



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Gary Davidson

v

Sydney Tools

(U2023/2601)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 8 AUGUST 2023

Application for relief from unfair dismissal – no theft – breach of company policy – valid reason for dismissal – dismissal harsh and unreasonable – compensation ordered.

Introduction

[1] Mr Gary Davidson was caught in a difficult situation. His daughter had been locked out of her apartment and her husband was away, with the keys to their apartment, in Goulburn. Mr Davidson was called to help find a solution to the problem his daughter faced on the afternoon of Sunday, 19 March 2023. Unsuccessful attempts were made to contact the property manager and the real estate agent for his daughter’s apartment. Mr Davidson then devised a plan to use a ladder to climb up to the balcony of his daughter’s first floor apartment and enter it by an open door leading on to the balcony. Mr Davidson did not have a long enough ladder for the task. He thought that his employer, Sydney Tools Pty Ltd (**Sydney Tools**), did have a ladder he could borrow for the task. Mr Davidson contacted the Gosford store of Sydney Tools and asked whether Mr Tony Titta, Second in Charge in the Gosford store, was working because Mr Davidson wanted to ask his permission to borrow a ladder. Mr Titta was unwell and not at work, nor was the Store Manager, Mr Christopher Lloyd. Mr Davidson spoke with Mr Luke Gillespie, who at that time was a Junior Sales Specialist, and informed him that he wanted to borrow a ladder to access his daughter’s apartment. Mr Gillespie collected a ladder from the stock of ladders available for sale in the Gosford store and left it at the register area of the store. Mr Davidson arrived a short time later and told another Junior Sales Specialist, Mr Alex Worthy, that he would return the ladder to the store in the morning. Mr Gillespie helped Mr Davidson to carry the ladder out to his car. Mr Davidson strapped the ladder to his roof racks and drove the short distance to his daughter’s apartment. He took it off the roof racks and leaned it against the wall of his daughter’s apartment block. Mr Davidson extended the ladder to its full height and realised that it was not tall enough to reach the balcony. He then took the ladder home (because the Gosford store was closed) and returned it to the store at 6:50am the following morning, Monday, 20 March 2023.

[2] At about 4pm on 20 March 2023, Mr Davidson was summarily dismissed. The termination letter described the reasons for dismissal as (a) theft and (b) the unhelpfully vague

contention that Mr Davidson had “engaged in wilful or deliberate behaviour” that was “inconsistent with the continuation of ... [his] contract of employment”.

[3] At about 3pm on the day of the unfair dismissal hearing before the Fair Work Commission, Sydney Tools abandoned its contention that Mr Davidson had engaged in theft. Hitherto Sydney Tools had maintained that Mr Davidson engaged in theft from the workplace. Sydney Tools should never have made or maintained such a contention, because at all times it was known by Sydney Tools that Mr Davidson had always intended to, and had in fact, borrowed a ladder from the Gosford store on the afternoon of 19 March 2023 and returned the ladder to the store at about 6:50am on Monday, 20 March 2023. Staff working at the Gosford store were aware from their discussions with Mr Davidson on 19 March 2023 that he was borrowing the ladder and would return it the next day. At no time did Mr Davidson have, or display, an intention to permanently deprive the owner of the ladder, Sydney Tools, of its property. That is one of the elements of the crime of theft.

[4] I heard Mr Davidson’s unfair dismissal case against Sydney Tools on 17 July 2023. Mr Davidson gave evidence in support of his case. Mr Luke Gillespie, Sales Specialist, Mr Alexander Worthy, Junior Sales Specialist, and Mr Christopher Lloyd, Store Manager, gave evidence for Sydney Tools.

Initial matters to be considered

[5] Section 396 of the *Fair Work Act 2009* (Cth) (**Act**) sets out four matters which I am required to decide before I consider the merits of the application.

[6] There is no dispute between the parties and I am satisfied on the evidence that:

- (a) Mr Davidson’s application for unfair dismissal was made within the period required in s 394(2) of the Act;
- (b) Mr Davidson was a person protected from unfair dismissal;
- (c) the Small Business Fair Dismissal Code did not apply to Mr Davidson’s dismissal; and
- (d) Mr Davidson’s dismissal was not a genuine redundancy.

Was the dismissal harsh, unjust or unreasonable?

[7] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Mr Davidson’s dismissal was harsh, unjust or unreasonable. I will address each of these matters in turn below.

Valid reason (s 387(a))

General principles

[8] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.¹ In order to be “valid”, the reason for the dismissal should be “sound, defensible and well founded”² and should not be “capricious, fanciful, spiteful or prejudiced.”³

[9] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁴ The question the Commission must address is whether there was a valid reason for the dismissal related to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees).⁵

[10] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.⁶ It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.⁷

[11] The question of whether there was a valid reason must be assessed by reference to facts which existed at the time of the dismissal, even if they did not come to light until after the dismissal.⁸

[12] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.⁹ In cases such as the present where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.¹⁰

[13] A reason will be ‘related to the capacity’ of the applicant where the reason is associated or connected with the ability of the employee to do his or his job.¹¹ The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.¹²

Sydney Tools’ contentions on valid reason

[14] Sydney Tools relied on the following alleged conduct on the part of Mr Davidson to support its case that it had a valid reason for dismissal and did not unfairly dismiss him:

- (a) First, Sydney Tools contends that Mr Davidson breached a company policy when he took the ladder from the Gosford store on 19 March 2023;
- (b) Secondly, Sydney Tools contends that Mr Davidson engaged in conduct in breach of company policies and procedures which led to him being given a written warning on 2 August 2022;¹³
- (c) Thirdly, Sydney Tools contends that Mr Davidson engaged in inappropriate conduct when dealing with two customers of Sydney Tools on 24 May 2022;¹⁴

- (d) Fourthly, Sydney Tools contends that Mr Davidson had a poor attitude, neglected customers and disrespected other staff members in early November 2022;¹⁵
- (e) Fifthly, Sydney Tools contends that Mr Davidson acted inappropriately in relation to rostering issues in November 2022;¹⁶ and
- (f) Sixthly, Sydney Tools contends that Mr Davidson acted inappropriately when leaving the workplace due to sickness and issuing credits to customers.¹⁷

Relevant facts re first contention

[15] There is no dispute that when Mr Davidson telephoned the Gosford store at about 3:49pm on Sunday, 19 March 2023, he asked Mr Gillespie whether Mr Titta was at work.¹⁸ I accept Mr Davidson’s evidence that he wanted to speak to Mr Titta because he thought the right thing to do, in the absence of any policy governing staff borrowing items from the store, would be to ask permission from the most senior person working in the store to borrow a ladder.

[16] Because Mr Titta was sick and not present at work, Mr Davidson contends that he asked Mr Gillespie whether he could borrow a ladder that would be high enough to reach a second story balcony because his daughter had locked her keys inside the apartment, to which Mr Gillespie said, “Sure, I can’t see why not”.¹⁹ Mr Gillespie does not recall Mr Davidson asking to borrow a ladder. He recalls Mr Davidson asking whether there was a ladder in the store that could “get up two storeys or two flights of stairs”, to which Mr Gillespie said he was sure they had such a ladder in stock, and Mr Davidson responded by saying words to the effect, “I’m coming in to grab it. Can you put it at the front door for me?”²⁰

[17] I prefer Mr Davidson’s evidence that he asked Mr Gillespie whether he could borrow a ladder, to which Mr Gillespie agreed, over Mr Gillespie’s lack of recall about whether such a request was made. First, Mr Worthy, who was working with Mr Gillespie at the time, gave oral evidence that Mr Gillespie told him that Mr Davidson was borrowing a ladder and would return it the next day. Secondly, Mr Worthy agrees that when Mr Davidson came to the store to collect the ladder Mr Worthy asked him whether there was “any paperwork to go with that”, to which Mr Davidson replied, “No, don’t worry I’ll bring it back in the morning.”²¹ Thirdly, at about 4:30pm on 19 March 2023, Mr Worthy called Mr Lloyd and explained to him that Mr Davidson had (a) called Mr Gillespie and told him that he needed to borrow a ladder and (b) said that he was borrowing the ladder to help his daughter.²²

[18] I accept Mr Gillespie’s evidence that he considered Mr Davidson to be a more senior salesperson than him due to his age and longer period of service with Sydney Tools.

[19] Mr Gillespie had the ladder ready for Mr Davidson’s collection at the front of the Gosford store. Mr Gillespie helped Mr Davidson to carry the ladder out to his car, where Mr Davidson used two ratchet straps to attach the ladder to the rubber insulated roof racks on his car. There was some plastic cling wrap on the top of the ladder and a cardboard wrap-around label about half-way down the ladder. The cardboard wrap-around showed the brand of the ladder, “Gorilla”, and the height, weight and other specifications of the ladder. Those specifications were also on the side of the ladder. Mr Davidson took the plastic cling wrap and cardboard wrap-around off the ladder when he was putting the ladder on his car or taking it off.

[20] Mr Davidson then drove about 1.5km to his daughter's new apartment building. He took the ladder off his roof racks and carried it to the building, where he placed the yellow hard-plastic feet of the ladder in loose gravel and leaned the ladder against the wall of the building. Upon extending the ladder to its maximum height, Mr Davidson discovered that it was not tall enough to reach the balcony of his daughter's apartment. By that time, the Gosford store was closed. Mr Davidson drove the ladder about 3km to his home and parked his car, with the ladder on the roof racks, in a safe place at his premises.

[21] At 6:29pm on Sunday, 19 March 2023, Mr Lloyd send an email to Mr Jason Bey, Mr Elvis Bey and "Control Room" with the subject line "Gary Davidson internal theft? "Borrow". Mr Jason Bey and Mr Elvis Bey are senior employees and/or directors of Sydney Tools. The email states:

"Hey guys, I didn't want to call this late, but I just received a call from a younger but very concerned staff member about this afternoon.

Right upon closing, close to 4pm, Gary Davidson came it and took a brand new ladder home. When questioned apparently his response was "he's just borrowing it".

No purchase, not a transfer, he came in on his day off and took a brand new ladder out of stock without paying for it.

That's theft as far as I'm concerned."

[22] Early the next morning, Mr Davidson moved the ladder from the roof racks on his car to the roof racks above his trailer which he often used to undertake deliveries of goods to customers of Sydney Tools. The roof racks above the trailer were insulated. Mr Davidson used two ratchet straps to attach the ladder to the roof racks above his trailer. He then drove to work and arrived at the Gosford store at about 6:50am, ready to start work at 7am.

[23] Mr Davidson noticed that there was some gravel dust on the yellow hard-plastic feet of the ladder. I accept Mr Davidson's evidence that he wiped the gravel dust from the feet of the ladder before taking it in to the Gosford store, where he returned it to the stack of ladders for sale. The ladder did not have the plastic cling wrap on the top of the ladder, nor did it have the cardboard wrap-around, which ripped when Mr Davidson removed it from the ladder.

[24] Mr Davidson gave evidence that the ladder did not have any marks on it and was not damaged in any way when he returned it to the store on the morning of Monday, 20 March 2023. He considered that the ladder was fit for sale at its full retail price.

[25] On the morning of Monday, 20 March 2023, Mr Worthy inspected the ladder borrowed and then returned by Mr Davidson earlier that morning. Mr Worthy gave evidence that the ladder was not damaged and he could not tell that the ladder had been used. Mr Worthy also gave evidence that he saw no reason to discount the price of the ladder and he did not see any discount applied to the price of the ladder. Mr Worthy does not know whether the ladder was sold. I accept Mr Worthy's evidence about these matters.

[26] Mr Gillespie gave evidence that he did not look at the ladder after it was returned by Mr Davidson. Further, Mr Gillespie is not aware whether the ladder has been sold.

[27] Mr Lloyd gave evidence that he looked at the ladder on Tuesday, 21 March 2023. He thinks that Mr Gillespie showed him the ladder. Mr Lloyd said in his oral evidence that he does not completely recall what he saw when he looked at the ladder. He then went on to say that he did not see any marks or scratches on the ladder, but saw that the feet of the ladder were dirty. Mr Lloyd could not recall whether he instructed any staff to clean the feet of the ladder, however is sure that the ladder would have been cleaned. Mr Lloyd also said that he believed that the ladder was not fit for sale when he saw it on account of the dirty feet on the ladder, but it would be fit for sale once the feet were cleaned and there would be no reason to sell the ladder at a discount after the feet were cleaned. Mr Lloyd believes that the cardboard wrap-around label was on the ladder when he saw it. Mr Lloyd does not know whether the ladder has been sold.

[28] I prefer the evidence given by Mr Davidson and Mr Worthy in relation to the condition of the ladder when it was returned to the store on 20 March 2023 over the evidence given by Mr Lloyd on that topic. First, the evidence of Mr Davidson and Mr Worthy was consistent in that they both say that the ladder was not damaged and there was no evidence to suggest that the ladder had been used. This is inconsistent with Mr Lloyd's evidence that the ladder had dirty feet. Secondly, if Mr Lloyd had seen that the ladder had dirty feet, I consider it highly probable that in his capacity as the Store Manager he would have instructed a staff member to clean the feet of the ladder so that it was fit for sale and would recall giving such an instruction. Thirdly, Mr Lloyd conceded that he could not completely recall what he saw when he looked at the ladder. Fourthly, Mr Lloyd was the only witness to recall that the cardboard wrap-around label was on the ladder when Mr Davidson returned it to the store. Both Mr Davidson and Mr Worthy gave evidence that the label had been removed from the ladder before it was returned to the store. Fifthly, Mr Gillespie gave evidence that he did not look at the ladder when it was returned. This evidence casts doubt on Mr Lloyd's recollection that Mr Gillespie showed him the ladder on Tuesday, 21 March 2023

[29] On Monday, 20 March 2023, Mr Titta told Mr Davidson that he would have lent the ladder to him if he had been asked.²³

[30] At 2:47pm on Monday, 20 March 2023, Mr Daniel Letta, Talent Acquisition Specialist of Sydney Tools, sent an email in the following terms to Mr Davidson:

“Hi Gary,

Following events on Sunday (19/03/2023) in the Gosford store with a product you had taken from the store without payment for personal use. We request that you make yourself available for a meeting with Chris Lloyd at 4pm this afternoon regarding this breach of company policy and procedure.

Please note that you are welcome to have a support person present at this meeting if you wish.”

[31] Mr Davidson did not see the email at the time it was sent to him. At about 3:50pm on Monday, 20 March 2023, Mr Lloyd told Mr Davidson that they were due to meet at 4pm and

an email had been sent to Mr Davidson about the meeting. A copy of Mr Letta's email was then provided to Mr Davidson.

[32] At approximately 4pm on 20 March 2023, Mr Lloyd, Mr Titta and Mr Davidson walked together out of the Gosford store so they could have a meeting outside the view and hearing of the other members of staff. Mr Lloyd accepts that the meeting took about one minute before he handed Mr Davidson a pre-prepared letter of termination in the following terms:

“Private and Confidential

Gary Davidson

Dear Gary,

LETTER OF TERMINATION

We are writing to you about your termination of your employment with Sydney Tools Pty Ltd ('Sydney Tools').

We refer to our meeting on 20 March 2023 which was attended by yourself and Chris Lloyd. During the meeting we discussed your conduct in an incident which occurred on 19 March 2023

We indicated that your employment may be terminated upon further investigation. As you have:

- in the course of your employment engaged in theft.
- engaged in wilful or deliberate behaviour by you that is inconsistent with the continuation of your contract of employment.

Sydney Tools consider that your actions constitute serious misconduct warranting summary dismissal. In the circumstances we are left with no option but to terminate your employment immediately as your continued employment during a notice period would be unreasonable.

You will be paid your accrued entitlements and any outstanding pay up to and including your last day of employment. If you have been paid annual leave in advance, any amount still owing will be deducted from your final pay.

Kind Regards,
Management”

[33] Mr Lloyd had a conversation along the following lines with Mr Davidson in their one-minute meeting prior to handing the letter of termination to Mr Davidson:²⁴

“Me: Hwy Gary, further to the email that you received from HR, can you run me through what happened yesterday with the ladder?

Gary: Yeah, I came in and borrowed a ladder from the store because I needed to get up to my daughters flat.

Me: Who did you get approval from for that?

Gary: Luke.

Me: Gary, Luke is one year your junior. You are his senior and you know the company policy – nothing leaves the store without payment or approval.

Gary: I asked Luke and he said it was okay.

Me: That is not the policy. You know the policy is to get approval from management and that paperwork needs to be checked with the stock.”

[34] Mr Lloyd says that Mr Davidson became frustrated and angry when he was provided with the letter of termination and said to him, “Is this because of the ladder?”, to which Mr Lloyd replied, “No, mate. It is because of the numerous warnings that you have received, your performance and the failure to improve. The ladder was the final straw.”²⁵ Mr Davidson denies Mr Lloyd’s account of the conversation. Mr Davidson says that when Mr Lloyd provided him with the letter of termination he said, “Because you stole the ladder”. Mr Davidson says that he responded by saying, “I did not steal anything. You’re joking. I rang the store and asked Alex and Luke if I could borrow a ladder before I even left home”. It is asserted by Mr Davidson that Mr Lloyd then said, “That’s not all, remember that day when you went home sick and blew up at me?”, to which Mr Davidson said, “Yes”. Mr Lloyd then responded, “Well, it’s for that as well”.²⁶

[35] I prefer Mr Davidson’s account of this conversation over the account given by Mr Lloyd. The short discussion took place after the termination letter had been handed to Mr Davidson. The termination letter states that “During the meeting [on 20 March 2023] we discussed your conduct in an incident which occurred on 19 March 2023”. There is no mention in the termination letter of any discussion concerning previous warnings, performance issues or a failure to improve. Further, had there been a discussion about previous warnings or failing to improve, I consider it highly likely that Mr Davidson would have challenged any contention that multiple warnings had been given to him or that he had any performance issues which needed to improve.

[36] Mr Lloyd did not suggest in his evidence that he explained in any detail the behaviour described in the letter of termination as “wilful or deliberate behaviour ... that is inconsistent with the continuation of your contract of employment”. Mr Davidson gave evidence that no explanation was given to him as to what was meant by this part of the termination letter. I accept Mr Davidson’s evidence in this regard.

[37] Mr Lloyd says that after Mr Davidson was given the letter of termination he said, “Fuck this, I am going to call Elvis” and then stormed into the store to call Mr Elvis Bey. Mr Lloyd was present during the telephone conversation between Mr Elvis Bey and Mr Davidson. Mr Elvis Bey told Mr Davidson that the matter was being handled by Mr Jason Bey, Human Resource Management, Control Room, and Mr Lloyd. Mr Elvis Bey said to Mr Davidson,

“Mate, if you had just called and got the proper approval from me or Jason, I would have probably told you to keep the bloody thing”.²⁷ Mr Davidson told Mr Elvis Bey that he understood that he had broken policy, but he did it in the heat of the moment to help his daughter. Mr Elvis Bey told Mr Davidson that there would be an investigation into the matter. There is no evidence to suggest that any such investigation was carried out.

[38] Mr Davidson also called Mr Jason Bey and explained that he did not steal the ladder. Mr Jason Bey told Mr Davidson that he would look into it and get back to Mr Davidson. Mr Jason Bey did not get back to Mr Davidson.

[39] Mr Davidson then refused to sign the letter of termination and left the Gosford store.

Consideration re first contention

[40] Mr Davidson accepts that he breached policy and procedure when he borrowed the ladder on Sunday, 19 March 2023. Although Sydney Tools does not have a policy which governs the borrowing of items from a store for personal use, Mr Davidson accepts that the proper procedure or approach would have been for him to obtain approval from a manager such as Mr Titta, Mr Lloyd, Mr Elvis Bey or Mr Jason Bey before borrowing the ladder. Mr Davidson thought that Mr Titta would be working in the store on Sunday, 19 March 2023. That is why he asked to speak to Mr Titta when he called the store. After becoming aware that Mr Titta was sick and not at work, Mr Davidson sought and obtained approval from a junior salesperson, Mr Gillespie. Mr Davidson accepts that Mr Gillespie did not have authority to permit him to borrow the ladder, but it was late on Sunday afternoon and he panicked in his attempt to help his daughter. Mr Davidson accepts that he should have called a member of the management team to obtain approval to borrow the ladder.

[41] Sydney Tools’ staff purchasing policy is not relevant because it only applies to the purchase of goods by staff. However, the following part of Sydney Tools’ Security Policy, which governs “internal theft”, is relevant:

“Internal Theft

- No cash is to be removed from the till.
- No staff is to leave the store with a tool: All staff that leave the store with stock regardless if it is for a customer, store transfer or repairs. All stock must be accompanied with paper work.
 - Store transfer/Repairs: send an email to security@sydneytools.com, controlroom@sydneytools.com.au, cc your manager and the receiving store/staff and ask them to confirm in the email chain for transfers or repairs. Include the invoice, picking slip numbers and where the items will be delivered to and why.
 - Customer: If you are helping customers carry the stock to the car or if staff are taking items to deliver to the customer, you must also send an email to security@sydneytools.com, controlroom@sydneytools.com.au,

cc your manager. Include the invoice, picking slip numbers and where the items will be delivered to and why.”

[42] Although this part of the Security Policy is drafted in an inelegant manner, it is clear enough on its proper construction that it prohibits staff from leaving a store with stock unless the staff member has the appropriate paperwork. Mr Davidson breached this requirement because he did not have any paperwork authorising him to take the ladder from the Gosford store on 19 March 2023.

[43] I accept that Mr Davidson’s breach of policy and procedure in connection with his conduct in borrowing the ladder on 19 March 2023 gave Sydney Tools a valid reason to terminate his employment.

Relevant facts re second contention

[44] These contentions relate to a period of time when Mr Rhys Jones, Sales Specialist of Sydney Tools, was filling in for the previous Store Manager of the Gosford store, Mr Nathan Boss, who was absent from work. Mr Jones worked in the Gosford store of Sydney Tools and was ordinarily in the same position as Mr Davidson.

[45] Sydney Tools relies on an email in the following terms from Mr Jones:

“Hi Jack,
i am seeking approval to give gary davidson a written warning for two reasons which i will list below;
Incident 1:
on copious occasions he has been asked by myself and nathan boss to price both his isles to which he has not done. He refuses to do his pricing and then when questioned about it his response is "you're not the boss of me" and then proceeds to stand at the counter doing non work related tasks.
Nathan and I have tried numerous times to pull him up on this behaviour to no avail.
Incident 2:
It has come to my attention that Gary Davidson has not been completing his work hours to a sufficient standard of late. Below I have compiled a list of specific incidents where he has neglected his duties copious times in the last particular week or two. These selfish actions are letting our team down and leaving us short staffed last minute and often without reason.

Gary:
Monday 11/7/22 - Left work at 11am and returned at 1:30pm
Tuesday 12/7/22 - Fixing his car out the front of work in work time
Tuesday 12/7/22 - Left at 2pm and told me i'm better off finding someone else to open with tomorrow because i might not be in
Wednesday 13/7/22 - Didn't show up to work and did not message or call with a reason why, which left us very understaffed and with one person on close which resulted in myself having to stay back and having to rearrange someone else picking my son up that afternoon at short notice.

Thursday 14/07 Didn't show up to work and did not message or call with a reason why, which again left us very understaffed with people on break and off with covid.

Friday 15/7/22 - Walked out at 10:50am and didn't say anything to anyone.

Tuesday 19/07 very understaffed and left for lunch while we were busy and had a 40min+ lunch.

Thursday 21/07 Left twice to go to the trailer shop to sort his own trailer out during work hours.

Monday 25/07 Gary left at 7:45am and got back at 8:50am leaving one salesman in the store, he had also left at 1:35pm and got back at 2:00pm after already having lunch that same day.

Something needs to be done to rectify this as staff members are coming to me constantly complaining about these issues as this is becoming a frequent problem.

--

Regards,”

[46] Mr Jones was not called to give evidence in the proceedings.

[47] Sydney Tools also relies on a warning letter dated 2 August 2022 to Mr Davidson in relation to these matters. The warning letter was signed by Mr Davidson on 3 August 2022. The warning letter states:

“Private and Confidential

Gary Davidson

Dear Gary,

WARNING LETTER

We are writing to you regarding your performance and conduct during employment with Sydney Tools Pty Ltd (‘Sydney Tools’).

On 3 August 2022 you had a meeting with your Line Manager Nathan Boss.

At this meeting you were advised of your failure to adhere to the Sydney Tools company policies and procedures:

- follow reasonable directions from management.
- perform tasks to the standard required in your role.
- attend work as required and/or unexplained absences.
- constantly leaving the store short staffed.

Sydney Tools has previously raised issues with respect to your current performance and conduct being unsatisfactory, noting immediate improvement was required.

It is our hope and expectation that you will respond positively to our performance request, with your performance and conduct improving significantly moving forward.

Please use this opportunity to reflect and improve.

Kind regards,

Sydney Tools Pty Ltd”

[48] Apart from the email from Mr Jones and the warning letter, both of which are set out above, Sydney Tools did not adduce any evidence from any of its witnesses to support these contentions.

[49] Mr Davidson gave evidence that he did not agree with the warning letter; he signed it to acknowledge that he had read and understood it and because he wanted to keep his job. When he received the warning letter Mr Davidson told Mr Boss that this was what he had to put up with from Mr Jones when Mr Boss was away.

[50] Mr Davidson gave oral evidence to the following effect in relation to these matters:

- Mr Davidson does not recall refusing to price items of stock located in the isles for which he was responsible in the Gosford store. Mr Davidson says that the isles he looked after were impeccable and had prices marked on the stocked items.
- Mr Davidson accepts that he said to Mr Jones words to the effect, “You’re not the boss of me”, but denies that he made such comments in the context of pricing items of stock. Mr Davidson said, by way of example, that he made such comments to Mr Jones when he tried to dictate when Mr Davidson would take his lunch break on a particular day.
- Mr Davidson denies standing at the counter doing non-work-related tasks.
- Mr Davidson denies failing to complete his work hours. In response to the dates referred to in July 2022 in Mr Jones’ email, Mr Davidson says:
 - he did leave work between about 11am and 1:30pm on 11 July 2022 in order to attend an appointment with his doctor. Mr Davidson told his manager, Mr Boss, about this appointment;
 - he did not fix his car out the front of work in work time on 12 July 2022. On that day Mr Davidson went to his car for a short break because he was feeling unwell;
 - he left work early on 12 July 2022 and said that he might not be in to work tomorrow because he was not feeling well;
 - on 13 and 14 July 2022 he did not attend work because he was unwell. Mr Davidson agrees that he did not call to notify that he would not be attending work, but believes everyone at work knew from what he had

said on 12 July 2022 that he would not be likely to attend work on 13 and 14 July on account of his illness;

- on 15 July 2022 he attended work all day and was probably out doing deliveries to customers when Mr Jones believed he walked out without saying anything to anyone;
- on 19 July 2022 he got caught up and took ten minutes more than his usual 30-minute lunch break;
- on 21 July 2022 he left work to take his trailer to be repaired and then picked up from the repair shop. This was the trailer which Mr Davidson used on a regular basis to make deliveries to customers of Sydney Tools; and
- on 25 July 2022 he was absent from work doing deliveries and/or taking a permitted break.

[51] Sydney Tools did not seek to adduce any oral or written evidence in reply to the oral evidence given by Mr Davidson in relation to these matters.

Consideration re second contention

[52] I prefer the direct, detailed evidence given by Mr Davidson in relation to these contentions over the email from Mr Jones and the warning letter prepared following the meeting with Mr Boss, neither of whom gave evidence. The evidence given by Mr Davidson about his regular absences from the Gosford store to make deliveries to customers and the use of his personal car and trailer to do so was supported by Mr Gillespie. Having accepted Mr Davidson's evidence, I do not consider that he engaged in any conduct in connection with this second contention that gave Sydney Tools a sound, defensible or well-founded reason to terminate Mr Davidson's employment. It would have been better for Mr Davidson to expressly notify his employer on the morning of 13 and 14 July 2022 that he could not attend work on those days on account of his ill health, rather than relying on the statement he made on 12 July 2022 that Mr Jones would be better off finding someone else to open the store on the following day because Mr Davidson might not be in. Mr Davidson's conduct in that regard justified a warning, but did not provide Sydney Tools with a sound, defensible or well-founded reason to dismiss him. I do not consider that Mr Davidson's conduct in connection with the balance of the matters the subject of this second contention was inappropriate or provided Sydney Tools with a valid reason to terminate his employment.

Relevant facts re third contention

[53] Sydney Tools relies on an email in the following terms from Mr Jones to Mr Nathan Boss:

“Yesterday the 24/05 Gary had a customer come into the store which he had previously spoken with on the phone about his Festool tools that he needed to bring in for warranty. The customer came in and went to Gary to book these tools in, Gary then

refused to book them in as it was apparently too hard to do so and it is not his job. He then sent the customer away to united tools to book these tools in for repair with them instead.

United tools rang our store blasting us for not dealing with our own customers, then Don our Festool rep called the store blasting us also. Tony then had to sort all of this out for Gary because he does not know how to book a warranty. It's highly unprofessional and embarrassing for the company when their employees can't do their job properly and this seems to be an ongoing issue with Gary.

Later on in the day, Gary sold a customer a Makita table saw. He then called Shane our bdm to collect it for him from Kotara. Shane was unable to pick this Makita table saw up as his truck was full. Gary then took it upon himself to abuse Shane for not picking this tool up for him and hung up on him. Gary refused to ring his customer to let him know his table saw was not coming into store this afternoon. Which will only make a forwarding problem once the customer comes in to collect his saw.”

[54] Apart from the email from Mr Jones set out above, Sydney Tools did not adduce any evidence from any of its witnesses to support these contentions. At the hearing Sydney Tools withdrew its contention that Mr Davidson was given a written warning in relation to these matters.

[55] Mr Davidson gave oral evidence to the following effect in relation to these matters:

- Mr Davidson did not refuse to book a customer in for a warranty.
- A customer attended the Gosford store and spoke to Mr Davidson about a warranty claim in relation to a product purchased from Sydney Tools. Mr Davidson explained to the customer that the product could be sent away by Mr Davidson for a warranty claim but the process would take about two weeks. Mr Davidson explained that the customer was frustrated by the length of this process so he told the customer that there was another option whereby the customer could have the tool fixed in a much quicker time frame. The second option involved the customer taking the tool to United Tools, which is located near the Sydney Tools Gosford store, to have the tool repaired. United Tools are an authorised repairer of the tool purchased by the customer.
- The customer decided to take the tool to United Tools for repair. When the customer arrived at United Tools he was asked to provide proof that he had purchased the tool from Sydney Tools. The customer did not have with him any documentation to prove that he had purchased the tool from Sydney Tools. An employee of United Tools, Don, then contacted Sydney Tools and spoke to Mr Titta, who provided United Tools with documentation to prove that the customer had purchased the tool from Sydney Tools.
- As to the second issue addressed in Mr Jones’s email, Mr Davidson sold a Makita table saw to a customer. There were no Makita table saws in stock at the Gosford store. Mr Davidson found that there was a Makita table saw in stock at

Sydney Tools' Kotara store. Mr Davidson then called Shane, Business Development Manager of Sydney Tools, to arrange for the Makita table saw to be transported from the Kotara store to the Gosford store so that it could be collected by the customer. Shane told Mr Davidson that he would arrange for the Makita table saw to be put on a truck that afternoon for transportation to the Gosford store. Mr Davidson spoke to Shane again later in the day, at which time Shane informed Mr Davidson that the truck was full and he would not be able to have the Makita table saw transported to the Gosford store on that day. Mr Davidson responded by saying, "What the bloody hell, the customer is coming tomorrow." Mr Davidson then terminated the call and made alternative arrangements to for the saw to be collected the next day and transported to the Gosford store.

- Mr Davidson did not refuse to ring the customer. He did not need to call the customer because he knew the customer was coming in to the Gosford store on the following afternoon and, by that time, Mr Davidson would have the Makita table saw in the Gosford store for collection by the customer.

[56] Sydney Tools did not seek to adduce any oral or written evidence in reply to the oral evidence given by Mr Davidson in relation to these matters.

Consideration re third contention

[57] I prefer the direct, detailed evidence given by Mr Davidson in relation to these contentions over the email from Mr Jones, who was not called to give evidence. I do not consider that Mr Davidson engaged in any conduct in connection with this third contention that was inappropriate or gave Sydney Tools a sound, defensible or well-founded reason to terminate his employment.

Relevant facts re fourth contention

[58] Sydney Tools relies on an email in the following terms from Mr Lloyd:

"Gents,

This is to address Gary's poor attitude, neglecting customers and disrespecting other staff members.

today at midday Gary was part way through serving a customer, having me process a credit for them, they were about to spend over \$1500 when Gary decided to angrily tell our new staff member to "get his piece of shit Kia out of our carpark". I calmly mentioned that Gary should move his car out as well being a trade night. He said "fuck that, my car is too good to park on the road to get hit". So I then told him that it's not his place to say, also unfair if he won't move his own car out. He then replied "fuck that I'll move it and go home" which I am hoping is just for lunch. However left his customer wondering where the salesman went.

This on top of his incident that you all know about from last week when he overrode dispatch, loaded what he thought was 5 toolboxes on to a customers ute before dispatch

checked the order off, luckily for us the customer returned the petrol pressure washer and two Bayer power heads that were also wrapped in the pallet.

When these things get addressed he throws his hands up in the air and walks away swearing that we have no idea etc

Kind Regards,”

[59] Apart from the email from Mr Lloyd set out above, Sydney Tools did not adduce any evidence from any of its witnesses to support these contentions.

[60] Mr Davidson gave oral evidence to the following effect in relation to these matters:

- Mr Lloyd was processing a \$1,500 credit for a customer because such credits must be processed by a manager when they are present in the store.
- Mr Davidson denies that he angrily told a new staff member to “get his piece of shit Kia out of our car park.” Mr Davidson says that it was a trade sale night and the Gosford store was busy. Mr Davidson noticed that a Kia vehicle had been parked in the car park of the Gosford store for some time. Mr Davidson said to the staff working at the Gosford store, “Who owns that shit box Kia?” A staff member identified that he was the owner of the vehicle. Mr Davidson then asked the staff member to move his vehicle out of the car park because it was needed for customers.
- Mr Lloyd told Mr Davidson that he should also move his car from where it was parked because it was a trade night. Mr Davidson denies swearing in response to this request. He agrees that he said, “My car is too good to park on the road to get hit”. After further comments from Mr Lloyd, Mr Davidson denies swearing and instead says he responded by saying, “I will move it and go to lunch”. Mr Davidson also says that he had his car parked in the car park because he often used it to make deliveries to customers of Sydney Tools and the previous manager had given him permission to park in the Sydney Tools car park.
- Mr Davidson agrees that he made an error when he loaded what he thought were five toolboxes on to a customer’s ute. In fact, the pallet loaded on to the customer's ute also contained a petrol pressure washer and two Bayer power heads. Mr Davidson did not know that these items, which had not been purchased by the customer, were also on the pallet. Fortunately for Mr Davidson, the customer identified the error and returned the petrol pressure washer and two Bayer power heads.
- Mr Davidson denies that he threw his hands up in the air and walked away swearing in connection with these incidents.
- At 3pm on 10 November 2022, Mr Davidson participated in a telephone meeting with Mr Letta to discuss these issues. Mr Davidson denied that he had sworn in front of customers. Mr Davidson was told that there would be an investigation.

- Following the discussion on 10 November 2022, Mr Davidson made a number of inquiries to follow up on the outcome of the investigation which he was told would take place. About three weeks after 10 November 2022, Mr Christopher Huntington, HR Business Partner of Sydney Tools, called Mr Davidson and told him that the investigation had been finished and Sydney Tools wanted him to continue his employment.

[61] Mr Davidson also addressed the allegations relating to the trade sale night in his witness statement in chief. Relevantly, he stated:²⁸

“We discussed the issues that Chris said had happened and I totally reject his claims made. I was told there would be an investigation into this and we will get back to you. 1 week goes by and I have not heard anything about those false accusations about me, so I ring HR to be told that they are still looking in to it. 2 weeks go by. I again ring HR, “still no answer for you Gary sorry”. The next day I get a call from Chris HR (BOSS) saying “hi Gary just wanting to get back to you about our investigation and there will be no further action we wish you to continue your employment with us. Sorry. Thank you”.

[62] Sydney Tools did not seek to adduce any oral or written evidence in reply to this part of Mr Davidson’s witness statement or the oral evidence given by Mr Davidson in relation to these matters.

[63] There is no evidence to suggest that Mr Davidson was given a warning or subjected to any other disciplinary outcome as a result of these matters.

Consideration re fourth contention

[64] I prefer the direct, detailed evidence given by Mr Davidson in relation to these contentions over the email from Mr Lloyd, particularly in light of the unchallenged evidence that Mr Davidson was informed by Mr Huntington of the completion of the investigation and the decision by Sydney Tools to continue his employment.

[65] Although Mr Davidson made a mistake when he accidentally loaded additional items on to the customer’s ute, the customer returned the items and Sydney Tools suffered no loss.

[66] I do not consider that Mr Davidson engaged in any conduct in connection with this fourth contention that gave Sydney Tools a sound, defensible or well-founded reason to terminate his employment.

Relevant facts re fifth contention

[67] Sydney Tools relies on an email in the following terms from Mr Lloyd:

“This needs to be noted, what action can be taken?”

21/11/2022

While I am at Five Dock for training, Gary was rostered to open. The other early shift boys messaged me saying he wasn't there to open. Gary's reason was he "thought he was rostered off" to which I explained he was not and it's been on the roster for two weeks.

Gary opened the shop, then left shortly after the late shift crew arrived stating to them that it was his RDO. Once again it is not.

Again an example of Gary doing what he wants, not being a team player with complete disregard for the store and for his teammates.

This comes after last weeks drama with him having the dates wrong for his daughters wedding and taking last Friday Saturday and Monday off without updating myself or payroll.

This constant ignorance is starting to upset the other staff members as it is putting the pressure back on the rest of us leaving us short staffed.

Any advice on what action can be taken is greatly appreciated.

Kind Regards,"

[68] Apart from the email from Mr Lloyd set out above, Sydney Tools did not adduce any evidence from any of its witnesses to support these contentions.

[69] Mr Davidson gave oral evidence to the following effect in relation to these matters:

- Mr Davidson had every second Monday off work as a rostered day off.
- Mr Davidson believed that Monday, 21 November 2022 was one of his rostered days off. He says that nobody told him that the roster had been changed at 12:02pm on Saturday afternoon such that he was rostered to work on the following Monday.
- Mr Davidson was at home on the morning of Monday, 21 November 2022 when he received a telephone call from employees at the Gosford store. He was told that he was rostered to work and there was nobody at work with a key to open the store. Mr Davidson drove straight to the Gosford store and opened the store at about 7:20am, which was 20 minutes after the store normally opens. Mr Davidson stayed in the store until about 8am when additional staff arrived and then went home.
- Mr Davidson spoke to Mr Nathan Rogers, Regional Manager of Sydney Tools, in relation to this matter and explained the late change in the roster without his knowledge. Mr Davidson says that Mr Rogers told him that it sounds like Mr Lloyd needs to know how to do a roster.
- Mr Davidson accepts that he made a mistake in relation to the date of his daughter's wedding. About 9 to 12 months before the wedding, Mr Davidson made his leave request to attend the wedding. A week or so before the wedding Mr Davidson realised that he had requested the wrong days off to attend the wedding. He spoke to Mr Lloyd

who told him that they would sort it out. The roster was then changed and Mr Davidson was permitted to attend his daughter's wedding.

[70] Sydney Tools did not seek to adduce any oral or written evidence in reply to the oral evidence given by Mr Davidson in relation to these matters.

[71] There is no evidence to suggest that Mr Davidson was given a warning or subjected to any other disciplinary outcome as a result of these matters.

Consideration re fifth contention

[72] I prefer the direct, detailed evidence given by Mr Davidson in relation to these contentions over the email from Mr Lloyd, particularly having regard to the fact that Mr Davidson was not warned or subjected to any disciplinary action in relation to these matters.

[73] I do not consider that Mr Davidson engaged in any conduct in connection with this fifth contention that was inappropriate or gave Sydney Tools a sound, defensible or well-founded reason to terminate his employment.

Relevant facts re sixth contention

[74] Sydney Tools relies on an email in the following terms from Mr Lloyd:

“Hi gents,

This email comes with much frustration and concern for my staff and the store. Gary just left at 2:55 throwing Ben his keys saying he may not be in tomorrow. I followed him out to ask what's up and he snapped at me saying he wasn't well and that we still owe him 8 hours TIL, when in fact he owes us. I explained that it's not the case and we have it in black and white, he growled through his teeth "I'm fucking sick" and I said how dare you snap at me like that, I didn't know he was sick but apparently everyone knows? I said he needs to talk to me and not just come and go as he pleases and hand his keys to someone else and not even talk to me, which is part of the issue with his last HR meeting! As far as I'm concerned he shouldn't have keys anymore if he's just going to hand them to anyone and not even talk to me.

Ben just came to me and gave me Gary's keys saying he knew nothing about him being sick, nobody did.

We have a few examples of him stealing peoples quotes and customers which I've heard other stores say was an offence worthy of a written warning? He has also doing credits under other peoples log in instead of asking Tony to do them if I am not available. His sales are good, but he burns customers and other staff to get there.

He left the work WhatsApp group because he's "sick of all the notifications' ". Even after I explained that I was talking to Elvis about it this morning.

I'll be 100% honest here and say that out of all our staff members, I do not trust him. He has a complete lack of respect for myself, the company and other team members.

Ben Hayward has let me know of more than one time that Gary has undermined what I've told Ben to do. Ben even called me last Tuesday quite concerned as Gary did a credit and used Ben as the secondary verification, using Nathan's log in details instead of asking Tony to do it or even tell anyone what he did and why to cover himself.

Sorry to vent so much but I have made mention many times of many things and feel something needs to happen so that he doesn't feel "untouchable" as he has told the boys he is.

Kind Regards”

[75] Mr Davidson gave oral evidence to the following effect in relation to these matters:

- At about 2:55pm on 16 February 2023, Mr Davidson left the Gosford store because he was in immense pain. He told Mr Lloyd that he was sick and was going home. Mr Davidson burst into tears in pain when he got to his car. Mr Davidson was later admitted to hospital.
- Mr Davidson denies that he growled through his teeth at Mr Lloyd, “I’m fucking sick”.
- Mr Davidson denies that he threw his work keys at anyone. He says he threw them on the desk before he left work on 16 February 2023.
- Both Mr Lloyd and the previous Store Manager of the Sydney Tools Gosford store gave Mr Davidson their log in details and told him that he could use those details to do credits when a manager was not working in the store.
- Mr Lloyd often worked in the Gosford store without a manager and, at those times, used the log in details provided by his manager to provide credits to customers. He says that this would have been obvious to Sydney Tools from the data which was readily available concerning sales and credits at the Gosford store.
- Mr Lloyd took himself off the Sydney Tools WhatsApp group because he was sick of receiving messages outside work hours about matters that had nothing to do with him or the Gosford store.

[76] Mr Davidson’s witness statement in chief includes the following relevant statements in relation to his departure from work on 16 February 2023:²⁹

“I said to you [Mr Lloyd] ‘I have not been well for 3 days and I have to go’, you then said that I just can’t walk out whenever you want, I replied ‘I’m not well and I need to go NOW’. As I walk out the door you followed me continuing letting me know I just can’t leave. I said, ‘I am sick, I have a bowel issue and am in extreme pain’. I got to my car and burst into tears with pain. I then ring Nathan Rogers (REGIONAL MANAGER) in tears to inform him that I have left because I am not well and also informed him of how Chris treated me in front of staff and customers. His reply was to get to the doctors have tomorrow off, he said he will talk to Chris. Nathan’s reply was it sounds like he didn’t handle the situation. He has a lot to learn to become a good manager.”

[77] No evidence was given by Mr Rogers in response.

[78] Mr Lloyd did not address the substance of these matters in his witness statement. Instead, he gave the following ‘blanket denial’ to the matters raised by Mr Davidson in his witness statement in chief:³⁰

- “a. I answer to the allegation made by Mr Davidson in relation to the conversations that he had with me, I deny that I said the words alleged of me or to the effect in the Davidson Statement.
- ...
- c. In answer to the allegations made by Mr Davidson of bullying and harassment, I deny that I bullied or harassed Mr Davidson as alleged in the Davidson Statement or at all.
- d. I deny each and every allegation made by Mr Davidson of me in the Davidson Statement.”

[79] Mr Davidson tendered text messages between himself and Mr Lloyd in relation to the authority which he says he was given to do credits when the Store Manager and Second in Charge were not present in the Gosford store. Those text messages include the following:³¹

Mr Davidson to Mr Lloyd on 3 February 2023:

“Hey mate, sorry to bother you but I tried to do a credit today with Nathan’s log in and it did [not] work. Tomorrow what am I to do if I need to credit?

Hope your [sic] feeling better!”

Mr Lloyd in response to Mr Davidson:

“You can use his, or mine, whatever you’re comfortable with mate.

I am heaps better thank you.”

[80] I am satisfied that Mr Davidson and Mr Lloyd exchanged the text messages set out in the previous paragraph in February 2023. Mr Davidson was adamant that he sent and received such a text message from Mr Lloyd. At the hearing Mr Davidson made reference to these text messages and then, during a break in proceedings, located the messages and provided them to my Associate for printing.³² Although Mr Lloyd gave evidence that he did not recall these text messages, he did not deny sending the response set out above to Mr Davidson.

[81] There is no evidence to suggest that Mr Davidson was given a warning or subjected to any other disciplinary outcome as a result of any of these matters.

Consideration re sixth contention

[82] I prefer the direct, detailed evidence given by Mr Davidson in relation to these contentions over the email from Mr Lloyd and his limited oral evidence in relation to these matters, particularly having regard to the fact that Mr Davidson was not warned or subjected to any disciplinary action in connection with any of these matters. Further, no evidence was given in response to Mr Davidson's evidence, which I accept, that the Regional Manager, Mr Rogers, told Mr Davidson on 16 February 2023 that he should get to the doctor's and have tomorrow off work, he would talk to Mr Lloyd, it sounds like Mr Lloyd didn't handle the situation, and Mr Lloyd has a lot to learn to become a good manager.³³

[83] I am satisfied that Mr Davidson was given authority by Mr Lloyd and the previous Store Manager to use their log in details to do credits when managers were not in the Gosford store. I do not accept Mr Lloyd's evidence that Mr Davidson was required to contact him for approval each time Mr Davidson was going to provide a credit to a customer when Mr Lloyd was not in the store. Mr Lloyd's text message to Mr Davidson in February 2023 does not suggest that approval is required for each credit transaction. In addition, if the requirement had been to obtain such approval before each credit transaction, I expect that the issue would have been raised with Mr Davidson in a written warning or other notification. There is no evidence to suggest that any such step was taken.

[84] No steps were taken to discipline Mr Davidson over his decision to remove himself from the Sydney Tools WhatsApp group. That is not surprising given Mr Davidson's unchallenged evidence that he was receiving many messages on that WhatsApp group outside of work hours about matters that did not concern him or the Gosford store.

[85] I do not consider that Mr Davidson engaged in any conduct in connection with this sixth contention that was inappropriate or gave Sydney Tools a sound, defensible or well-founded reason to terminate his employment.

Conclusion re valid reason

[86] I have found that Sydney Tools had a valid reason to dismiss Mr Davidson in relation to his breach of policy and procedure when he borrowed the ladder on 19 March 2023 without first obtaining permission from management and the appropriate paperwork. The balance of the matters relied on by Sydney Tools did not provide it with, or contribute to a finding that it had, a valid reason for Mr Davidson's dismissal.

[87] That Sydney Tools had a sound, defensible and well-founded reason to terminate Mr Davidson's employment weighs against Mr Davidson's contention that his dismissal was unfair.

Notification of reason (s 387(b))

[88] I am satisfied on the evidence that Mr Davidson was notified of the valid reason for his dismissal. In particular, Mr Lloyd told Mr Davidson in their brief meeting before he was dismissed that he had failed to comply with company policy which required approval from management and paperwork to accompany the item of stock when it left the store.³⁴

[89] This factor (s 387(b)) weighs against Mr Davidson's argument that his dismissal was unfair.

Opportunity to respond (s 387(c))

[90] In the one-minute discussion which preceded Mr Lloyd handing the termination letter to Mr Davidson on the afternoon of 20 March 2023, Mr Lloyd gave Mr Davidson a very brief opportunity to explain what happened with the ladder on the previous day and to respond to the contention that he had breached company policy by failing to obtain approval from management and paperwork to accompany the item of stock when it left the store.³⁵

[91] Having regard to all the circumstances, I am satisfied that Mr Davidson was given an opportunity to respond to the valid reason for his dismissal. This provides a small amount of weight in support of Sydney Tools' argument that Mr Davidson's dismissal was not unfair. The weight I have attributed to this factor is small because the opportunity provided to Mr Davidson was very brief and I consider that a more fulsome opportunity and discussion should, as a matter of fairness, have taken place as part of a proper investigation before any decision was made to terminate Mr Davidson's employment. I address this point as a relevant other matter under s 387(h) below.

Unreasonable refusal to allow a support person (s 387(d))

[92] Mr Davidson was only given about 10 minutes' notice of the termination meeting with Mr Lloyd at 4pm on 20 March 2023. The email provided to Mr Davidson shortly before that meeting informed him that he had the opportunity to have a support person present at the meeting. Although the time for Mr Davidson to arrange a support person was very short, he did not request to have a support person attend the meeting or for the meeting to be adjourned so that he could arrange a support person.

[93] Having regard to all the circumstances, I am satisfied on the evidence that there was not any unreasonable refusal by Sydney Tools to allow Mr Davidson to have a support person present to assist in any discussions relating to his dismissal.

Warnings of unsatisfactory performance (s 387(e))

[94] Some of the reasons relied on Sydney Tools to dismiss Mr Davidson related to his conduct, while other reasons related to his performance. On the evidence before the Commission, the only warning Mr Davidson received for unsatisfactory performance was the written warning issued to him on 2 August 2022. He was not warned in relation to the other performance related contentions now relied on by Sydney Tools to justify his dismissal.³⁶ That Mr Davidson was not warned about these performance related matters weighs in support of his claim that he was unfairly dismissed.

Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))

[95] Sydney Tools had about 900 employees at the time Mr Davidson was dismissed. It also had dedicated human resource management specialists and expertise available at the time of his dismissal.

[96] In all the circumstances, I am satisfied that neither the size of Sydney Tools' enterprise nor any absence of human resource management specialists or expertise had any impact on the procedures followed in effecting Mr Davidson's dismissal.

Other relevant matters

[97] Section 387(h) of the Act provides the Commission with a broad scope to consider any other matters it considers relevant.

[98] The basis upon which a dismissal may be found to be harsh, unjust or unreasonable, notwithstanding a finding that there was a valid reason for dismissal based upon conduct in breach of employer policy was explained by the Full Bench majority in *B, C and D v Australian Postal Corporation T/A Australia Post* in the following terms:³⁷

“[41] Nevertheless, it remains a bedrock principle in unfair dismissal jurisprudence of the Commission that a dismissal may be “harsh, unjust or unreasonable” notwithstanding the existence of a “valid reason” for the dismissal”: *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *J Boag & Son Brewing Pty Ltd v John Button* [2010] FWA 4022; *Windsor Smith v Liu* [1998] Print Q3462; *Caspanello v Telstra Corporation Limited* [2002] AIRC 1171; *King v Freshmore (Vic) Pty Ltd* [2000] Print S4213; *Dahlstrom v Wagstaff Cranbourne Pty Ltd* [2000] Print T1001; *Erskine v Chalmers Industries Pty Ltd* [2001] PR902746 citing *Allied Express Transport Pty Ltd* (1998) 81 IR 410 at 413; *Qantas Airways Limited v Cornwall* (1998) 82 IR 102 at 109; *ALH Group Pty Ltd T/A the Royal Exchange Hotel v Mulhall* [2002] PR919205. That principle reflects the approach of the High Court in *Victoria v Commonwealth* and is a consequence of the reality that in any given case there may be “relevant matters” that *do not* bear upon whether there was a “valid reason” for the dismissal but *do* bear upon whether the dismissal was “harsh, unjust or unreasonable”.

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

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

[43] The determination of whether there was a “valid reason” proceeds by reference to the matters in category (1) and occurs before there is a consideration of what Northrop J described as “substantive fairness” from the perspective of the employee. Matters in categories (2) and (3) are then properly brought to account in the overall consideration of the whether the dismissal was “harsh, unjust or unreasonable” notwithstanding the existence of a “valid reason”.

...

[47] In *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 41 IR 452 Sheppard and Heerey JJ observed (at p 460):

“Employers can promulgate polices and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.”

[48] Thus, a finding that an employee has failed to comply with policies and procedures does not mean that a dismissal is not harsh, unjust or unreasonable. The Commission has consistently applied the proposition that instant dismissal of an employee for non-compliance with his or her employer’s policies may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable: *Kangan Batman TAFE v Hart* [2005] PR958003, Ross VP, Kaufman SDP and Foggo C at para [51]; *Fearnley v Tenix Defence Systems Pty Ltd* [2000] Print S6238, Ross VP, Polites SDP and Smith C (Fearnley) at [61]; *Atfield v Jupiters Ltd* (2003) 124 IR 217 (Jupiters) at [12]-[13].”

[99] There are four other relevant matters to consider.

[100] First, Sydney Tools should never have alleged, let alone stated in Mr Davidson’s termination letter, that he engaged in theft. Theft is a very serious allegation. It should not be made lightly or without a proper investigation. Dismissing an employee for theft can have a significant impact on the employee and their ability to obtain alternative employment. In the present case, Mr Davidson borrowed the ladder from his workplace on 19 March 2023 with the full knowledge of at least Mr Gillespie and Mr Worthy. They knew that he intended to return the ladder to the Gosford store the next morning. Further, the Store Manager, Mr Lloyd, also knew on 19 March 2023 that Mr Davidson had borrowed the ladder because Mr Worthy told him so.³⁸ True to his word, Mr Davidson returned the ladder to the Gosford store before it opened on the morning of 20 March 2023. Despite those known facts, at about 4pm on 20 March 2023 Sydney Tools dismissed Mr Davidson for theft.³⁹ At no stage did Mr Davidson have, or display, an intention to permanently deprive Sydney Tools of their ownership of the ladder. It is not, and never was, even arguable that Mr Davidson stole the ladder from Sydney Tools. This conduct on the part of Sydney Tools adds weight to Mr Davidson’s contention that his dismissal was unfair.

[101] Secondly, the gravity of the misconduct in which Mr Davidson engaged when he borrowed the ladder was disproportionate to his dismissal, even when regard is had to the previous warning Mr Davidson received on 2 August 2022. The evidence before the Commission established a practice whereby employees of Sydney Tools do not comply with

the requirement in the internal theft part of the Security Policy to “send an email to security@sydneytools.com, controlroom@sydneytools.com.au, cc your manager” before helping a customer to carry stock to their car. However, I consider this to be quite different from the obligation in the same part of the policy to ensure that stock does not leave the store unless it is accompanied by appropriate paperwork. In the case of the sales employee assisting a customer to take a purchased item to their car, the customer has paperwork in the form of a receipt for their purchase. In contrast, Mr Davidson did not have any paperwork when he borrowed the ladder from the store. Accordingly, I do not consider this to be a mitigating factor when considering the seriousness of Mr Davidson’s conduct.

[102] Although Mr Davidson breached policy and procedure on 19 March 2023, it is clear from the statements made to Mr Davidson by both Mr Elvis Bey and Mr Titta that he would have been given permission to borrow the ladder if he had made the request to management on 19 March 2023.⁴⁰ Mr Davidson made an error of judgment in the heat of the moment because he wanted to help his daughter who had locked her keys in her apartment on a Sunday afternoon. He should have paused and considered which managers he could call to obtain permission to borrow the ladder, rather than asking a junior sales employee if he could borrow the ladder after he was told that Mr Titta was sick and not at work. But Mr Davidson was not dishonest. Nor did he do anything to cause financial or other damage to Sydney Tools. His conduct warranted a warning but dismissal was a disproportionate response. This adds significant weight to Mr Davidson’s argument that his dismissal was harsh.

[103] Thirdly, it is relevant that I have regard to the fact that Mr Davidson was summarily dismissed as part of my overall assessment concerning the harshness of his dismissal. The proportionality of the summary nature of Mr Davidson’s dismissal must be weighed against the gravity of his misconduct.⁴¹

[104] In *Sharp v BCS Infrastructure Support Pty Ltd*,⁴² a Full Bench of the Commission discussed the question of whether particular conduct by an employee warranted their summary dismissal as an “other relevant matter” within the meaning of s 387(h) of the Act (references omitted):

“[33] The relevance of the definition of “serious misconduct” in reg.1.07 to the matter is also, with respect, obscure. Section 12 of the Act contains a definition of “serious misconduct” for the purposes of the Act which simply cross-refers to reg.1.07. Apart from s.12 itself, the expression “serious misconduct” is used in only three places in the Act. In s.123(1)(b), a dismissal for serious misconduct is a circumstance in which the notice and redundancy entitlement provisions of Pt 2-2 Div 11 are not applicable; in s.534(1)(b) a dismissal for serious misconduct is one to which the requirements for notification and consultation in Pt 3-6 Div 2 do not apply; and in s.789(1)(b) a dismissal for serious misconduct is one in relation to which the requirements established by Pt 6-4 Div 3 for notification and consultation do not apply. The expression “serious misconduct” is not used anywhere in Pt 3-2, Unfair Dismissal, of the Act. Section 392(3) requires the Commission, in relation to the award of compensation for an unfair dismissal, to reduce the amount that it would otherwise order by an appropriate amount where it is “satisfied that the misconduct of a person contributed to the employer’s decision to dismiss the person”. However, it is clear that conduct may constitute “misconduct” for the purpose of s.392(3) without necessarily

being “serious misconduct”. The expression is used in the Small Business Fair Dismissal Code, but that had no application in this case (and it is at least highly doubtful in any event whether the reg.1.07 definition applies to the Small Business Fair Dismissal Code). Reg.1.07 therefore had no work to do in the application of the provisions of Pt 3-2 to the circumstances of this case.

[34] It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee’s conduct met a postulated standard of “serious misconduct”. In *Rankin v Marine Power International Pty Ltd* Gillard J stated that “There is no rule of law that defines the degree of misconduct which would justify dismissal without notice” and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship. “Serious misconduct” is sometimes used as a rubric for conduct of this nature, but to adopt it as a fixed standard for the consideration of misconduct for the purpose of s.387(h) may be confusing or misleading because the expression, and other expressions of a similar nature, have been considered and applied in a variety of contexts in ways which are influenced by those contexts. In *McDonald v Parnell Laboratories (Aust) Pty Ltd* Buchanan J said:

“[48] The terms ‘misconduct’, ‘serious misconduct’ and ‘serious and wilful misconduct’ are often the subject of judicial and administrative attention as applied to the facts of particular cases but there is relatively little judicial discussion about their content and meaning. Naturally enough, when the term ‘serious misconduct’ is under consideration an evaluation of what conduct represents ‘serious’ misconduct is influenced by the (usually statutory) setting in which the phrase must be given meaning and applied. Frequently, for example, the question at issue is whether an employee is disentitled by reason of his or her conduct to a statutory entitlement (eg. in New South Wales, where Ms McDonald was employed, see Long Service Leave Act 1955(NSW) s 4(2)(a)(iii); Workers Compensation Act 1987(NSW) s 14(2).”

[35] In the Decision, the Vice President, correctly, did not attempt to address the parties’ submission concerning “serious misconduct” in the context of his consideration of whether there was a valid reason for the dismissal, but only as a relevant matter under s.387(h). His findings at paragraph [55] and [56] that Mr Sharp’s conduct was “serious misconduct” was, we consider, responsive to the submission of BCS noted in the first sentence of paragraph [52] that “the Applicant’s conduct constituted serious misconduct justifying immediate dismissal”. That is, “serious misconduct” was used as a shorthand expression to describe misconduct of a nature that justified summary dismissal. A finding of that nature was a matter which was open to be taken into account as relevant under s.387(h) because it involved an assessment of the seriousness of the conduct in question.”

[105] Mr Davidson’s conduct did not warrant his dismissal, let alone summary dismissal. His conduct on 19 and 20 March 2023 was not of such a grave nature as to be repugnant to the

employment relationship. Nor was his conduct incompatible with the employment in which he had been engaged by Sydney Tools. He made a one-off error of judgment by failing to follow policy and procedure. He did not engage in theft or any act of dishonesty. He was aware of other employees borrowing stocked items from the Gosford store. For example, Mr Davidson was aware that the previous Gosford Store Manager had borrowed a chainsaw from the Gosford store while he went camping for the weekend. Mr Davidson's error was not to call another manager for permission once he became aware that Mr Titta was not at work on the afternoon of Sunday, 19 March 2023. The evidence before the Commission demonstrates that the ladder was voluntarily returned to the Gosford store by Mr Davidson on the morning of 20 March 2023 and the ladder was not damaged or discounted on account of the fact that it had been briefly used (extended against a wall) by Mr Davidson.

[106] Fourthly, the process followed by Sydney Tools prior to dismissing Mr Davidson was procedurally unfair because it did not involve any proper or fair investigation into the serious allegation of theft before the decision was made to summarily terminate Mr Davidson's employment. A fair investigation would have involved giving Mr Davidson a reasonable opportunity to explain in detail what had happened and why he had acted in the way that he did when he borrowed the ladder from work. If Mr Davidson had been provided with such an opportunity, there is no doubt that he would have explained in detail the difficult situation his daughter faced on the previous afternoon, provided details of his discussions with both Mr Gillespie and Mr Worthy on the previous day and his request to speak to Mr Titta, suggested that Sydney Tools view the available CCTV footage to check his account of what happened on the previous day when he attended the store to borrow the ladder, and explained what happened when he took the ladder to his daughter's apartment. If Sydney Tools had investigated those matters in a fair and balanced manner, it would not, acting reasonably, have concluded that Mr Davidson engaged in theft or that his conduct warranted more than a warning to follow the correct policy and procedure.

Conclusion on whether a harsh, unjust or unreasonable dismissal

[107] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that Sydney Tools' dismissal of Mr Davidson was not unjust, but it was harsh and unreasonable.

[108] Sydney Tools had a valid reason for Mr Davidson's dismissal, notified him of the reason for his dismissal, and gave him a very brief opportunity to respond to the reason. For those reasons, I have concluded that the dismissal was not unjust.

[109] However, the dismissal, let alone summary dismissal, was disproportionate to the conduct in which Mr Davidson engaged, Sydney Tools did not conduct a proper or fair investigation before deciding to dismiss Mr Davidson, and it should never have dismissed him for theft. It follows, in my assessment, that Mr Davidson's dismissal was harsh and unreasonable.

Remedy

[110] Having found that Mr Davidson was protected from unfair dismissal, and that his dismissal was unfair because it was harsh and unreasonable, it is necessary to consider what, if

any, remedy should be granted to him. Mr Davidson does not wish to be reinstated to employment with Sydney Tools. It is agreed by Sydney Tools that reinstatement would not be appropriate. In all the circumstances, I am satisfied that it would be inappropriate to reinstate Mr Davidson.

[111] Section 390(3)(b) of the Act provides that the Commission may only issue an order for compensation if it is appropriate in all the circumstances. A compensation remedy is designed to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal within the bounds of the statutory cap on compensation that is to be applied.⁴³

[112] Having regard to all the circumstances of the case, including the fact that Mr Davidson has suffered financial loss as a result of his unfair dismissal, I consider that an order for payment of compensation to him is appropriate.

[113] It is necessary therefore, for me to assess the amount of compensation that should be ordered to be paid to Mr Davidson. In assessing compensation, I am required by s 392(2) of the Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of this subsection.

[114] I will use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket*⁴⁴ and applied and elaborated upon in the context of the current Act by Full Benches of the Commission in a number of cases.⁴⁵ The approach to calculating compensation in accordance with these authorities is as follows:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount she or she would have received if they had continued in their employment.

Step 5: Apply the legislative cap on compensation.

Remuneration Mr Davidson would have received, or would have been likely to receive, if he had not been dismissed (s 392(2)(c))

[115] Like all calculations of damages or compensation, there is an element of speculation in determining an employee's anticipated period of employment because the task involves an assessment of what would have been likely to happen in the future had the employee not been dismissed.⁴⁶

[116] Mr Davidson submits that he would have remained in employment with Sydney Tools for between about 6 and twelve months if he had not been dismissed on 20 March 2023. The more junior sales employees looked up to Mr Davidson because he was experienced and had knowledge of the products sold by Sydney Tools. It is likely that these attributes led to Mr Davidson being selected by Sydney Tools to attend pre-management training in Sydney in December 2022. These matters suggest a potentially enduring employment relationship. However, Mr Davidson gave evidence that it was becoming very difficult for him to work with Mr Lloyd. They clearly did not get on well. Having only started employment with Sydney Tools in about October 2022, Mr Davidson did not consider that Mr Lloyd had much knowledge about the products sold by Sydney Tools. Mr Davidson also believed that he was being reprimanded by Mr Lloyd for the slightest of things. Mr Davidson submitted that six to 12 months was the period it would have taken him to find equal or better employment or “they would get me on something”.

[117] Sydney Tools submits that Mr Davidson would have remained in employment with Sydney Tools for between about one and three months if he had not been dismissed on 20 March 2023. In support of this submission Sydney Tools relies on the difficult relationship that Mr Davidson had with Mr Lloyd and other employees of Sydney Tools. It is contended that Mr Lloyd did not trust Mr Davidson and believed that he had a complete lack of respect for Mr Lloyd, Sydney Tools and other team members.⁴⁷

[118] I find on the balance of probabilities that if Mr Davidson had not been dismissed on 20 March 2023, he would have remained employed by Sydney Tools for a further period of four months. I have made this assessment weighing up the time that it took Mr Davidson to find alternative employment once he started looking (almost four months), the difficulties in the relationship between Mr Davidson and Mr Lloyd, and the fact that Mr Davidson had only received one warning (in August 2022) before his conduct on 19/20 March 2023, which warranted a further warning.

[119] I am satisfied that Mr Davidson would have continued to receive his normal salary of \$71,500 if he had remained employed by Sydney Tools after 20 March 2023. Mr Davidson submitted that his salary was \$73,990, but this figure is not supported by the evidence. The payslips tendered by Mr Davidson show that his hourly rate of pay was \$30.3035.⁴⁸ He worked 45.25 hours per week. $\$30.3035 \times 45.25 \times 52.1428407$ (weeks per year) = \$71,500. This is the salary figure included in the form F3 Response filed by Sydney Tools.⁴⁹ When Mr Davidson commenced employment with Sydney Tools his annual salary was \$68,000.⁵⁰ At that time his hourly rate of pay was \$28.8201.⁵¹ Converting that to an annual figure, $\$28.8201 \times 45.25 \times 52.1428407$ (weeks per year) = \$68,000.

[120] Accordingly, I am satisfied that \$23,833.33 (4/12 months x \$71,500 = \$23,833.33) is the remuneration that Mr Davidson would have received, or would have been likely to receive, if he had not been dismissed.

Remuneration earned (s 392(2)(e)) and income reasonably likely to be earned (s 392(2)(f))

[121] I accept Mr Davidson’s evidence that, apart from unemployment benefits, he only earned \$250 for one day’s work in the period from 21 March 2023 until he commenced his new job on 10 July 2023, where he is earning more income than he did in his job with Sydney Tools.

Accordingly, Mr Davidson has a period of financial loss from his dismissal on 20 March 2023 until his employment in his new job on 10 July 2023. The loss incurred in that period is \$21,557.50 (15.87 weeks from 21 March 2023 until 9 July 2023 x \$1,375/week = \$21,807.50 - \$250 = \$21,557.50). This calculation is intended to put Mr Davidson in the position he would have been in but for the termination of his employment.⁵²

Viability (s 392(2)(a))

[122] No submission was made on behalf of Sydney Tools that any particular amount of compensation would affect the viability of Sydney Tools' enterprise.

[123] My view is that no adjustment will be made on this account.

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

[124] My view is that Mr Davidson's period of service with Sydney Tools (almost two years) does not justify any adjustment to the amount of compensation.

Mitigation efforts (s 392(2)(d))

[125] The evidence establishes that Mr Davidson applied for hundreds of jobs in the period between his dismissal and securing new employment on 10 July 2023.

[126] In all the circumstances, I am satisfied that Mr Davidson acted reasonably to mitigate the loss suffered by him because of the dismissal and I do not consider it appropriate to reduce the compensation on this account.

Any other relevant matter (s 392(2)(g))

[127] It is necessary to consider whether to discount the remaining amount (\$21,557.50) for 'contingencies'. This step is a means of taking into account the possibility that the occurrence of contingencies to which Mr Davidson was subject might have brought about some change in earning capacity or earnings.⁵³ Positive considerations which might have resulted in advancement and increased earnings are also taken into account.

[128] The discount for contingencies should only be applied in respect to an 'anticipated period of employment' that is not actually known, that is a period that is prospective to the date of the decision.⁵⁴

[129] Because I am looking in this matter at an anticipated period of employment which has already passed (21 March 2023 to 20 July 2023), there is no uncertainty about Mr Davidson's earnings, capacity or any other matters during that period of time.

[130] In all the circumstances, my view is that it is not appropriate to discount or increase the figure of \$21,557.50 for contingencies.

[131] Save for the matters referred to in this decision, my view is that there are no other matters which I consider relevant to the task of determining an amount for the purposes of an order under s 392(1) of the Act.

[132] I have considered the impact of taxation, but my view is that I prefer to determine compensation as a gross amount and leave taxation for determination.

Misconduct (s 392(3))

[133] I have found that Mr Davidson did engage in misconduct on 19 March 2023 because he failed to comply with policy and procedure which required him not to leave the store with stock unless he had permission to do so with the appropriate paperwork. That conduct formed part of the reason for Sydney Tools' decision to dismiss Mr Davidson.

[134] In all the circumstances, I consider 10% to be an appropriate amount to reduce the compensation on account of Mr Davidson's misconduct. It does not warrant a higher discount because Sydney Tools did not suffer any financial loss as a consequence of Mr Davidson's conduct, Mr Davidson attempted to obtain permission from Mr Titta before borrowing the ladder, I consider it highly likely that Mr Elvis Bey and Mr Titta would have given Mr Davidson approval to borrow the ladder had he made the request to either of them,⁵⁵ Mr Davidson was at all times clear and transparent with the Sydney Tools staff to whom he spoke on 19 March 2023 about the purpose for which he wanted to borrow the ladder and the fact that he would return it the next morning, and, true to his word, Mr Davidson did return the ladder to the store before it opened on the following morning.

[135] This reduces the compensation to \$19,401.75 ($\$21,557.50 - 10\% = \$19,401.75$).

Shock, distress or humiliation, or other analogous hurt (s 392(4))

[136] I note that in accordance with s 392(4) of the Act, the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap (s 392(5)-(6))

[137] The amount of \$19,401.75 is less than half the amount of the high income threshold immediately before the dismissal. It is also less than the total amount of remuneration to which Mr Davidson was entitled in his employment with Sydney Tools during the 26 weeks immediately before his dismissal. In those circumstances, my view is that there is no basis to reduce the amount of \$19,401.75 by reason of s 392(5) of the Act.

Instalments (s 393)

[138] No application has been made to date by Sydney Tools for any amount of compensation awarded to be paid in the form of instalments.

Conclusion on compensation

[139] In my view, the application of the *Sprigg* formula does not, in this case, yield an amount that is clearly excessive or clearly inadequate. Accordingly, my view is that there is no basis for me to reassess the assumptions made in reaching the amount of \$19,401.75.⁵⁶

[140] For the reasons I have given, my view is that a remedy of compensation in the sum of \$19,401.75 (less taxation as required by law) in favour of Mr Davidson is appropriate in the circumstances of this case. An order will be made to that effect.



DEPUTY PRESIDENT

Appearances:

Mr G Davidson, on his own behalf

Mr P Haklany, Senior Solicitor employed by *Sydney Tools Pty Ltd*, on behalf of *Sydney Tools Pty Ltd*

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¹ *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

² *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

³ *Ibid*

⁴ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

⁵ *Ibid*

⁶ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 at[24]

⁷ *Ibid*

⁸ *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [99]

⁹ *Ibid*

¹⁰ *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J

¹¹ *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]

¹² *Crozie v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 at [62]

¹³ Court Book at pp 87-90

- ¹⁴ Court Book at pp 82-3
- ¹⁵ Court Book at p 91
- ¹⁶ Court Book at p 94
- ¹⁷ Court Book at pp 97-8
- ¹⁸ Court Book at p 62[8]
- ¹⁹ Court Book at p 48
- ²⁰ Court Book at p 62[8]
- ²¹ Court Book at p 67[17]
- ²² Court Book at p 70[7]
- ²³ Court Book at p 49
- ²⁴ Court Book at pp 71-2 at [15], with which Mr Davidson agreed in his oral evidence.
- ²⁵ Court Book at p 72 at [17]
- ²⁶ Court Book at p 48
- ²⁷ Court Book at pp 72 at [21], with which Mr Davidson agreed in his oral evidence.
- ²⁸ Court Book at p 49
- ²⁹ Court Book at p 48
- ³⁰ Court Book at p 72 at [26]
- ³¹ Ex A8
- ³² Ex A8
- ³³ Court Book at p 48
- ³⁴ See paragraph [33] above.
- ³⁵ See paragraph [33] above.
- ³⁶ See paragraphs [14]-[85] above.
- ³⁷ [\[2013\] FWCFB 6191](#)
- ³⁸ Court Book at p 70 at [7]
- ³⁹ Court Book at p 101
- ⁴⁰ See paragraphs [29] and [37] above.
- ⁴¹ *Johnson v Northwest Supermarkets Pty Ltd* [\[2017\] FWCFB 4453](#) at [5]; *Sharp v BCS Infrastructure Support Pty Ltd* [\[2015\] FWCFB 1033](#) at [34]
- ⁴² [\[2015\] FWCFB 1033](#)
- ⁴³ *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 at [17]
- ⁴⁴ (1998) 88 IR 21
- ⁴⁵ *Tabro Meat Pty Ltd v Heffernan* [2011] FWA FB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762; *Bowden v Ottrey Homes Cobram* [2013] FWCFB 431
- ⁴⁶ *Double N Equipment Hire Pty Ltd v Humphries* [2016] FWCFB 7206 at [16]-[17]
- ⁴⁷ Court Book at p 98
- ⁴⁸ Ex A7
- ⁴⁹ Court Book at p 19
- ⁵⁰ Court Book at p 74
- ⁵¹ Ex A7
- ⁵² *Bowden* at [24], citing *Ellawala v Australian Postal Corporation* Print S5109 at [35]
- ⁵³ *Ellawala v Australian Postal Corporation* Print S5109 at [36]
- ⁵⁴ *Enhance Systems Pty Ltd v Cox* [PR910779](#) at [39]
- ⁵⁵ Court Book at p 72 [21]
- ⁵⁶ *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at [32]