have been confirmed when the respondent formalised an organisational structure in or around June 2018,[46] noting that in the organisational chart that "Finance" for NSW remained "outsourced for now to Monger Baker" while "Administrator" was "currently handled by the customer service team".[47] In an email from the applicant to Mr Thai and Mr Huynh on 26 June 2018 (which attached an organisational chart by function and by position and the 2018-2019 corporate objectives), the applicant wrote:

> I'm planning to present these slides together with the annual review to key personnel in this Friday (sic) – FY18 review & business plan for FY19.
>
> It's critical that we communicate corporate objectives clearly from the outset so that the team leader knows what is expected of them to contribute to the overall objectives.
>
> A few key messages for you to deliver a (sic) Trieu:
>
> 1. Key objectives for FY19
> 2. We have a formalise (sic) an organisation structure now with clear reporting line and departmental function. We will operate like this going forward – nothing new here but just want to reinforce the message.
> 3. There will be changes to some existing policies and procedures across the (sic) all departments as a result of ERP implementation. The process of design (sic) new policies & procedure will be an inclusive one which all stakeholders will need to participate and sign off on before implementation. Hence, this will be part of the KPI for everyone in the coming year.
>
> Regarding the organisational structure, it currently shows that Yogi reports to me but this is only for visual purpose (sic). Yogi will continue to report to a (sic) Trieu for now. However, I will take greater control in terms of specific sales activities and commercial aspects in relation to sales, just to ensure that we will achieve the sales objective in the coming year.
>
> …[48]

[22] Central to this application is a $1.8 million transaction received by the respondent from Trend on 30 November 2018 and its treatment and accounting. The respondent contends, *inter alia*, that the applicant breached his employment obligations in relation to the transaction by making false, misleading, or incorrect entries about the transaction and that he was reckless or

dishonest about causing, making or permitting inaccurate or false or misleading accounting records to be made. It says, *inter alia*, this amounted to serious misconduct justifying the applicant's dismissal.

[23] On 29 November 2018 Mr Huynh sent an email to the respondent's managing director, Mr Thai, advising that Mr Huynh had organised with the National Bank of Australia to "transact" $1.8 million to the respondent. Mr Huynh asked Mr Thai to "help to straight away transfer onto these (sic):

> 1 Pay Trend invoices about $500,000
> 2 Transfer to Richard Le Minh Huynh $200,000 (you have my account detail (sic))
> 3 Transfer to Annam Investments (**BSB**: [redacted] **Acct No**: [redacted]) $100,000
> 4 Transfer to Avant Garde Capital Pty Ltd (you would have details already) $200,000
> 5 The remaining I will sort it (sic) out with To Hai and will action.
>
> I am not sure of your limit but could you prioritise 1,2 (sic) and 4 for tomorrow mate.
>
> Accounting wise I will work out with Son tomorrow when I am at factory. I will be at factory (sic) around 10:30am stay for coupe (sic) of hours. We can do a call tomorrow to discuss stuff."[49]

[24] Later that day the applicant sent an email to Mr Huynh, with a copy to Mr Thai, in which the applicant said, "I think the bank will be asking straight away the nature of this transfer - assuming it is from attend (sic)?".[50] There is no dispute that the reference to "attend" was intended to be "Trend".[51] Shortly thereafter, Mr Huynh responded (also copying in Mr Thai) that "[i]ts (sic) from Trend USD account to Prodigy as capital contribution / loan. Then prodigy (sic) will use that money to pay bills etc (including trading with Trend)".[52]

[25] It must be said the notion that the $1.8 million payment to the respondent was a "capital contribution" or a "loan" from Trend appears at the outset to be dubious. *First*, the earlier email instructions from Mr Huynh to Mr Thai about how the funds are to be disbursed is self-evidently inconsistent with a capital contribution being made or a loan advanced to the respondent by Trend. *Second*, the earlier email suggests that the funds to be deposited are Mr Huynh's funds as Mr Huynh writes that "I have organized for NAB to transact first thing in the morning an amount of 1.8 million to [the respondent]". *Third*, because a capital contribution is usually made in exchange for shares in the company into which the contribution is made or in response to a capital contribution call made on existing shareholders in amounts relative to their existing shareholding. There is no evidence of that occurring here as between Trend and the respondent. *Fourth*, because save for the $500,000 to pay Trend invoices, the money does not seem to be available (according to Mr Huynh's instructions) for the respondent to use in its business. Rather much of the so-called later described capital contribution or loan was earlier already earmarked for immediate disbursement elsewhere. *Fifth*, there is no loan agreement as between Trend and the respondent, nor anything resembling terms of the loan such as interest charged, duration or the frequency and quantum of the repayments by the respondent to Trend.

[26] On 3 December 2018 Ms Nguyen sent an email about the $1.8 million transaction to Mr Thai and others, including the applicant, in which she sought instructions about how the transaction should be treated. Ms Nguyen wrote:

> There's a deposit of $1.8m from Trend Holdings on 30/11/2018. Could you please provide instruction on how this should be treated?
>
> Also, there are payments to Richard of $200k and Trend of $250k as well. Are these for Richard (sic) Loan offset and Perth Invoices respectively?[53]

[27] Mr Thai responded "all" to the email but instructed the applicant as follows:

> Son can you pls let Phuong know how to treat this? Thanks[54]

[28] Between 6 and 8 December 2018, there is a series of emails variously passing between Mr Thai, the applicant and Mr Huynh in which there is discussion about the treatment of the $1.8 million transaction. The times of each email produced (sometimes duplicated) in the evidence differ and do not run chronologically, which is explained by the different time zones from which each was sent, and the computer(s) from which the emails were sourced. On 6 December 2018 Mr Thai's email (at 7:04 am) to the applicant and Mr Huynh advises:

> Below is what's been transferred out from the $1.8mil received
>
> | | |
> |---|---|
> | Trend | $500,000.00 |
> | Richard Huynh | $300,000.00 |
> | Annam Capital | $100,000.00 |
> | Avant Garde | $200,000.00 |
> | Singapore | $200,036.00 |
> | | Total $1,300,036.00[55] |

[29] At 8:45 am that day Mr Huynh writes to Mr Thai and the applicant, but directed to Mr Thai, asking: "How much you want to borrow trieu (sic)? 200k or 300k?".[56] At 8:46 am (11:46 am AWDST), Mr Huynh writes: "Annam investments.,,not (sic) capital yeah"[57] intended to correct the reference to "Annam Capital" in the email extracted in the previous paragraph.

[30] Mr Thai answered both matters raised above in his email sent at 7:46 am that day. He wrote:

> 300K?
>
> Yeah Annan Investments[58]

[31] At 8:50 am Mr Huynh wrote:

> Ok you take 300k.
>
> The remaining 200k can you transfer 50k to annam investments (sic), 150k to myself.
>
> Accounting wise I will need to sit down with son (sic) one more time.
>
> Thanks[59]

[32] Mr Huynh followed up almost immediately with "[n]ot exactly 150k, whatever remaining transfer to myself." Mr Thai responded two minutes later at 8:52 am "[y]eah just less the $36 transfer fee to Sing".[60]

[33] On 8 December 2018 the applicant sent two emails to Messrs Thai and Huynh. The first at 3:31 pm provided as follows:

> Here's the proposed entries to treat this rather complex transactions (sic).
>
> | | | | |
> |---|---|---|---|
> | **1** | **Entry for Trend's book as at 30 June 2018** | Dr. | Cr. |
> | | Financial assets | 1,757,800 | |
> | | Trade Receivable from Prodigy | | 510,000 |
> | | Capital contribution loan to Prodigy | | 1,247,800 |
> | | | | |
> | **2** | **Entries for Trend's book for the period upto 30 November 2018** | | |
> | | Capital contribution loan to Prodigy | 1,000,000 | |
> | | Cash | | 1,000,000 |
> | | | | |
> | **3** | **Entry for Prodigy Holding Pty Ltd** | | |
> | | Payable to Trend | 500,000 | |
> | | Richard Huynh's loan | | 500,000 |
> | | | | |
> | | **To be treated as flow through Prodigy account (NO IMPACT)** | **1,300,000** | |
> | | Richard Huynh | 449,964 | |
> | | Annam Capital | 150,000 | |
> | | Avant Grarde | 200,000 | |
> | | Singapore | 200,036 | |
> | | Trieu | 300,000 | |
>
> After all these, Trend will still have a balance due to Richard (for his contribution on behalf of Trend) $247,800 and Prodigy has an outstanding loan from Richard of $888,935. Total due to Richard from both entity (sic) is $1,136,735.
>
> This also means that Richard's due to (sic) To Hai an amount of $400k and Trieu of $300k as personal loan. The alternative is to treat To Hai's $400k loan to Richard as loan to Prodigy and Richard will not need to take on this loan.
>
> Please let me know if you have any question.[61]

[34] About 40 minutes later at 4:14 pm the applicant sent a second email writing:

> Sorry, please ignore the email below. Here's the more accurate number that should be reflected:
>
> | | | | |
> |---|---|---|---|
> | **1** | **Entry for Trend's book as at 30 June 2018** | Dr. | Cr. |

	Financial assets	1,757,800	
	Receivable from Prodigy		510,000
	Prodigy's Capital contribution loan		1,247,800
2	**Entries for Trend's book for the period upto 30 November 2018**		
	Prodigy's Capital contribution loan	1,100,000	
	Convertible bond		1,100,000
	Recognise bond investment to Trend		
3	**Entry for Prodigy Holding Pty Ltd**		
	Payable to Trend	500,000	
	Richard Huynh's loan to Prodigy		100,000
	To Hai's loan to Prodigy		400,000
	To be treated as flow through Prodigy account (NO IMPACT)	**1,300,000**	
	Richard Huynh	449,964	
	Annam Capital	150,000	
	Avant Grarde	200,000	
	Singapore	200,036	
	Trieu	300,000	
	Amount Richard's contribution on behalf of Trend (now outstanding)	147,800	
	Richard's loan to Prodigy	488,935	
	Total due to Richard from both entities	**636,735**[62]	

[35] The following day (9 December 2018) Mr Thai responded with:

> Ok all $1.8mil has been transferred as follow (sic):
>
> | | |
> |---|---|
> | Trend | $500,000.00 |
> | Richard Huynh | $300,000.00 |
> | Annam Investments | $100,000.00 |
> | Avant Garde | $200,000.00 |
> | Singapore | $200,036.00 |
> | Trieu Thai | $300,000.00 |
> | Annam Investments | $50,000.00 |
> | Richard Huynh | $149,964.00 |
>
> All matches with Son's email below.
>
> Son I'll be putting back $49,215 to Prodigy as my outstanding contribution. Just did $10K and will continue to do $10K per day as it's my personal account daily limit[63]

[36] The applicant responded at 8:45 pm on the following evening (10 December 2018) with the following:

> Hi Richard –
>
> From Prodigy's perspective, only $500k will be recorded as your loan to prodigy (sic) and paid out to Trend for the settlement of trade payables.
>
> However, you need to ensure the following accounts are reconciled to Trend's book for the year ended **30 June 2018**:
>
> 1. Investment to Prodigy Pty Ltd – $3,134,800
> 2. Trade receivables from Prodigy Pty Ltd – $1,188,804.37. This is after the adjustment of $510k equity contribution in Sep 2017 and $25,798.63 of under contribution adjustment using equipment.
>
> …[64]

[37] Earlier that day at around 10:06 am, the applicant responded to Ms Nguyen's query of 3 December 2018 about the treatment of the $1.8 million transaction (which Mr Thai had requested that he do) as follows:

> Hi Phuong,
>
> This $1.8m has been transferred out completely as of yesterday.
>
> For the purpose of recording on Prodigy's book, please record as follow (sic):
> - $500k as cash receipt for loan from Richard Huynh
> - $500k as payment of trade payable to Trend Holding Pty Ltd
>
> The rest of the other transactions should be treated as a flow through so there's no impact on Prodigy's book (sic).
>
> . . .[65]

[38] Ms Nguyen responded a few minutes later with the following:

> Hi anh (sic),
>
> Thank you for that.
>
> To confirm, I'll just record $500k received as loan from Richard and $500k to offset invoices payable to Trend. The rest will be left to balance themselves out.
>
> . . .[66]

And the applicant responded with "[t]hanks correct. Thanks Phuong".[67]

[39] On 11 December 2018 the applicant sent an email to Mr Huynh as follows:

> Basically, I will ask Hanh to bring the financial asset for Trend from $1,377,000 (FY2017) to $3,134,800 (FY2018). The movement will partly be from the offsetting of

> $510,000 debtor of Prodigy to financial asset (reducing AR from Prodigy). The rest is from your direct contribution to Prodigy which you will need to figure out where to put on Trend's account. ASIC record is attached for reference.
>
> For trade receivables, apart from the debtor offset of $510k above, there is a $27,280 of equipment adjustment which was communicated to Hanh already (so she knows). The remaining difference is too small so I wouldn't worry about it.
>
> After you work with Hanh on the entries above, I will work with her to reconcile the AR/AP one way or the other.
>
> …[68]

[40] As is evident from the various email exchanges above, the three principal participants in the making, accounting and disbursement of the $1.8 million transaction were Messrs Huynh and Thai and the applicant. At that time Mr Huynh was a director of the respondent and a director of Trend, the respondent's majority shareholder. He was also chair of the respondent's board. Mr Thai was a director of the respondent as was the applicant, but Mr Thai was also the respondent's managing director.

[41] Needless to say, the $1.8 million transaction was, and remains, suspicious. What it was for is not clear, nor is it clear why some of the money paid to the respondent needed to flow through the respondent's account before finding its ultimate destination. At the outset, the applicant appeared concerned that the transaction might attract attention from the bank.[69] One reason for that concern was the amount involved which may have required an explanation about the nature of the transaction.[70]

[42] The applicant gave evidence that because of the relatively large size of the respondent's business, the initial capital requirements of the business were high in the period to the end of 2018. He said that all shareholders, including Trend came under increasing pressure to finance the contribution commensurate with their shareholding. He said that capital was raised when Mr Thai, acting as managing director, would forecast the respondent's fund requirement in the ensuing 3-6 months and make a "capital call" to all shareholders to fulfil the required funds.[71] Apart from the proximity of these statements to the applicant's evidence about the $1.8 million transaction, the applicant does not say there was a capital call in relation to the transaction. Indeed, the applicant's evidence was that at the time he doubted whether it (capital contribution) was the correct treatment (of the funds deposited by Trend) given that the respondent did not have a planned contribution from shareholders.[72] He said that any contribution from shareholders would require all shareholders to make contributions respective to their shareholding.[73]

[43] Mr Thai said that he did not believe $1.8 million was being transferred because of any capital calls for $1.8 million made by him and he did not cause any capital calls to be issued for $1.8 million. He said he was not aware of anyone from the respondent issuing a capital call for $1.8 million.[74]

[44] The $1.8 million transaction was not, nor was it ultimately treated as, a capital contribution.

[45] The discussion between Mr Huynh and the applicant foreshadowed in Mr Huynh's email of 29 November 2018 occurred the following day. The applicant said that he met with Mr Huynh at the respondent's Melbourne Distribution Centre at his request to reconcile the $1.8 million transaction.[75] During this meeting, the applicant said he expressed his concerns about the treatment of the transaction funds to Mr Huynh and that the transaction could not be treated as a capital contribution.[76] The applicant said that the meeting ended without a resolution as Mr Huynh needed to check and reconcile with his own record.[77]

[46] The applicant said that between 4 and 7 December 2018, he and Messrs Thai and Huynh held several conference calls about the transaction.[78] He said that Mr Huynh represented that the $1.8 million was, in fact, Trend's repayment to Mr Huynh for these contributions on behalf of Trend, including interest accrued for funds he had borrowed in his personal capacity.[79] The applicant said that he sent his email of 8 December 2018 containing draft proposals for entries in the respondent's and Trend's financial journal based on the conference calls and he thought it would have been beneficial to have the two sets of financial journals aligned, by an accounting professional.[80] That which would have been far more beneficial would have been some proof beyond Mr Huynh's representation about Trend's repayment to Mr Huynh. All the more so since only a few days earlier Mr Huynh represented that the funds were something altogether different.

[47] The applicant's 10 December 2018 email to Ms Nguyen provided her with details of the nature of the receipt and disbursement so that Ms Nguyen could record the transactions.[81]

[48] Mr Thai said that he did not recall Mr Huynh telling him or the applicant that the $1.8 million was to be treated as Trend's repayment to Mr Huynh for funds he had loaned to Trend over the previous years to facilitate Trend's contribution to the respondent during any of the various discussions Mr Thai had held with Mr Huynh where the applicant was present.[82] Of course not recalling is not the same as a positive recollection that something was not said. But if it was not said, then Mr Thai must have accepted Mr Huynh's earlier explanation that the $1.8 million transaction was a capital contribution or loan from Trend. Which one (loan or capital contribution) is not clear but more likely he simply regarded the $1.8 million as Mr Huynh's funds because Mr Thai's evidence was that he believed at the time that the funds were Mr Huynh's personal funds.[83] Although this is what he believed, if he did not recall the conversation about the source of the funds recounted by the applicant then how did Mr Thai come to this belief in the face of Mr Huynh's second email of 29 November 2018 explaining the funds were from Trend and were made available to the respondent as a capital contribution/loan? In the face of that email and given Mr Thai's state of knowledge about the then planned $1.8 million transaction (discussed in the next paragraph) Mr Thai did not satisfactorily explain why as managing director he did not insist the funds coming into the respondent's account from Trend be so recorded or why he thought it was proper for him to take $300,000 as a loan from funds deposited by Trend into the respondent's account as a capital contribution or loan and then to become indebted to a third party for the $300,000. Mr Thai's explanation (also discussed further below) that the loan was negotiated by Mr Huynh, that he trusted Mr Huynh and that he had no contact with the person to whom he later became indebted,[84] is weak.

[49] Mr Thai's evidence was that in early November 2018, he had a conversation with Mr Huynh during which Mr Huynh told Mr Thai that Mr Huynh had organised a corporate bond between Trend and Nguyen Thien Kim Truong of $1.8 million which would be transferred directly to the respondent from Trend; and that these funds would be used by the respondent to pay off some of the outstanding balance that the respondent owed Trend; and that Mr Huynh will work with the applicant to figure out how to treat the rest.[85] This evidence is difficult to reconcile with his evidence that he believed at the time that the funds (as well as earlier funds he assisted Mr Huynh to deposit into the respondent's account) were Mr Huynh's personal funds.[86] Funds in Trend's account are surely Trend's funds (though it might be indebted to another party for some or all of the funds), just as funds (whether earned through trading, borrowed or from a capital call) in the respondent's account belong to the respondent.

[50] As to Mr Thai's own involvement in the $1.8 million transaction, his evidence, it must be said, sounded more like a combined Nuremberg like defence[87] and a Sergeant Schultz[88] like response from a foot soldier, rather than the considered explanation of a managing director of a corporation taking responsibility for his involvement. Such a large sum being deposited into the respondent's account by its majority shareholder Trend with substantial portions then swiftly being paid to third parties, required much more enquiry and diligence than that which Mr Thai evidently displayed. Mr Thai's Nuremberg like defence relating to his disbursement of some of the funds received was that he "followed Mr Huynh's instructions to transfer these funds. [He] did not ask any questions as to what these funds [were] going to be used for, [he] simply followed Richard's instructions at the time".[89] A very strange response by the managing director to the use of the respondent's funds. Once paid to the respondent the $1.8 million was the respondent's funds. Even stranger that he would disburse $300,000 of the funds to himself, on the basis that it was a loan, in respect of which he later (18 December 2018) signed a loan agreement with Nguyen Thien Kim Truong.[90] How funds of the respondent disbursed to Mr Thai could convert to a loan from a third party is not satisfactorily explained. The suggestion that Mr Huynh had organised a corporate bond between Trend and Nguyen Thien Kim Truong of $1.8 million does not explain how this is so. Of course, here Mr Thai, deploys the Sergeant Schultz like response. He said he did not ask any further questions about the corporate bond because he believed that this was just another similar convertible bond like the convertible bonds Mr Huynh had told him about in the past which Trend issued to various bondholders.[91]

[51] Mr Thai said that he did not communicate with Nguyen Thien Kim Truong directly to procure the loan for $300,000, nor did he discuss with Nguyen Thien Kim Truong the terms of the loan agreement.[92] Mr Thai said that he relied on Mr Huynh to communicate with Nguyen Thien Kim Truong and procure the loan and negotiate the terms. He said that he did not question Mr Huynh's involvement in procuring this loan on Mr Thai's behalf and he trusted Mr Huynh to do it.[93] When one asks no questions (even the most basic questions) one may say that they know nothing. The loan came about because of an earlier conversation between Messrs Thai and Huynh in or around October or November 2018 in which the former asked the latter to borrow some money to make good Mr Thai's contribution to the respondent.[94] Apparently Mr Huynh told Mr Thai that the money could be borrowed from the $1.8 million transaction.[95] Why funds of the respondent were used is not explained. Nor is it explained why Mr Huynh did not directly disburse the funds the subject of the loan (and for that matter the remainder of the funds which were said merely to flow through the respondent's accounts) to their intended destination without those funds first being paid to the respondent.

[52] Mr Thai's Sergeant Schultz like response extended to the accounting of the transaction, and it must be said to other important matters. Mr Thai's evidence was that although he received the 8 December emails, he did not pay much attention to the email because it was related to accounting processes in which he did not have any involvement. He said he was not familiar with accounting treatments for transactions, and he did not have any real appreciation for whether a particular accounting treatment was correct or not. He said that he trusted and relied on the applicant and Mr Huynh to record and treat the transactions appropriately, properly and diligently.[96] That may be so, but surely Mr Thai would ask more fundamental questions about a $1.8 million deposit of funds into the accounts of the company of which he was managing director. Surely, he would ask why the respondent was making payments to third parties out of those funds. Surely, he would ask why the payment was being made to the respondent in the first place and why payments directed to third parties could not be made directly by Trend or Mr Huynh. Surely, he would ask why the respondent was being used to funnel money to third parties. As managing director, surely Mr Thai would also ask why funds which are said to be a capital contribution or loan by a shareholder (Trend) to the respondent were being disbursed to third parties when there was no apparent business benefit to the respondent. Such questions do not require knowledge of the appropriate accounting treatments for transactions, nor any real appreciation for whether a particular accounting treatment is correct or not. Such basic questions seem to me to arise from the nature of the transaction itself and from the instructions of Mr Huynh to Mr Thai about the disbursement of funds, which at the time of disbursement are funds of the respondent, of which Mr Thai is managing director. Moreover, it takes no great knowledge of accounting to ask why some of the funds paid to the respondent and then disbursed to others, including to Mr Thai, should not appear in the respondent's financial reports.

[53] To use a colloquial turn of phrase, the transaction and its accounting appears "dodgy – it smells". It is to be remembered that the fact that the $1.8 million transaction was to happen was communicated by Mr Huynh to Mr Thai on 29 November 2018 with instructions to Mr Thai (not the applicant) about the disbursement of some of the funds to third parties. And even earlier (in early November 2018), Mr Huynh had a conversation with Mr Thai (not the applicant) during which Mr Huynh told Mr Thai that Mr Huynh had organised a corporate bond between Trend and Nguyen Thien Kim Truong of $1.8 million which would be transferred directly to the respondent from Trend so that, *inter alia,* the respondent could pay off some of the outstanding balance that it owes Trend.[97]

[54] I accept that the same questions ought to have entered the applicant's mind and that the accounting treatment proposed by him is unlikely to have accurately recorded the source and purpose of the funds. But Mr Thai as managing director acquiesced to the transaction and its accounting and facilitated the disbursement of some of the funds. And he displayed all the hallmarks of wilful blindness. Neither Mr Thai nor the applicant made any enquiries of Duc Long Hoang, another director of Trend and a signatory to the bank transfer documentation[98] which authorised the $1.8 million to be deposited into the respondent's accounts, about the nature and purpose of the payment, and whether the disbursements requested of Mr Thai by Mr Huynh were authorised or agreed to by Mr Hoang. Nor did the applicant make any enquiry of Mr Hoang about the veracity of Mr Huynh's subsequent representation about the source of the funds.

[55] The applicant knew that the $1.8 million was paid into the respondent's account because of Trend entering into a convertible bond with a third party.[99] Mr Thai knew that also, and that the third party was Nguyen Thien Kim Truong, to whom Mr Thai became indebted to the tune of $300,000 as a result of the $1.8 million transaction. But neither thought to ask, what do these funds procured by Trend from a third party through a convertible bond have to do with the respondent and why must the respondent disburse funds to various third parties for no apparent reason? And Mr Thai did not ask why there was a need for some of the funds to simply flow through the respondent's accounts. In sum, Mr Thai says that as managing director he asked no questions and simply followed instructions and advice in relation to the $1.8 million and its accounting. Coming from Ms Nguyen as accounts administrator, such a response might be acceptable or at least explicable, but that can hardly be said of the managing director. He did not even wait for the accounting treatment advice from applicant to be settled, as on 6 December 2018 he (not the applicant) disbursed much of the funds.[100]

[56] Mr Thai's Sergeant Schultz like response continued beyond the 8 December 2018 emails. He also said much the same about the 10 December 2018 emails, the respondent's financial statements for FY2019 and minutes of directors FY2019 which he signed and which he called shareholder minutes.[101] And about his telephone conversations (of which there were a number) with the applicant and Mr Huynh during which he says the applicant and Mr Huynh spoke about how to deal with the $1.8 million from an accounting perspective and that he had no input because he did not have an appreciation or understanding of the accounting treatment of the $1.8 million.[102] It is to stretch the bounds of credulity to suggest that as managing director he did not consider that taking $300,000 for himself (as a loan) out of funds then in the hands of the respondent, with the transaction not being recorded in the financial records, there being no account for his "loan" of those funds and the loan being described as flow through funds, was somehow appropriate – all because he apparently did not have an appreciation for the appropriate accounting treatment. The suggestion deserves no more than recourse to an idiom – pull the other one, it's got bells on it.

[57] Surprisingly this whole affair, played out in the guise of an unfair dismissal remedy application many years after the actual events of November and December 2018, is played out without either party calling nor seeking any order to compel, the chief protagonist, Mr Huynh to give evidence. Nor was Mr Hoang, Trend's other director at the time of the $1.8 million transaction, and continuing, called to give evidence. Except for Mr Thai, none of the third-party recipients of some of the proceeds of the $1.8 million transaction (the flow through funds) were called to give evidence explaining why they received the funds. And so, we have disputes about the source and purpose of the funds coming into and going out of the respondent's account, and their accounting treatment, but no direct evidence from those depositing (Mr Huynh and Mr Hoang) nor any third-party recipient (apart from Mr Thai). As will be evident shortly, it is difficult to properly record that which has a purpose which is not properly identified.

[58] Ultimately, it appears that of the $1.8 million paid into the respondent's account, $500,000 was accounted as a loan from Mr Huynh to the respondent, which was then paid out to Trend to settle a trade payable balance. The remaining $1.3 million appears to have been treated as a flow through into and out of the respondent's account to various third parties. At least most of the funds in the hands of the respondent appear to have been regarded, by the applicant and also by Mr Thai, since he was only following Mr Huynh's orders and was the

beneficiary of some of the funds, funds of Mr Huynh or as funds payable on Mr Huynh's behalf to others. Indeed, Mr Thai's evidence was that he believed at the time that the funds (as well as earlier funds he assisted Mr Huynh to deposit into the respondent's account) were Mr Huynh's personal funds.[103] This is most evident in the following table[104] explaining how the $1.8 million was disbursed, which the applicant sent to Duc Long Hoang with a copy to Mr Thai by email on 24 February 2021:

Date	**On behalf of**	**Beneficiary account**	**Ultimate Beneficiary**	**Amount**
30/11/2018	Richard Huynh	Richard Huynh	Richard Huynh	200,000
30/11/2018	Prodigy	Trend Holdings	Trend Holdings	250,000
3/12/2018	Richard Huynh	Annam Investments		100,000
3/12/2018	Richard Huynh	Avant Garde Capital		200,000
3/12/2018	Prodigy	Trend Holdings	Trend Holdings	250,000
4/12/2018	Richard Huynh	Richard Huynh		100,000
4/12/2018	Richard Huynh	Lam Thi To Nga		100,000
5/12/2018	Richard Huynh	Lam Thi To Nga		100,000
10/12/2018	Richard Huynh	Annam Investments		50,000
10/12/2018	Richard Huynh	Richard Huynh		150,000
10/12/2018	Trieu Thai	Trieu Thai	Trieu Thai	300,000
	TOTAL			**1,800,000**

[59] Annam Investments and Avant Garde Capital, into which a total of $300,000 apparently "flowed", are both entities that are associated with Mr Huynh.[105]

[60] The applicant submits that following 30 November 2018, a consensus (as between the applicant and Messrs Huynh and Thai) was reached that the sum of $1.8 million should be treated as repayment for the sums Mr Huynh had procured over the previous two years and advanced on behalf of Trend to the respondent as capital contributions and a shareholder loan.[106] He maintained that it was appropriate and reasonable for the sum to be treated as Mr Huynh's money.[107] This cannot be accepted for three reasons. *First*, the treatment of the sum is inconsistent with the initial explanation by Mr Huynh about the purpose of the funds – that it was a capital contribution or loan from Trend. That one explanation was given, then another, ought to have raised suspicion and scepticism about the transaction and its purpose. *Second*, the funds came from Trend's account paid directly to the respondent. If the $1.8 million or any of it was repayment by Trend for the sums Mr Huynh had procured over the previous two years and advanced on behalf of Trend to the respondent as capital contributions and a shareholder loan, one would expect the payment to first be made by Trend to Mr Huynh. Moreover, one would expect some documentation as between Trend and Mr Huynh to support the loan or advance made by Mr Huynh. But there was nothing of that kind in the evidence. On no account can it be said that it was in the respondent's interest to be used to flush money said to belong to Mr Huynh but paid by Trend through its accounts, and then paid to third parties. *Third*, the applicant knew that Mr Huynh had arranged for Mr Thai to borrow $300,000 from the $1.8 million as a "personal loan from a third party"[108] which is inconsistent with any belief that the full $1.8 million was a repayment from Trend to Mr Huynh, as $300,000 of those funds was a separate loan between Mr Thai and a third party. *Fourth*, the only "consensus" (so to speak) apparent from the evidence is that Messrs Huynh and Thai and the applicant, ultimately treated the funds deposited by Trend into the respondent's account as being Mr Huynh's funds.

Whether they were is a matter on the evidence which cannot be conclusively determined, but what evidence there is suggests that the funds were Trend's funds. The only explanation in the evidence about the source and purpose of the funds which is procured directly from Mr Huynh, is that set out in his second email of 29 November 2018 in which he says the funds are from a Trend account as a capital contribution/loan.

[61] The applicant also contends that as $500,000 of the $1.8 million used by the respondent to pay down its debts to Trend was Mr Huynh's money, it was entirely appropriate for the applicant to instruct that it be recorded in the respondent's books as a $500,000 cash receipt for a loan from Mr Huynh and $500,000 as payment of trade balance to Trend. [109] This also cannot be accepted because there is no credible evidence that it was Mr Huynh's money for the reasons earlier given. Moreover, there is no evidence in the form of a loan agreement as between Mr Huynh and the respondent as might be expected for a loan transaction of that kind.

[62] The effect of the accounting treatment was that the respondent's financial statements for 2019 did not reveal the receipt of the $1.8 million and the disbursements totalling $1.3 million. As a result, only $500,000 was relevant to the respondent's business, which was recorded. Another $1.3 million flowed in and out of its accounts but was not recorded in the financial statements. It cannot be said that a failure to record funds received by the respondent and then paid to third parties was acting in the interests of the respondent. Nor do I accept that it was so. It also cannot have been in the respondent's interests to allow its accounts to be used to flow through funds from one party to others without any evident business rationale affecting the respondent. Paul Cockburn, a chartered accountant who operates a forensic accounting and advisory business, prepared a report about the $1.8 million and its method of accounting and he gave evidence in the proceeding.[110] The effect of his evidence is that there was no business reason for the $1.8 million to go through the respondent's account and I agree. Mr Cockburn's report goes to the questions of the propriety of the accounting treatment of the $1.8 million transaction - a matter that is within his expertise which was not in dispute.[111]

[63] Moreover, Mr Cockburn's report discloses that the proper accounting treatment of the $1.8 million transactions was as follows. *First*, the $1.8 million should have been recorded as a loan from Trend. *Second*, of the $1.3 million flow through funds, $1 million which was paid to Mr Huynh and to third parties, was not supported by any documentation or instruction explaining why the payments were made but could have been recorded as a loan from the respondent to Mr Huynh, directed drawings or as other unexplained expenditure. *Third*, the payment to Mr Thai of $300,000 should have been recorded as a loan in accordance with a loan agreement and *fourth*, the payment of $500,000 by the respondent to Trend should have been recorded as debts owed by the respondent to Trend in relation to the supply of goods by Trend to the respondent.[112] Recording the various transactions as a loan from Trend to the respondent, and then the outgoings as a loan from the respondent to Mr Huynh and Mr Thai respectively, would at least have accounted for all of the $1.8 million coming into and going out of the respondent's account. However, there is no satisfactory evidence that the intended purpose of the initial deposit and the subsequent disbursements (save for that which was paid to Mr Thai) from which it may be concluded that such a recording would be accurate. Mr Huynh and Mr Hoang, who both authorised the transfer of the $1.8 million from Trend to the respondent, might have been able to shed light on this, but neither was called to give evidence.

[64] As to the actual recording of the transaction, Mr Cockburn's report discloses the following matters. *First*, the funds received by Trend from Nguyen Thien Kim Truong for the payment of the convertible bond of $1.8 million were not recorded correctly in either Trend's or the respondent's books and records. As the funds were initially deposited into the bank account of Sarah's Patisserie Kwinana and then withdrawn from that bank account on the same day, the convertible bond was not recorded in Trend's books and records. At the time there was no documentation or agreement to support this deposit.[113] As to the manner of recording in Trend's books, that is not a matter for which the applicant bears any responsibility.

[65] *Second*, in the respondent's books and records, the funds transferred from Trend which were previously transferred from an account held in the name of Trend which held funds that were deposited by Nguyen Thien Kim Truong. Whilst $500,000 from the $1.8 Million received by the respondent was used to pay debts owed to Trend, false entries were created on the bank register under instruction from the applicant to gain the benefit from the $500,000 paid to Trend. The balance of the funds, being $1,000,000, were paid to Mr Huynh and other entities and $300,000 was paid to Mr Thai as a loan.[114]

[66] This was not consistent with the initial suggestion from Mr Huynh in explaining the nature of the payment and its proposed use by the respondent - that the respondent could use the money paid to it as a capital contribution/loan by Trend "to pay bills etc".[115] I agree and I also note that this inconsistency was obviously apparent on the face of the earlier set out emails and so was known or ought to have been known to both the applicant and Mr Thai.

[67] *Third*, there was no loan recorded from Trend for the deposit made by it of $1.8 million and the net result of the accounting was that Mr Huynh's loan in the respondent's account increased by $500,000. I agree but note my earlier observations about the absence of any satisfactory evidence as to the purpose of the $1.8 million deposit by Trend to the respondent.

[68] *Fourth*, the end result of the various accounting for the funds was that $1.8 million came into the respondent's bank account and was thereafter disbursed to Mr Huynh and third parties, including Trend and Mr Thai, with a zero effect in the books and records of the respondent and the transaction was recorded in a manner that concealed the $1.8 million transfer from Trend and provided a benefit to Mr Huynh's loan account of $500,000. The applicant was complicit in assisting Mr Huynh conceal the $1.8 million transaction from Trend by preparing journal entries to be processed by the respondent and in providing instructions to the accountant to process bank entries that did not exist.[116] This may be so, but as I have already noted the recording and accounting in Trend's books, is not a matter for which the applicant bears any responsibility. But if there was some complicity in a deception *vis-à-vis* Trend's books, then Mr Thai both as beneficiary of some of the funds and as recipient without demur of the emails suggesting entries into Trend's books was also at the very least knowingly involved.

[69] Mr Cockburn also gave evidence that his opinion in his report would not have changed if he was told that the $1.8 million was raised, used, and applied as a means of repaying Mr Huynh for the advanced capital contributions he had made on behalf of Trend to the respondent.[117] Of course this explanation is all hypothetical since there is no evidence beyond the applicant's evidence of that which Mr Huynh told him - that the $1.8 million was raised, used, and applied as a means of repaying Mr Huynh for the advanced capital contributions he had made on behalf of Trend. Mr Huynh did not give evidence, no-one from Trend gave

evidence to confirm the arrangement and no document has been produced to confirm the arrangement. Moreover, even if true – and again to resort to a metaphorical idiom - the elephants in the room remain. Why was there a need to flush $1.3 million through the respondent's account for payment to third parties including Mr Huynh and Mr Thai? Why was it not necessary to properly record the transactions? And what business imperative was being served?

[70] I accept Mr Cockburn's evidence about the inappropriate recording of the $1.8 million transaction as set out in his report, although I do not accept all of his suggestions as to the appropriate manner of recording because I do not consider there is sufficient evidence to conclude that the initial deposit by Trend to the respondent of $1.8 million was, or was intended, as a loan. It must also be said that one need not rely on an expert report to suspect that the transaction, its explanation, and its recording was, speaking colloquially, "dodgy".

[71] From the foregoing, the following matters may be comfortably concluded in respect of the $1.8 million transaction. *First*, it is not conceivable that the applicant could have on the information available to him, reasonably concluded that the $1.8 million transaction concerned funds of Mr Huynh. But in any event once the funds were in the hands of the respondent they ought to have been treated and recorded as the respondent's funds and the source and purpose of those funds ought properly to have been identified and recorded. That did not occur. Having been asked to advise on the recording of the funds, the applicant ought to have proceeded to advise that the source and purpose of those funds should be recorded, the disbursements should be recorded including the purpose of each disbursement, and all the transactions should be recorded in the respondent's financial records. But he did not. *Second*, the applicant proposed accounting treatments for all the transactions relating to the $1.8 million transaction for both the respondent and for Trend.[118] His advice caused two false entries, each valued at $500,000, to debit the unallocated monies ledger and credit the bank register, then debit the bank register and credit Mr Huynh's loan account.[119] This was undertaken in circumstances where Mr Huynh did not loan any money to the respondent, as the money came from Trend's funds.[120] *Third*, the applicant, by his advice, caused the $1.8 million transaction not to appear in the respondent's financial records. In the result the details of the $1.8 million transaction were hidden, at least from some of the shareholders who were not in the know, namely those other than the applicant Messrs Huynh and Thai. This was because, his advice, caused the whole of the $1.8 million not to be recorded accurately in the respondent's books, and instead it was recorded in a ledger account "Unallocated Monies" in the books and records of the respondent, with the intention of being treated as a flow through account and having no impact.[121] And as earlier noted, the respondent's financial statements for the year ended 30 June 2019 do not disclose or record the transaction of $1.8 million.[122]

[72] In the circumstances, it is inconceivable that the applicant did not know that there was no good, proper or valid business reason for the whole of the $1.8 million to go through the respondent's account. I conclude that he well knew that was the case but proceeded none the less in order to facilitate achieving Mr Huynh's purpose, whatever that might have been. I do not know because he did not give evidence, but the lack of clarity both as to the source and purpose of the funds going in, and the lack of explanation for the flow through funds speak volumes. Save for the $500,000 paid to Trend, the remaining funds were not deposited nor disbursed for any business reason connected with the respondent. As Mr Cockburn has concluded and I accept, the $1.8 million transaction should have been properly recorded. [123]

Quite possibly this may have been as a loan from Trend to the respondent, because the 51% capital contributions had already been paid by Trend at the time of the deposit on 30 November 2018 and the funds paid to Messrs Huynh and Thai should have been allocated to their respective loan accounts. But that is about the recording of the transaction. I consider that, as a base step, clarity about the source and purpose of the funds ought to have been obtained. Without that, accurate recording is difficult. It may be accepted that the funds paid to Trend by the respondent were treated correctly,[124] subject to the caveat in the previous sentence. In the result the financial records of the respondent are not accurate and must be corrected.[125] The receipt, inaccurate accounting and disbursement of funds of doubtful origin and purpose was never in the interests of the respondent. And those involved, including the applicant, did not act in the respondent's interests at the time.

[73] In the normal course of events, I would conclude that the conduct in which the applicant engaged was misconduct and provided a valid reason for dismissal. The applicant failed to discharge his duties as an employee of the respondent by permitting or facilitating the treatment of funds which were the respondent's funds, in a manner that was contrary to the respondent's interests and caused a false or deliberately inaccurate financial narrative to be created. But this is not a case in the normal course of events.

[74] At the time of the $1.8 million transaction, the respondent's directors were Mr Thai, having become a director on 5 March 2015, Mr Huynh (who was also a Trend director, the respondent's majority shareholder), and the applicant who were both appointed as directors on 11 October 2016. Mr Huynh ceased being a director on 18 November 2020 and was replaced by Mr Hoang (also a director of Trend). The applicant ceased being a director on 25 October 2022 (replaced by Bao Ngoc Anh Nguyen, who it will be recalled has an interest in BNNN Pty Limited which held a 12% interest in the respondent and who was also the respondent's general manager of operations in New South Wales). Mr Thai remains a director of the respondent[126] and as earlier noted he was at the time of the transactions, the respondent's managing director.

[75] For the reasons earlier given, I do not accept that Mr Thai was in the dark about the nature of the $1.8 million transaction nor about the legitimacy of the way in which the applicant advised the transaction should be accounted. Mr Huynh conveyed the fact that the $1.8 million deposit would be made to the respondent, directly to Mr Thai. He also directed Mr Thai to disburse some of those funds to third parties and Mr Thai was to be a direct beneficiary of $300,000 of the funds. The applicant did not initiate the payment of the funds, nor did he unilaterally suggest how those funds should be treated. Instead as the email exchanges between Messrs Huynh and Thai and the applicant between 29 November and 10 December 2018 disclose, it was Mr Thai who asked the applicant to assist Ms Nguyen when determining how to treat the funds.[127] Moreover Mr Thai's evidence discloses that he knew since early November 2018, that Mr Huynh had organised a corporate bond between Trend and Nguyen Thien Kim Truong of $1.8 million which would be transferred directly to the respondent from Trend; and that these funds will be used by the respondent to pay off some of the outstanding balance that the respondent owed Trend; and that Mr Huynh would work with the applicant to figure out how to treat the rest.[128]

[76] All of this shows that Mr Thai knew about and was involved in the $1.8 million transaction, and that he knew about, authorised or at least acquiesced in the way the transaction both incoming and outgoing would be recorded, and that he did so in his capacity as managing

director and thus had the authority to authorise or acquiesce to the way the funds were recorded. Moreover, he was a direct participant in making the outgoing payments, which he was asked to action by Mr Huynh. Just as with the applicant, it is inconceivable that Mr Thai did not know that there was no good, proper or valid business reason for the whole of the $1.8 million to go through the respondent's account. Nor was there any good business reason for the respondent to be making payments to third parties which Mr Thai knowingly facilitated, his Nuremberg like defence notwithstanding. And as I earlier noted, great knowledge of accounting was not required in order to ask why some of the funds paid to the respondent and then disbursed to others, including to Mr Thai, should not appear in the respondent's financial reports. Frankly as managing director of the respondent, Mr Thai had an obligation to make that most basic inquiry.

[77] Mr Huynh was also a director of the respondent involved in the transaction and in the recording of same. He was plainly conflicted in that he appears to have been dealing with monies originating from Trend of which he was a director, funnelled through the respondent of which he was also a director and then paid to third parties, including by way of a loan to Mr Thai in relation to which he was instrumental in facilitating. He also benefitted from the disbursement of funds to Annam Investments and Avant Garde Capital, in which he had an interest. And he directly benefited by receiving some of the funds. He would in these dealings have made a fine octopus.

[78] In the circumstances, the directing and controlling minds of the respondent, and therefore the respondent, had at the relevant time both knowledge of the $1.8 million transaction and its accounting and acquiesced to its accounting as well as facilitating the arrangements by approving the payments made to third parties and in the case of Mr Thai by benefiting directly from part of the funds. Thus, the conduct in which the applicant engaged in 2018 and about which the respondent now complains and suggests provides it with a valid reason for the applicant's dismissal, was conduct which was known to the respondent at the time. It condoned the misconduct about which it now complains. As managing director, Mr Thai was able to intervene, raise questions, ask for clarification and to say "no" to the proposed recording of the transaction. He was not kept in the dark. Rather he was fully involved.

[79] At common law, an employer is not entitled to summarily dismiss an employee for an earlier instance of employee misconduct if the employer with full knowledge of that misconduct had decided to retain the employee in employment.[129] In such cases the condoning employer is taken to have waived the right to summarily dismiss the employee – in shorthand, the principle is often referred to as condonation and waiver. But an employer may take such conduct into account in deciding whether further misconduct by an employee justifies summary dismissal.[130]

[80] To conclude for the purpose of s 387(a) of the Act that an employer who had condoned misconduct by an employee in this way and had thus waived the right of summary dismissal at common law nonetheless had a valid reason for dismissing that employee for that misconduct is difficult.[131] But in the same way that such conduct may be taken into account in deciding whether further misconduct by an employee justifies summary dismissal, the earlier conduct is not irrelevant and it may be considered under s 387(h) in determining whether a dismissal was harsh, unjust or unreasonable, for example where later misconduct is said to be part of a pattern of conduct or behaviour.[132] But no such allegation is here made.

[81] And so, I accept the applicant's contention that an employer who has condoned misconduct by an employee in this way does not later have a valid reason for dismissing that employee for the earlier misconduct. I consider that the respondent through its directing and controlling minds, including Mr Thai, had full knowledge of the misconduct now alleged and nonetheless retained the applicant in employment and having made that election, the respondent deliberately abandoned the right to summarily dismiss the applicant. This is so because the controlling minds of the respondent were complicit in the receipt, disbursement and recording of the funds the subject of the $1.8 million transaction. Consequently, the applicant's involvement in the recording and accounting of the $1.8 million transaction in the respondent's records is not a valid reason for his dismissal. That conclusion is not to condone the dealings involving the $1.8 million transaction, but merely to recognise that all of the respondent's directors, one of whom was also the managing director, were knowingly involved in the transaction and its accounting, such that the respondent cannot now rely upon the applicant's conduct at the time as a valid reason for dismissal.

[82] It is necessary to deal with a further related matter. By February 2021, Mr Hoang had replaced Mr Huynh as a director of the respondent. Mr Hoang was also a director of Trend. Mr Hoang sought details from the applicant about the $1.8 million transaction.[133] An initial response, with a copy to Mr Thai, was provided by email on 17 February 2021 in which the applicant advised that "[b]ased on Prodigy's bank record, Prodigy Holding received $1.8m on 29 November 2018" and the funds were transferred out based on Mr Huynh's instruction in accordance with a table set out in the email.[134] That table provides: [135]

Date	**On behalf of**	**Beneficiary account**	**Ultimate Beneficiary**	**Amount**
30/11/2018	Prodigy	Richard Huynh	Richard Huynh	200,000
30/11/2018	Prodigy	Trend Holdings	Trend Holdings	250,000
3/12/2018	Prodigy	Annam Investments	Richard Huynh	100,000
3/12/2018	Prodigy	Avant Garde Capital	Richard Huynh	200,000
3/12/2018	Prodigy	Trend Holdings	Trend Holdings	250,000
4/12/2018	Richard Huynh	Richard Huynh		100,000
4/12/2018	Richard Huynh	Lam Thi To Nga		100,000
5/12/2018	Richard Huynh	Lam Thi To Nga		100,000
10/12/2018	Richard Huynh	Annam Investments		50,000
10/12/2018	Richard Huynh	Richard Huynh		150,000
10/12/2018	Trieu Thai	Trieu Thai	Trieu Thai	300,000
	TOTAL			1,800,000

[83] The applicant's email also advised that "[o]f the $1.8m, $1m is accounted for as [the respondent's receipt and payments on behalf of itself" and "the remaining $800k were simply treated as flow through where Prodigy received and transferred out on behalf of others (sic) parties as noted above". This was incorrect.

[84] On 24 February 2021, the applicant sent Messrs Hoang and Thai a further email more correctly setting out the details of the $1.8 million transaction and how the $1.8 million transfer and disbursements were recorded in the respondent's financial books.[136] The table in the email (correcting the table above) is earlier set out at [58] and the text of the email advised as follows:

> Upon further investigation, we confirm that of the $1.8m received, only $500k was accounted for as loan from Richard Huynh to Prodigy Holding which was immediately paid out to Trend Holding to settle trade payable balance.
>
> The remaining $1.3m was treated as a flow through to Prodigy account to various parties. Please see amended summary below.
>
> …[137]

[85] The email did not disclose that the funds received were from Trend not Mr Huynh, nor that Mr Huynh initially represented the deposit to be a capital contribution from Trend and later represented that the funds were Trend's repayment to Mr Huynh for funds he had loaned to Trend over the previous years to facilitate Trend's contribution to the respondent or that the applicant and Mr Thai accepted this explanation.

[86] Mr Huynh did not follow up or accept the invitation to call the applicant for any clarification. Nor did Mr Thai take any step to add to (or dispute) the explanation. That the funds came from Trend was in the knowledge of Mr Hoang, after all he did sign the transfer of funds authorisation.[138] Mr Huynh's representation as to the source and purpose of the funds may have been relevant information but not critical. More relevant was that here Mr Hoang was asking questions as a director of the respondent and not in his capacity as a director of Trend. The other elements of the "dodgy" dealing were apparent from the email, but they appear to raise no question in Mr Hoang's mind about the reason why funds he signed off to transfer to the respondent, made their way almost immediately as "flow through" to third parties including to the managing director of the respondent. And as a director of the respondent, judging by the absences of any follow up, Mr Huynh appeared none too concerned that $1.3 million was treated as a flow through to the respondent's account to various parties on his instructions. Nor does he appear concerned to establish why the funds were paid to the respondent at all.

[87] Although Mr Hoang was not a director of the respondent at the time of the $1.8 million transaction, the respondent suggests that since becoming a director, he did not have full knowledge of the transaction such that condonation of the conduct and waiver of the right to dismiss because of the conduct does not arise. This contention is rejected for the following reasons. *First*, and most obviously, Mr Hoang did not give evidence and so he could not tell me about the state of his knowledge nor be cross-examined about his knowledge and other relevant matters. *Second*, the notion that misconduct by an employee that has been condoned the employment continued, and summary dismissal rights thereby waived when one group controls an entity, may later not be condoned and the earlier waiver undone when another takes charge such that dismissal on that ground would found a valid reason, is rejected. *Third*, and just as importantly, on the available evidence what is it that Mr Hoang did not apparently know? He had the knowledge to which reference is made above. That alone was sufficient to raise questions about the business legitimacy of the transaction. But he raised no concerns. He had access to the financial reports both as a director and before that as a director of the respondent's major shareholder. That which he may not have known (but I cannot so conclude because he did not give evidence) is the representation about the source of the funds made by Mr Huynh. But in the overall scheme of things, that information is hardly critical to assessing that the transaction and its accounting was "dodgy". In any event the representation concerns the

conduct of Mr Huynh, not the applicant. It appears to me on the available evidence that Mr Hoang had the requisite knowledge of the conduct since at least the end of February 2021 and he did nothing at the time.

[88] A further matter on which the respondent relies as founding a valid reason for dismissing the applicant is an allegation that the applicant gave Vu Anh Tran unrestricted access to its Systems Applications and Products (SAP) on 10 July 2021. That such access was given is said to have only come to light after the dismissal of the applicant.[139] The applicant gave evidence that Mr Tran was appointed an independent advisor to the respondent's board at a shareholders' meeting on 13 April 2021.[140] This is strange since Mr Tran does not appear to have applied for the position until 27 May 2021 for commencement in June of that year.[141] In any event that Mr Tran was appointed as such is not in dispute. Both the applicant and Mr Thai supported the appointment of Mr Tran and the scope of work he had proposed in the role.[142] As part of his role Mr Tran would undertake research and provide advice on, *inter alia*, effectively managing costs, which necessarily involved an examination of the books and records of the respondent, particularly production and operating costs, to enable Mr Tran to develop a proposal for the board.[143]

[89] On 21 June 2021, the applicant sent Ms Nguyen an email to introduce Mr Tran as an independent advisor and asked her to give Mr Tran access to data from the respondent's system as required from time to time and to provide him with relevant information upon request. Mr Thai was copied into that email.[144] On 21 July 2021, the applicant provided Mr Tran with SAP access details by email and instructed him to change the password provided on his initial login.[145] It is not in dispute that unrestricted SAP access gives the holder access to an array of confidential material.[146] Nor is it in dispute that the arrangement with Mr Tran was not subject to a written agreement, it was not remunerated and it was not employment, nor was he a director of the respondent.[147] It is also not in dispute that Mr Tran was not bound by any confidentiality undertaking in relation to the material in SAP, nor was he bound by the confidentiality provisions of the shareholder agreement[148] because he was not a party to that agreement.[149] He did represent a shareholder, namely Thu Phuong Nguyen.[150]

[90] The respondent contends that there is no evidence that it consented to or authorised Mr Tran's unrestricted access to SAP. So much may be true, but it does not advance matters. The real issue is whether the applicant was authorised to grant Mr Tran unrestricted access to SAP, and there is nothing to suggest that he was not. That the applicant did not copy in others to the access email is unsurprising, given that it contained a username and password. Rudimentary adherence to security protocol would suggest that such information ought not be shared with persons beyond the intended user.

[91] The respondent contends that the applicant's improper grant of unrestricted access to Mr Tran, without the respondent's consent or authority, constitutes a valid reason for dismissal. But there is no evidence that the grant of access was not authorised. There is no particularised evidence about who is authorised to grant access to SAP or under what circumstances a grant of access would be given. There is some evidence that the applicant has given and restricted access to SAP and the respondent's accounts during the course of January to June 2022,[151] and it must be said it would be surprising if as the respondent's general manager at the time with responsibility for financial reporting, the applicant would not have had authority to grant, remove or limit access to SAP. Moreover, the fact that the applicant had the capacity to grant

access to SAP (which he did in relation to Mr Tran) suggests that with that capacity comes authority. Mr Thai does not say the applicant was not authorised to grant Mr Tran access. He says only that he was not aware of the grant of access until after the applicant's employment ended.[152]

[92] Mr Tran was appointed as advisor to the respondent's board and given his role I accept that he would need to review some confidential information including that which may be contained in SAP. The applicant appeared to take a role in ensuring that Mr Tran had access to relevant information as is evident by his email to Ms Nguyen on 21 June 2021. Mr Thai was copied into that email, and there is no evident demur. Though it may not have been wise to grant full access without requiring a strict confidentiality undertaking, I do not accept that the respondent has made out a case that the grant of access was unauthorised or improper. I should also indicate that I do not accept the applicant's contention that as Mr Tran represented Thu Phuong Nguyen, under the shareholders' agreement, Mr Nguyen was obliged to ensure his employees and agents comply with the shareholders agreement, including its confidentiality provisions, and so the respondent had sufficient protection. The obvious flaw in the argument is that Mr Tran was not being given access in his capacity as representative of Mr Nguyen. He was given access in his capacity as independent advisor to the Board. In those circumstances Mr Nguyen bore no such obligation. Whether, as a representative of Mr Nguyen, a shareholder of the respondent, Mr Tran could properly be described as an "independent advisor" to the respondent's board is not a matter I need determine but was one that seems not to have troubled the respondent nor Mr Thai and the applicant at the time.

[93] In 2020 there began a dispute in connection with Mr Huynh's involvement with Trend and which later that year escalated to legal proceedings in the Supreme Court of Western Australia.[153] Trend engaged forensic accountants, Auxilium Partners, for the purposes of those proceedings to review Trend's accounts and produce an expert report.[154] The respondent cooperated with that review and provided Auxilium Partners with access to the respondent's accounts and the applicant facilitated this access.[155] Trend received a draft report from the forensic accountants in early September 2022.[156] It is not in evidence before me.

[94] In late 2021 and through 2022 there were also internal machinations in the respondent about the position of managing director held by Mr Thai.[157] The validity of the removal of Mr Thai and appointment of the applicant as managing director is in contest, but as I have earlier noted, it is not a matter that requires my determination. It is sufficient for context to note that on 11 May 2022, a meeting of the respondent's shareholders purported to resolve to appoint the applicant as the respondent's managing director.[158] On 1 June 2022, Mr Thai, appears to have sent an email to various persons indicating that he would step down from his role as managing director effective that day and the applicant apparently became the managing director for the respondent from that date.[159] Mr Thai's access to SAP was restricted to "read only" by the applicant.[160] Lawyers were engaged to do battle over, *inter alia*, the validity of the removal of Mr Thai from his position and correspondence was exchanged.[161] Mr Thai returned to the managing director role after the applicant was dismissed.

[95] On 7 October 2022, lawyers acting for Trend, sent correspondence to the applicant alleging that he had breached various duties as a director of the respondent in relation to the $1.8 million transaction.[162] The applicant, through his lawyers responded to the allegations – denying them – in correspondence dated 20 October 2022.[163] On 22 October 2022, the

respondent's shareholders offered to purchase the shares in the respondent controlled by the applicant .[164] The applicant was required to accept the offer by 5:00 pm AEST on 24 October 2022.[165] At 4:16 pm on 24 October 2022, the applicant requested an extension of time to consider the offer but received no response.[166] On 25 October 2022, a meeting to remove the applicant as a director of the respondent took place and a resolution for his removal was purportedly passed.[167]

[96] On 30 October 2022, the applicant received a letter from solicitors who act for Trend in making breach of director duties allegations against the applicant, and also act for the respondent on instructions from Mr Hoang in his capacity as a director of the respondent.[168] The correspondence alleged, *inter alia*:

> Based on the information that is available to Prodigy and the inadequacy of your explanations set out in Walter Grant Legal's letter of 20 October 2022, Prodigy holds the belief that your actions and conduct mentioned above constitutes serious and wilful misconduct which has caused loss and damage to Prodigy and to its majority shareholder Trend.[169]

[97] No loss or damage is particularised, but as an aside, if loss and damage was caused to Trend as alleged by reason of the applicant's conduct, the applicant's employer, the respondent, would likely be vicariously liable and perhaps also principally liable since the respondent received and disbursed Trends' funds in the circumstances earlier described. So how is it that these lawyers can act for both Trend and the respondent in relation to the same or related matters without a conflict? No figurative "Chinese wall" is evident as all relevant correspondence appears to have been signed off by the same legal practitioner. Surely, if the lawyers advised Trend in relation to the loss and damage alleged, they will have advised it that such loss and damage may be recovered in a suit as against the respondent as well as the applicant. Conflicts are matters for the lawyers to sort out, and it is not a matter about which I need to comment further, save to point out the real potential of an actual conflict of interest, that such a conflict may be waived if waiver is given after full disclosure of the nature of the conflict and the irony in the lawyers acting *prima facie* in conflict (having a duty to not so do) contending the applicant has breached certain of his duties.

[98] The correspondence advised the applicant that he was summarily dismissed from his employment with the respondent.[170]

[99] I turn next to consider whether the applicant's dismissal was unfair.

Whether dismissal was unfair

Protection from unfair dismissal

[100] An unfair dismissal remedy in the form of an order for reinstatement or compensation may only be made if I am satisfied the applicant was, at the date of the dismissal, protected from unfair dismissal under the Act and that the dismissal was unfair. Section 382 of the Act sets out the circumstances that must exist for the applicant to be protected from unfair dismissal and there is no dispute, and I am satisfied, that he was, on 30 October 2022, protected from unfair dismissal within the meaning of s 382. The applicant's dismissal will have been unfair

if, on the evidence, I am satisfied that all of the circumstances set out in s 385 of the Act existed. There is also no dispute that the applicant was dismissed at the initiative of the respondent within the meaning of s 386(1)(a). The respondent is not a small business employer, so the Small Business Fair Dismissal Code is not engaged, and the dismissal was not a case of genuine redundancy within the meaning of s 389.

Harsh, unjust or unreasonable

[101] A consideration whether a dismissal was harsh, unjust or unreasonable, requires the following matters in s 387 of the Act be taken into account: (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); (b) whether the person was notified of that reason; (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; (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; (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; (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; (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; (h) any other matters that the Commission considers relevant.

[102] A statutory requirement that a matter be taken into account means that the matter is a 'relevant consideration' and is a matter which the decision maker is bound to take into account.[171] To take into account the matters set out in s 387 means that each of the matters must be treated as a matter of significance in the decision-making process[172] and requires the decision maker to evaluate it and give it due weight, having regard to all other relevant factors.[173] In weighing relevant matters, the weight given to a particular matter is ultimately a matter for the Commission subject to some qualifications, which for example might lead a court to set aside a decision if the decision maker has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance.[174]

[103] The phrase "harsh, unjust or unreasonable", finds no definition in the Act, but a dismissal may be harsh but not unjust or unreasonable; it may be unjust but not harsh or unreasonable; or may be unreasonable but not harsh or unjust. There will be cases where these concepts will overlap. In any given case all the concepts may be present, or only some, or none. A dismissal may be unjust because the employee was not guilty of the misconduct on which the employer acted. It may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer. And may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.[175] But the assessment of whether any or all of these concepts is present in a given case of dismissal is undertaken in a statutory context and it is the matters set out in s 387 of the Act to which regard must be had in assessing whether a particular dismissal was harsh, unjust or unreasonable.

Valid reason – s 387(a)

[104] The essence of a valid reason is that the reason is a sound, defensible or a well-founded reason – one that is not capricious, fanciful, spiteful or prejudiced.[176] The issue is whether there was such a valid reason related to the applicant's capacity or conduct. Whether conduct which is said to found a valid reason occurred is to be determined based on the evidence in the proceedings assessed on the balance of probabilities taking into account the gravity or seriousness of the allegations.[177] The existence of a valid reason is not ascertained by asking whether the employer, after a sufficient investigation, had a reasonably held belief that the conduct occurred.[178] A reason would be valid because the conduct occurred, and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination.[179] It is not necessary to show the misconduct as sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).[180] An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) may also be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.[181]

[105] But for the condonation and waiver by the respondent in respect of the misconduct in which the applicant engaged, I would have concluded that there was a valid reason for dismissal. The whole of the circumstances around the $1.8 million transaction was suspect and there was no evident business reason to support what was done. The accounting of the transaction did not accurately reflect the transaction, its origin and purpose, nor the disbursement of the funds the respondent received from Trend and purpose thereof. But there was condonation and waiver in relation to the misconduct in the requisite sense. All the directors of the respondent at the time had the requisite state of knowledge about the $1.8 million transaction and were involved in it with two of the three directors (the applicant not being one of them) benefiting from the transaction. I am not persuaded there was a valid reason for the applicant's dismissal relating to his involvement in the $1.8 million transaction and its accounting. My reasons for these conclusions are earlier set out at [22]-[87]. For the reasons set out at [88]-[92] I am not persuaded that allowing Mr Tran unrestricted access to SAP is a valid reason for dismissal. Consequently, there was no valid reason for the applicant's dismissal. The absence of a valid reason is a factor that weighs in favour of a conclusion that the dismissal was unfair.

Notification of the reason for dismissal and opportunity to respond – s 387(b) – (c)

[106] Notification of a valid reason for termination should be given to an employee protected from unfair dismissal before the decision is made,[182] in explicit terms,[183] plain and clear terms.[184] This is an element which may be described as procedural fairness in order that an employee may respond to the reason. Procedural fairness requires that an employee be notified of the reason for the dismissal before any decision is taken to terminate employment to provide them with an opportunity to respond to the reason identified. Section 387(b) and (c) would have little practical effect if it were sufficient to notify an employee and give them an opportunity to respond after a decision had been taken to terminate employment.[185] An employee protected from unfair dismissal should also be given an opportunity to respond to any reason for dismissal relating to the employee's conduct or capacity.

[107] Here the applicant was notified of the principal reason for the dismissal on the day his dismissal took effect, but the decision to dismiss had already been taken when he was so notified, and he was not given an opportunity to respond to it. I do not accept, as the respondent contends, that the applicant's earlier responses to the lawyers then acting for Trend, amounted to an opportunity to respond to the reason for his dismissal. Trend was not his employer and Trend was not suggesting that the matters raised might lead to his dismissal as an employee of the respondent. The SAP allegation was not raised I accept because the grant of access to Mr Tran was not known until after dismissal. But that there was no opportunity afforded the applicant to respond to the reason for dismissal is a matter that weighs in favour of a conclusion that his dismissal was unfair. The applicant could have responded by pointing out, as he has in this case, quite properly the conduct the subject of the allegations was known to the respondent, that the respondent condoned the conduct and took no step to dismiss or otherwise discipline the applicant.

Any unreasonable refusal by the employer to allow the person to have a support person – s 387(d)

[108] This consideration is concerned with whether there was any unreasonable refusal by the respondent to allow the applicant to have a support person present to assist at any discussions relating to the dismissal. There was no termination or employment meeting or discussion to which the applicant could have brought a support person. The applicant and the respondent were legally represented, and the termination of the applicant's employment was effected by letter from solicitors acting for the respondent. This consideration does not arise.

Warnings regarding unsatisfactory performance – s 387(e)

[109] The applicant's dismissal was not related to any unsatisfactory performance and so this consideration does not arise. The dismissal was for misconduct.

Impact of the size of the respondent on the procedure followed – s 387(f)

[110] The consideration in s 387(f) of the Act is concerned with the likely impact of the size of an employer's enterprise on the procedures followed by the employer. There is no evidence nor any suggestion that the respondent's size negatively impacted the procedure it adopted to effect the applicant's dismissal. This consideration weighs neutrally.

Absence of dedicated human resources management specialist/expertise on procedures followed – s 387(g)

[111] There is no evidence about the impact on the procedure adopted by the respondent to effect the dismissal was affected by an absence of any dedicated human resources management specialists or expertise". The respondent engaged lawyers to guide it through the applicant's dismissal. This consideration also weighs neutrally.

Any other matters that the Commission considers relevant – s 387(h)

[112] It is hard to ignore the guiding hand of Trend through Mr Hoang and the dispute for control of the respondent in this case. But since Mr Hoang did not give evidence, I do not wish, nor do I need, to make any adverse findings. It is sufficient to observe that the applicant appears to me to be the casualty of a struggle for control of the respondent and the past conduct of Mr

Huynh. But again, these are matters I need not weigh in the applicant's favour because the absence of a valid reason and the denial of procedural fairness taken together are sufficiently weighty to support a conclusion that the applicant's dismissal was unfair.

[113] The applicant's past conduct, which the respondent through its directors at the time condoned, was used as the proverbial axe. As I earlier observed, I do not condone the applicant's conduct, nor that of the other directors involved in the $1.8 million transaction. I simply do not consider in the circumstances that dismissal for that conduct was justified. It is not otherwise taken into account since there is no finding of any further misconduct and no suggestion that the earlier condoned misconduct is part of a pattern of conduct or behaviour that would justify dismissal.

[114] The preponderance of relevant matters weigh in favour of a conclusion that the applicant's dismissal was unreasonable, because he was dismissed for conduct earlier condoned, and because of the failure to allow the applicant to respond to the principal reason for dismissal. No relevant consideration weighs against a conclusion that the dismissal was unfair.

[115] For these reasons I am satisfied that the applicant's dismissal was unfair. I will hear the parties separately on the question of remedy. I set out the below directions to facilitate this and I will require the parties to attend a member assisted conciliation to attempt to resolve the question of remedy by agreement.

[116] I direct:

1. The parties will attend a member assisted conciliation conference facilitated by Commissioner Lee at **11:00 am AEST on Wednesday, 23 August 2023**.

2. The applicant shall file in the Commission and serve on the respondent an outline of submissions, any statement(s) of evidence and any documentary material(s) addressing the issue of the remedy, if any, that should be ordered consequent of the finding that the applicant's dismissal was unfair (remedy issue) by no later than **5:00 pm AEST on Tuesday, 5 September 2023**.

3. The respondent shall file in the Commission and serve on the applicant an outline of submissions, any statement(s) of evidence and any documentary material(s) addressing the remedy issue by no later than **5:00 pm AEST on Tuesday, 26 September 2023**.

4. The applicant shall file in the Commission and serve on the respondent any material in reply by no later than **5:00 pm AEST on Tuesday, 3 October 2023**.

5. All material should be sent to chambers.gostencnik.dp@fwc.gov.au.

6. The parties are granted liberty to apply to vary these directions. Any application for an extension to file materials must be made before the date and time materials are due.

DEPUTY PRESIDENT

Appearances:

C Power Solicitor for the applicant

A Power of Counsel for the respondent

Hearing details:

13 and 14 February 2023
Melbourne

1 May 2023
Microsoft Teams

Closing written submissions:

Applicant: 28 February 2023, 21 March 2023

Respondent: 14 March 2023

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[1] Further Amended Consolidated Book of Documents (CB)72

[2] Exhibit 1 at [44]

[3] Ibid at [3] where first appearing

[4] Ibid

[5] CB11

[6] Exhibit 1 at [4] second appearing

[7] Exhibit 6 at [21]

[8] Exhibit 1 at [4] first appearing; Exhibit 3 at [71]

[9] CB13

[10] See Exhibit 1 at [3] where second appearing; exhibit 4, annexure PC-1 pp 22-30

[11] Ibid

[12] Exhibit 1 at [5]

[13] Ibid at [6]

[14] Exhibit 3 at [84]-[86]

[15] CB14

[16] Ibid at clause 6

[17] Form F3 (answer to Q3.2 at [2]), and Attachment A thereto; see also CB28

[18] Exhibit 1 at [9]

[19] Exhibit 3 at [99]; CB26A

[20] Ibid

[21] CB27

[22] Exhibit 3 at [102]

[23] Respondent's Closing submissions at [4]

[24] CB14 at clause 9.2

[25] Exhibit 1 at [8]

[26] Ibid

[27] Ibid at [10]

[28] Ibid

[29] Ibid at [11]

[30] Ibid

[31] Exhibit 3 at [88]

[32] Exhibit 1 at [1]-[2]; Transcript PN393, PN401-PN402

[33] Exhibit 1 at [2]-[3]; Transcript PN394-PN400

[34] Transcript PN397

[35] PN473-495 and CB10

[36] Exhibit 3 at [90]-[91]

[37] Exhibit 6 at [6]

[38] Ibid at [8]

[39] Ibid at [7]

[40] Transcript PN2638-PN2661

[41] Ibid PN2639-PN2641

[42] CB16

[43] Exhibit 3 at [90]

[44] Transcript PN2638-PN2661

[45] CB18-CB24

[46] CB16A at p 132.2

[47] CB16A at p 132.3

[48] CB16A

[49] CB31 at 308

[50] Ibid

[51] Transcript PN803

[52] CB31 at 308

[53] CB36

[54] Ibid

[55] CB83 at 359

[56] Ibid

[57] CB38 at 360

[58] Ibid

[59] Ibid

[60] CB39 at 365

[61] CB41 at 370-371

[62] CB41 at 370

[63] CB41 at 369-370

[64] CB41 at 369

[65] CB40 at 367-368

[66] CB40 at 367

[67] Ibid

[68] CB41

[69] CB31 at 308

[70] Transcript PN804-PN807

[71] Exhibit 1 at [14]

[72] Exhibit 2 at [9]

[73] Ibid

[74] Exhibit 3 at [112]

[75] Exhibit 2 at [10]

[76] Ibid at [11]

[77] Ibid at [13]

[78] Ibid at [14]

[79] Ibid

[80] Exhibit 2 at [15]

[81] Ibid at [17]

[82] Exhibit 3 at [114]

[83] Ibid at [122]

[84] Ibid at [119]

[85] Ibid at [107]

[86] Ibid at [122]

[87] "Just following orders"

[88] A fictitious character of Hogan's Heroes fame (an American 1960's - early 1970s comedy television series), who despite compelling evidence to the contrary would consistently exclaim "I know nothing" and "I see nothing"

[89] Exhibit 3at [113]

[90] Ibid at [117]

[91] Ibid at [108]

[92] Ibid at [119]

[93] Ibid

[94] Ibid at [115]

[95] Ibid

[96] Ibid at [128]

[97] Ibid at [107]

[98] CB34 at 319-321

[99] Transcript PN961

[100] CB83 at 359

[101] Exhibit 3 at [129]-[133]

[102] Ibid at [123]-[124]

[103] Ibid at [122]

[104] CB55A at 569.2

[105] Transcript PN1465

[106] Applicant's closing submissions at [10]; Exhibit 1 at [22]

[107] Applicant's closing submissions at [10]-[11]

[108] Exhibit 2 at [17]

[109] Applicant's closing submissions at [17]

[110] Exhibit 4 and PC-2

[111] Transcript PN2401-PN2418

[112] Exhibit 4, PC-2, executive summary

[113] Ibid

[114] Ibid

[115] See CB-31 at 308

[116] Exhibit 4, PC-2, executive summary

[117] Transcript 2577

[118] Exhibit 4, PC-2, at pp 14, 16 and 17; CB37

[119] Ibid

[120] Ibid

[121] Exhibit 4, PC-2, at p 17

[122] Ibid; see also CB-44

[123] Exhibit 4, PC-2 at p 18

[124] Ibid

[125] Ibid

[126] Exhibit 4, PC-2 annexure A

[127] See CB-36

[128] Exhibit 3 at [107]

[129] See *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117 at [352]; *Connor v Grundy Television Pty Ltd* [2005] VSC 466 at [150]; *Howard v Pilkington (Australia) Ltd* [2008] VSC 491 at [49]

[130] See *John Lysaght (Australia) Ltd v Federated Iron Workers; Re York* (1972) 14 AILR 517; *McCasker v Darling Downs Co-op Bacon Association* (1988) 25 IR 107

[131] See *Toll Holdings Limited v Joseph Johnpulle* [2016] FWCFB 108 at [15]

[132] Ibid

[133] Exhibit 1 at [28]

[134] CB-55AA at 569B

[135] Ibid

[136] CB-55A at 569.1

[137] Ibid

[138] CB-34 at 321

[139] Exhibit 3 at [186]-[197]

[140] Exhibit 1 at [30]

[141] CB58 at 577

[142] Ibid at 576

[143] CB58; Transcript PN290-PN292

[144] CB59

[145] CB60

[146] Transcript PN1427-1446

[147] Ibid PN1718-1721

[148] See CB13

[149] Transcript PN1747-PN1757

[150] Exhibit 1 at [4]

[151] Ibid at [34], [36]

[152] Exhibit 3 at [186]- [197]

[153] Exhibit 1 at [34]

[154] Ibid

[155] Ibid

[156] Ibid

[157] Exhibit 3 at [146]-[173]

[158] Exhibit 1 at [35]; CB-64 at 588

[159] CB-66

[160] Exhibit 1 at [36]

[161] See for example CB-64-CB74

[162] CB-77

[163] CB-79

[164] Exhibit 1 at [40]; CB-80

[165] Exhibit 1 at [40]; CB-80 at 662

[166] Exhibit 1 at [41]

[167] Ibid at [42]

[168] CB-86A at 677.2

[169] Ibid at 677.4 [6]

[170] CB-86A at 677.4 [8]

[171] *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* [1986] HCA 40, (1986) 162 CLR 24; see also *Griffiths v The Queen* (1989) 167 CLR 372 at 379; *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]-[26] and cited in *Hasim v Attorney-General of the Commonwealth* [2013] FCA 1433, (2013) 218 FCR 25 at [65]

[172] *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836 and *National Retail Association v Fair Work Commission* [2014] FCAFC 118

[173] *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184

[174] *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* [1986] HCA 40, (1986) 162 CLR 24 at [15]

[175] *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 465

[176] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333, (1995) 62 IR 371 at 373

[177] *Briginshaw v Briginshaw* [1938] 60 CLR 336

[178] *King v Freshmore* (Vic) Pty Ltd Print S4213 at [23]-[24]

[179] *Sydney Trains v Gary Hilder* [2020] FWCFB 1373 at [26]

[180] Ibid

[181] Ibid

[182] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41]

[183] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [150]–[151]

[184] *Previsic v Australian Quarantine Inspection Services* Print Q3730

[185] See also *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151 which was dealing with the corresponding provisions in s 170CG(3)(b) and (c) of the Workplace Relations Act 199