

[2023] FWC 2098

The attached document replaces the document previously issued with the above code on 28 August 2023.

Paragraph [123] is amended to replace the word “against” with “in favour of”.

Associate to Deputy President Anderson.

Dated 29 August 2023.



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Brett Ferber

v

Orana Australia Ltd
(U2023/4889)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 28 AUGUST 2023

Application for an unfair dismissal remedy – disability sector – supervisor – driving incident – termination – no valid reason – procedural fairness – dismissal harsh and unfair – parties directed to confer on remedy

[1] On 3 June 2023 Brett Ferber (Mr Ferber or the applicant) applied under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy.¹ He was dismissed on 29 May 2023 by Orana Australia Ltd (Orana, the respondent or the employer).

[2] At the date of dismissal, Mr Ferber was employed as a supervisor.

[3] Mr Ferber claims the dismissal was harsh, unjust or unreasonable. He seeks reinstatement or, in lieu, compensation.

[4] Orana oppose the application. It contends that the dismissal was not unfair and no issue of remedy arises.

[5] Conciliation was conducted on 4 July 2023. The application did not resolve.

[6] Directions were issued on 10 July 2023.

[7] In advance of the hearing, I received materials from Mr Ferber and the employer.

[8] By consent, permission was granted to Mr Ferber and Orana to be legally represented.

[9] I heard the matter (merits and remedy) by video on 21 August 2023.

Evidence

[10] I heard evidence from three persons:

- Brett Ferber (applicant);²

- Michelle Drake, Executive Manager People and Culture (Orana);³ and
- Lindsay Zappia, Executive Manager Business Services (Orana).⁴

[11] I declined to admit a late additional statement sought to be filed by the respondent.

[12] A Statement of Agreed Facts was submitted.

[13] Some limited factual disputes arise. To the extent necessary, I deal with those in the body of this decision.

[14] I take into account that some evidence includes hearsay. I give limited weight to hearsay where it concerns disputed facts unless otherwise corroborated by direct evidence on which findings can be made to the requisite standard of proof.

Facts

[15] I make the following findings.

Agreed facts

[16] The nine agreed facts are as follows:

1. Mr Ferber hit a wheelie-bin when at work.
2. There were three other people in the car at the time (clients of the respondent).
3. There was no damage to the bin or car.
4. The car was travelling under the speed limit at the time of hitting the bin (around 30 km/h or less).
5. Mr Ferber apologised for the incident, thus admitting he hit the bin.
6. Mr Ferber acknowledges he took his eyes off the road momentarily.
7. Mr Ferber acknowledges he was checking if the toilet keys were in his pocket just prior to hitting the bin.
8. Mr Ferber also acknowledges he had a poor night's rest the night before due to family issues.
9. Mr Ferber had not been involved in any disciplinary issues, driving or otherwise before this incident.

[17] I make the following other findings.

Orana

[18] Orana operates in the community sector and, amongst other activities, provides supported employment for persons living with disabilities through its Business Services department. It does this on contract to the National Disability Insurance Agency (NDIA) under the National Disability Insurance Scheme (NDIS).

[19] A division within Orana's Business Services department provides external services such as maintenance and cleaning to commercial businesses and government bodies.

[20] Orana conducts activities in Port Augusta in regional South Australia. These include external services whereby its clients (persons living with disability) are taken by Orana to undertake local maintenance and cleaning tasks.

[21] At times relevant to this matter, in Port Augusta, Orana employed two persons to perform the task of supervising clients performing external services. Mr Ferber (a supervisor) was one such person. The other was Mr Harrison (a co-ordinator and supervisor) to whom Mr Ferber reported.

[22] Orana is not a small business within the meaning of the FW Act though its Port Augusta operations are limited (two persons in external services and approximately five others in day operations where a higher level of client dependency and disability exists).

Mr Ferber

[23] Mr Ferber is 60 years of age. He is a long-term resident of Port Augusta.

[24] Mr Ferber was employed by Orana in October 2021 as a supervisor.⁵ At the date of dismissal he had been employed for nineteen months. He initially reported to a Senior Business Manager. When that position ceased to exist, he reported to Mr Harrison.

[25] Mr Ferber was a full-time employee working Monday to Friday. Occasionally a small amount of weekend overtime was worked.

[26] Throughout his employment, Mr Ferber worked in external services.

[27] In order to drive clients to local locations, it was necessary that Mr Ferber be licensed to drive a motor vehicle. It was a condition of his employment that he be licensed to drive an Orana vehicle or a private vehicle.⁶

[28] Orana has two vehicles at Port Augusta for these purposes. Mr Ferber drove one of those.

[29] Until an incident on 17 May 2023, Mr Ferber had an unblemished work record, with no warnings concerning his performance generally or driving clients in particular.

Events 17 May 2023

[30] On Wednesday 17 May Mr Ferber was scheduled to take three clients (with varying levels of intellectual disability) to the Port Augusta secondary school (to clean up rubbish) and then to the Port Augusta railway station (to clean station toilets) as part of a supported employment activity.

[31] Mr Ferber drove the Orana vehicle for that purpose. He commenced from the depot at approximately 7:00am and drove the clients to the school. That job was completed by 7:20am. Mr Ferber then drove the clients the short distance to the railway station (one in the front passenger seat, two in the rear).

[32] Mr Ferber turned off a main road into an access road leading (by a mild descent) to the station car park.

[33] No other cars were on the access road, behind or oncoming.

[34] Mr Ferber was travelling at low speed (25 to 30km/h).

[35] As Mr Ferber made a left turn from the access road towards the car park a wheelie bin appeared on the road, about five metres beyond the kerbside.

[36] The access road is wide. However, in order to get around the wheelie bin Mr Ferber needed to traverse the other side of the road.

[37] Mr Ferber became distracted. He momentarily took his eyes off the road ahead. Why he did so is in dispute. Mr Ferber says he did so when he looked into his rear and side mirrors to check if it was safe to move off his line onto the other side of the road and around the bin. Orana say that Mr Ferber averted his eyes from the road and looked down to his pocket to check that he had keys to the station toilets.

[38] I deal with this dispute later in the body of this decision. It is however an agreed fact that Mr Ferber did check if the toilet keys were in his pocket just prior to hitting the bin.

[39] As the vehicle moved around the bin its left front bull-bar clipped the bin. The bin briefly freewheeled then toppled to the ground.

[40] A brief conversation occurred between Mr Ferber and the clients in which one of the clients pointed out that the bin had been hit. Two of the three laughed. Mr Ferber acknowledged that the bin had been hit and said it was an accident. He proceeded to park the car in the car park. He and the clients completed the job and returned to the depot.

[41] Upon clipping the bin and whilst noticing it had toppled, Mr Ferber did not return to the bin to right it or inspect its condition. No contents (if any) had spilled. He believed no damage had been done to the bin.

[42] No damage was done to the car.

[43] No occupant stated or reported any injury.

[44] Mr Ferber gave no further thought to the incident. He did not report it.

[45] Unknown to Mr Ferber, when back at the depot that morning one of the clients mentioned to Mr Harrison that Mr Ferber had struck a wheelie bin while driving at the station.

[46] Around lunchtime Mr Harrison approached Mr Ferber and asked about the incident and said that it needed to be reported. Mr Ferber acknowledged the incident, considered it trivial but agreed to provide a written statement.

[47] Mr Harrison spoke to each of the three clients about the incident. Mr Harrison then reported the incident (by phone) to his manager (in Adelaide) Mr Zappia.

[48] Mr Ferber that afternoon wrote a statement and gave it to Mr Harrison. It read:⁷

“On Wednesday 17 of May at around 7:25 I clipped a rubbish (sic) bin which was on the road, no damage to the bin or car, poor judgement on my part and I take blame for that sorry Brett Ferber.”

Suspension 18 May

[49] The following day, 18 May, Mr Zappia (who was responsible for business operations) informed Ms Drake (who was responsible for human resources) of the incident. Mr Zappia considered the incident serious enough to warrant investigation. They agreed that Mr Ferber be suspended whilst the matter was investigated.

[50] Mr Zappia telephoned Mr Ferber and informed him that he was suspended pending an investigation into “what may be considered serious misconduct”. This was confirmed by a letter given to Mr Ferber that day (18 May 2023).⁸

[51] Between 18 and 22 May Mr Zappia was supplied by Mr Harrison with copies of text messages sent by two of the clients about the incident,⁹ and with photographs Mr Harrison re-created (post-incident) of the railway station precinct and access road (with a bin placed on the road).¹⁰

[52] Mr Zappia forwarded this material to Ms Drake. They decided that the next step would be an allegations letter and meeting with Mr Ferber.

Allegation of serious and wilful misconduct

[53] On 22 May Mr Zappia prepared an allegations letter (based on one sent two weeks earlier to another employee (K)¹¹ who was also said to have driven distracted). The allegations letter was sent to Mr Ferber the next day.¹² The letter required Mr Ferber to attend a meeting on 25 May to answer an allegation “of serious and wilful misconduct”. The allegation was:

“It is alleged that on Wednesday 17 May 2023 at around 7.25am you drove without due care with clients in the vehicle and hit a wheelie bin”.

[54] The letter went on to state:

“These allegations are of a serious nature and if substantiated, demonstrate that you have breached the Code of Conduct. Your behaviour, if substantiated, has adversely affected our reputation and relationship with the Orana Community.”

[55] On the morning of 25 May, and prior to meeting with Mr Ferber, Mr Zappia spoke (remotely) to each of the clients who were in the vehicle at the time of the incident. Based upon those discussions Mr Zappia considered the incident to have occurred and to have been of a serious nature.

[56] Mr Zappia and Ms Drake met with Ms Ferber on 25 May 2023 (by video). Mr Harrison was also present. As Mr Ferber continued to believe the incident “trivial”¹³, he did not bring a support person despite the allegations letter inviting him to do so.

[57] At the meeting Mr Ferber acknowledged the incident but disagreed that it was serious. He stated that it was trivial because he was driving at low speed and the bin had been in the middle of the road. Mr Ferber acknowledged that he was distracted and stated that he had been looking for the station toilet keys in his pocket at the time he hit the bin. He also stated that he was sleep deprived that morning because he had dealt the previous evening with an incident concerning a family member.

[58] Upon Mr Ferber stating that the incident was not serious, Ms Drake replied “I am telling you, it was a serious incident”.¹⁴

[59] The meeting concluded with Ms Drake indicating that in light of the admission that the bin had been struck and the further admission that Mr Ferber had taken his eyes off the road, the company would consider its response and get back to him.¹⁵

Dismissal

[60] On 25 May, following the allegations meeting with Mr Ferber, Mr Zappia and Ms Drake discussed their options. Both considered that dismissal was warranted for serious misconduct.

[61] Mr Zappia had dealt with a disciplinary situation a few weeks earlier with employee K. He considered the situation with Mr Ferber to be similar. In the case of employee K, Orana had decided to dismiss K for distracted driving. That employee resigned during the disciplinary process. Mr Zappia considered it wrong to apply a different sanction to Mr Ferber. In his evidence he stated:¹⁶

“I considered both incidents to be as serious as the other.”

[62] Mr Zappia and Ms Drake each considered that a final warning would be inadequate. Neither believed they could trust Mr Ferber to again drive clients safely in the course of his employment.¹⁷

[63] Each considered that Mr Ferber had showed no remorse or insight into the seriousness of his conduct.

[64] According to Mr Zappia:¹⁸

“From my perspective, Brett showed no remorse, the incident had occurred because he took his eyes off the road to look for keys, and he didn’t at any stage acknowledge or see the serious nature of what occurred.”

“In the end, because Brett didn’t show any responsibility or remorse, and did not seem to understand at all the seriousness of the incident, I felt that I could not trust him to be behind the wheel of a car with our clients in it.”

[65] Mr Zappia also considered it relevant that Mr Ferber had not self-reported the incident but had only done so once it was raised with him by Mr Harrison.¹⁹

[66] According to Ms Drake:²⁰

“When I thought about putting him back in the car with the clients and if something worse happened, it made me feel sick.”

[67] Mr Zappia and Ms Drake jointly decided to make a recommendation to the Chief Executive Officer (CEO) that Mr Ferber be dismissed for serious misconduct. Ms Drake took independent advice.

[68] On 26 May Mr Zappia and Ms Drake met with the CEO Mr Liu. Mr Liu accepted their recommendation. Ms Drake prepared a termination letter. Mr Ferber was asked to attend a meeting on 29 May 2023 to hear the outcome of Orana’s deliberations.

[69] On 26 May, after the CEO agreed to the termination, Mr Zappia called Mr Ferber and gave him a ‘heads-up’ that the decision made was to terminate his employment.

[70] On 29 May Mr Ferber attended a meeting (by video) with a support person. Mr Zappia and Ms Drake attended.

[71] Mr Ferber, believing that he was to be sacked, was asked if he wanted to say anything. Mr Ferber read a prepared statement. In part he stated:²¹

“I wish to appeal the decision to terminate my employment....Serous misconduct means intent, disregard of duties or negligence in duties. I take great care in my duties and safety of those in my care...On the day where I did hit the wheely bin which was on the road I was travelling at a cautious speed approximately 25 – 30km. It was an accident. No damage occurred.”

[72] Mr Ferber was told that he was summarily dismissed, effective immediately. He was paid an ex-gratia amount of three weeks in lieu of notice. He was sent a letter of termination. Relevantly, it read:²²

“Your employment has been terminated as the Organisation is satisfied that the below allegations have, on the balance of probabilities, been substantiated.

It is alleged that on Wednesday 17 May 2023 at around 7.25am you drove without due care with clients in the vehicle and hit a wheelie bin.

The above allegation is in breach of our and the NIDS Code of Conduct specifically to undertake your duties in a diligent and safe manner and ensure the safety of our clients.

We have also considered alternative options, other than termination of employment; however, we feel that termination of employment is the most appropriate outcome in all of the circumstances.”

[73] Mr Ferber commenced these proceedings on 3 June 2023.

[74] Orana did not report the incident to the NDIA.

Circumstances since dismissal

[75] Two weeks after dismissal Mr Ferber enquired about work opportunities with the local council. About a week later he was offered work, subject to internal processes. Those processes took another month. It was not until mid-August that Mr Ferber commenced casual work for the council undertaking two full day shifts. Being casual, ongoing work is not guaranteed though future work is rostered.

[76] Since Mr Ferber’s dismissal, Mr Harrison ceased working his former role, which is currently vacant. Mr Ferber’s role in external services has been filled by another person. Orana have commenced a broader review of its northern operations with a view to a future restructure.

Submissions

Mr Ferber

[77] Mr Ferber advances his case on three primary grounds.

[78] Firstly, Mr Ferber submits that there was no valid reason for dismissal because the driving incident was accidental, minor and could not be reasonably said to have resulted in a loss of trust and confidence in his ability to meet his employment obligations. There being no valid reason, dismissal was unfair.

[79] Secondly, in the alternative Mr Ferber submits that if there was a valid reason for dismissal, then dismissal was harsh because it was disproportionate having regard to the incident and his work history. He submits mitigating factors such as his tiredness on the morning of 17 May caused by family issues the previous evening were not taken into account. He submits dismissal is also harsh having regard to his age and the difficult prospects of obtaining alternative work in regional South Australia.

[80] Thirdly, Mr Ferber submits that the dismissal was procedurally unfair because he was not given an opportunity to view or comment on the photographs given to Mr Zappia by Mr Harrison, was not given access to all of the statements produced during the investigation and,

as a decision was made before the 29 May meeting, it was pointless being asked to make a final statement at that meeting.

[81] Mr Ferber submits that his circumstances are the very reason why unfair dismissal laws exist (to cure injustice in decisions to terminate) and why the remedy of reinstatement is the primary remedy.

[82] Mr Ferber submits that he should be reinstated because he should not have been dismissed and because he has found it difficult to obtain comparable employment. He submits that Mr Harrison has subsequently left the workplace meaning that no awkwardness would exist in resuming his work.

[83] In the alternative, Mr Ferber submits that he should be compensated to the maximum extent allowed by law given his plans to have worked until pensionable age.

Orana

[84] Orana submit that the dismissal was not harsh, unjust or unreasonable and no issue of remedy arises.

[85] Orana submit that a valid reason for dismissal existed because the seriousness of the 17 May incident arises from the risk created by Mr Ferber's carelessness. It is risk, not outcome that determines seriousness. By taking his eyes off the road, Mr Ferber's carelessness created serious risk of injury to himself and clients, and was a valid reason for dismissal.

[86] Orana submit that Mr Ferber's carelessness also created reputational risk for Orana.

[87] By failing to self-report the incident, Mr Ferber's post-incident conduct showed that he lacked insight into the seriousness of the incident. It was not trivial as he told his managers.

[88] By failing to acknowledge the seriousness of the incident, Mr Ferber failed to show remorse. This led to a reasonably based loss of trust and confidence in his ability to undertake duties in a manner that met his obligations to act safely and with due care.

[89] Orana submit that the dismissal was not procedurally unfair. A transparent investigation process was undertaken and a decision was not made until after Mr Ferber was provided an opportunity to explain his conduct.

[90] In the alternative, Orana submit that reinstatement should not be ordered because of Mr Ferber's lack of insight into the seriousness of the incident, and because another person has since been employed in the position he held. No such position for which he is qualified exists in Port Augusta.

[91] Should compensation be considered, the amount should be limited taking into account Mr Ferber's contribution to his employment ending, the ex-gratia payment made, and that Mr Ferber has now secured alternative employment.

Consideration

[92] The issue for determination is simply put; was Mr Ferber’s dismissal “harsh, unjust or unreasonable” and, if so, is it appropriate to order a remedy by way of reinstatement or compensation?

[93] No jurisdictional issues arise. Mr Ferber was protected from unfair dismissal within the meaning of s 382 of the FW Act. He served the statutorily required minimum employment period (s 382(2)(a)). His annual rate of earnings did not exceed the high income threshold (s 382(2)(b)(iii)). His employer was a “national system employer” within the meaning of s 14 of the FW Act. His application was filed within the statutorily required twenty-one days after dismissal took effect.

[94] Section 387 of the FW Act provides:

“387 Criteria for considering harshness etc.

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

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

[95] I now consider the factors in s 387.

Valid Reason (s 387(a))

[96] An employer must have a valid reason for the dismissal of an employee. It is the Commission's task to determine if a valid reason exists. The reason(s) should be "sound, defensible and well founded" and should not be "capricious, fanciful, spiteful or prejudiced".²³

[97] Other than in the case of a small business (as defined), in a conduct-based dismissal²⁴ the test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct. The Commission must itself make findings as to whether the conduct occurred based on the evidence before it.²⁵

[98] A valid reason is not assessed simply by reference to a legal right to terminate a contract of employment.²⁶

[99] I now consider whether, on the evidence before me, the conduct said to constitute the alleged breach of duty is established to the standard of proof required and, if so, whether it collectively or individually constituted a valid reason for dismissal.

[100] The allegation is that Mr Ferber drove without due care, putting clients and himself at risk and causing reputational damage to the employer and a reasonably held loss of trust and confidence in his ability to perform his duties with due care.

[101] I find that Mr Ferber drove without due care on 17 May in the vicinity of the Port Augusta railway station causing the company car he was driving to strike an object on the road. In doing so he breached the Code of Conduct and his duty to act with "reasonable skill, care and diligence".²⁷

[102] However, I do not find that the carelessness and associated risk was serious. I do not find it was a valid reason for termination.

[103] The lack of care by Mr Ferber was the result of momentarily averting his eyes from the road to check if he had the station toilet keys in his pocket. As a result he did not successfully navigate around a wheelie bin that he had seen moments earlier and which was near the middle of the road as he approached the car park. At low speed, the vehicle's bull bar clipped the bin, causing it to topple.

[104] Mr Ferber admitted the incident. I do not however accept Mr Ferber's evidence that he averted his eyes only to look in rear vision mirrors, and thus only averted his eyes from the front of the road and not the road as a whole. Whilst I accept that Mr Ferber did check his rear mirror to ensure that no one was behind him as he realised that he would need to manoeuvre around the bin, his momentary distraction was not caused by using rear vision mirrors but caused by checking for keys.

[105] I make this finding because no mention is made by Mr Ferber during the allegations meeting of the mirror explanation. He only refers to distraction looking for keys. The mirror explanation only emerged in the wake of these proceedings.

[106] Was this conduct a valid reason for dismissal?

[107] I agree with the employer's submission that the seriousness of workplace conduct that endangers oneself or others is primarily assessed by the risk created by that conduct and not its outcome. For example, conduct that creates a safety risk may be a valid reason for dismissal even though it resulted in a near miss rather than injury or damage.²⁸

[108] However, as with all matters where conduct or performance is assessed for valid reason, seriousness is to be assessed against all relevant circumstances.

[109] In this matter seriousness was at the lower end of the scale. Mr Ferber was approaching the bin at low speed, no more than 25 to 30 km/h. Mr Ferber had checked his mirrors and the road ahead. There was no oncoming traffic nor overtaking traffic. He was on a quiet access road. He and the occupants were buckled in. The vehicle clipped the bin. Mr Ferber did not directly drive into it.

[110] This latter point is relevant. Although Mr Zappia, when he commenced the investigation, had been told that Mr Ferber had intentionally driven into the bin, this was not the view he held at the time of dismissal. Nor was it the position Orana put at the hearing. There is no evidence of intention and I do not so find. The bin was struck by accident as Mr Ferber sought to manoeuvre around it, an accident caused by carelessness when allowing himself to be momentarily distracted.

[111] I agree with Orana's submission that careless conduct while driving a vehicle, no matter where on the scale, is rightly a matter of concern to an employer which has a duty to manage risk and enforce employment obligations (in the Code of Conduct) that its employees act with due care. Conduct that impacts (including by creating risk) the safety of others is specifically highlighted by the legislature as a consideration in assessing valid reason. Section 387(a) refers to the "effect on the safety and welfare of other employees".

[112] However not all breaches of duty (or in this case, the Code) are valid reasons. The consideration required by s 387(a) is "whether there was a valid reason for the dismissal" (emphasis added). A valid reason does not exist simply because a breach of employment obligations has occurred.

[113] Nor is the statutory consideration whether a valid reason existed for disciplinary sanction. It is whether the relevant conduct (or performance) was a valid reason for termination. Termination is the most severe of available disciplinary sanctions. Whilst the Commission does not put itself in the position of an employer in determining which of the available disciplinary sanctions should apply, if termination has been decided on by an employer then the relevant conduct (or performance) needs to be such that it constitutes a valid reason for that termination.

[114] For there to be a valid reason, the circumstances when objectively assessed need to have been of such a nature that they warranted the employment relationship being ended. In the case of a single incident of misconduct where there is no prior record of warning or poor performance, that misconduct would generally require a level of seriousness which is beyond minor. In circumstances such as these, where the employer has summarily dismissed for serious misconduct, the conduct is required to have been such that it fundamentally undermined the trust and confidence necessary to continue the employment relationship.

[115] I take into account that an essential element of Mr Ferber’s job was driving clients. However, given the circumstances I do not consider that the loss of trust and confidence in Mr Ferber’s ability to safely drive clients was reasonably based when the incident (including its risk) is objectively assessed. The conduct, at its highest, created no more than a low level of risk in that moment.

[116] Orana’s view that the conduct was serious misconduct warranting dismissal was a mischaracterisation. It was careless conduct but at the lower level on the scale of seriousness. That mischaracterisation in part arose because Mr Zappia considered the incident similar to the incident shortly prior with employee Z, and thus the same sanction needed to apply (employment ending). This was an untenable comparison. According to Mr Zappia’s evidence in cross examination, employee Z was said to be driving on a highway. Mr Ferber was on a quiet access road. Employee Z was said to be driving at about 100 km/h. Mr Ferber was driving at 25 to 30 km/h. Employee Z was said to be distracted by thinking she had “nodded off”. Mr Ferber was distracted by checking his pocket. Employee Z’s vehicle was said to have left the highway. Mr Ferber remained on the road. The impact caused by employee Z was said to have caused damage, not so in Mr Ferber’s case.

[117] I do not however accept that the 17 May incident was “trivial” as Mr Ferber unwisely told his employer. Distraction on a road is never trivial. However on the scale of seriousness the risk presented in this matter was minor.

[118] In assessing a valid reason I take into account that Mr Ferber did not self-report the incident. In large measure this was because he wrongly considered the incident trivial and looked at outcome (no one was injured and no damage) and the immediate reaction (laughing by some passengers), and not risk. In hindsight Mr Ferber ought to have reported the incident immediately upon returning to the depot given that it occurred on a public road, in an Orana vehicle and with clients present. However, there is no evidence before me that he had a duty to report within a particular time frame. Once it was drawn to his attention by Mr Harrison at lunchtime, Mr Ferber willingly prepared a report. Further, even with its mischaracterisation of the seriousness of the matter, Orana itself did not report the incident to the NDIS despite believing it presented a risk to clients under its care and control.

[119] Nor do I consider the assessment made by Orana that Mr Ferber did not take responsibility for the incident or express remorse to be reasonably based. Whilst Mr Ferber’s description of the incident as trivial warranted Orana to justifiably consider that he lacked some insight into the risk created by his distracted driving, its own mischaracterisation of his conduct as serious misconduct coloured its judgement about lack of remorse.

[120] It also coloured its judgment that the incident had caused reputational damage amongst the Orana community. Even though the vehicle is externally signed, there is no evidence of reputational damage on which I can make that finding.

[121] Plainly, in Mr Ferber’s handwritten report on the day of the incident he accepted responsibility (“poor judgement on my part and I take blame for that”) and remorse (“sorry”). In the allegations meeting, Mr Ferber explained the circumstances and what he saw as mitigation (as he was entitled to) but did not cover-up the incident or deny error.

[122] Considered overall, I do not find that a valid reason for termination existed. The stated loss of trust and confidence by the employer arising from a minor single incident of careless driving which created no more than a low level of risk was not reasonably based.

[123] This weighs in favour of a finding of unfair dismissal.

Notification of reason for dismissal (s 387(b))

[124] Mr Ferber was notified of the reason for dismissal at the termination meeting on 29 May 2023 and in the letter of termination he was subsequently sent.

[125] Mr Ferber disagreed with the reason but knew why he had been dismissed.

[126] This is a neutral conclusion.

Opportunity to respond (s 387(c))

[127] An employee protected from unfair dismissal should be provided an opportunity to respond to a reason for dismissal relating to their conduct or capacity. An opportunity to respond should be provided before a decision is taken to terminate an employee's employment.²⁹

[128] The opportunity to respond is an element of procedural fairness but does not require formality. This consideration is to be applied in a commonsense way to ensure the employee is treated fairly.³⁰ Where an employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, that is enough to satisfy this consideration.³¹

[129] I agree with Mr Ferber that as the decision to dismiss was made prior to the 29 May 2023 meeting, the opportunity he was given to make a statement at that meeting was hollow and not one that could have meaningfully swayed the decision-makers.

[130] However, Mr Ferber was provided an earlier opportunity to respond at the meeting on 25 May 2023. This was a meaningful discussion where there was no limit on him saying what he wished, though his response was met with a firm counter view by Ms Drake that the incident was in her view serious, not trivial.

[131] I do not accept Mr Ferber's submission that being denied the photographs supplied to Mr Zappia, or the full complement of statements, was a material denial of procedural fairness. Mr Ferber knew what he was responding to and why. Orana can be rightly criticised for not showing the photographs because the bin placement on the photograph was guesswork by Mr Harrison and a considerable distance from where Mr Ferber says the bin was placed, and Mr Zappia denied himself the chance to have that factual difference highlighted. However that failing did not render the investigation process unfair to Mr Ferber or likely to have materially altered the decision that was made.

[132] This is a neutral conclusion.

Opportunity for support person (s 387(d))

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

[134] Mr Ferber elected not to bring a support person to the 25 May meeting but did so at the 29 May meeting. The employer did not unreasonably refuse a support person.

[135] This is a neutral consideration.

Warnings concerning performance (s 387(e))

[136] There were no warnings concerning performance that had been given to Mr Ferber. He had an unblemished record concerning his performance and conduct.

[137] Whilst dismissal for serious misconduct does not require warnings, in circumstances where dismissal is based on a single incident and where I have not found the incident to have been serious misconduct but a singular and minor error of judgement, the absence of warnings is a material consideration.

[138] It weighs somewhat in favour of a finding of unfairness.

Size of enterprise and human resource capability (ss 387(f) and (g))

[139] This is a neutral consideration. Orana had a human resource capacity and it was used to advise Mr Zappia on the issues.

Other matters (s 387(h))

[140] Mr Ferber submits that his dismissal was harsh for a number of reasons, individually and collectively.

Disproportionate

[141] Should Mr Ferber's carelessness have constituted a valid reason for dismissal, I would have found, for the reasons set out above, that the sanction of dismissal was disproportionate to the misconduct and that the dismissal when objectively assessed was harsh on the ground of disproportionality.

[142] Relevant to this finding is that:

- This was not serious misconduct but a less serious error of judgement borne of momentary distraction whilst driving a vehicle;
- This was an accident borne of carelessness, not wilful conduct;
- This was a single incident of error; there was no prior warnings or record of poor performance, unsafe driving or putting clients at risk; and

- Mr Ferber did not deny or dispute the incident and was co-operative during the disciplinary process.

[143] I do not however make this finding based on the other grounds of harshness relied upon by Mr Ferber.

[144] Whilst I accept that Mr Ferber was tired that morning after a difficult night dealing with family issues, he presented for work. As a general rule, an employee's carelessness whilst at work is not mitigated by personal factors they bring into the workplace. If Mr Ferber was unwell such that he was not in a fit physical or emotional state to do the job, he should have taken personal leave that day.

[145] Whilst I accept that an employee in regional South Australia, particularly one sixty years of age, faces a difficult task securing employment in the regional labour market, this is not a factor unique to Mr Ferber. That alone does not render the dismissal harsh.

[146] I agree with Mr Ferber's submission that because he was summarily dismissed, this weighs in favour of a finding of harshness. I have found that the conduct was not such that justified summary dismissal. However, having found that the dismissal was unfair for other reasons, I do not need to deal further with this submission.

[147] There are no other matters raised for consideration.

Conclusion on unfairness

[148] Unfair dismissal matters are multifactorial.³²

[149] In considering whether Mr Ferber's dismissal was "harsh, unjust or unreasonable" the Commission is required to consider each of the matters in s 387 of the FW Act to the extent relevant.³³ Those matters must be considered as part of an overall assessment. Each assessment must be made on its merits. That assessment is to be based on the ordinary meaning of the words, in their statutory context. Context includes the object stated in s 381(2) of the FW Act that:

"...the manner of deciding on and working out such remedies are intended to ensure that a "fair go all round" is accorded to both the employer and the employee concerned."

[150] In arriving at an overall assessment, the statutory considerations must be applied in a practical, commonsense way to ensure that the employer and employee are each treated fairly.³⁴

[151] I have found a single instance of error on Mr Ferber's part but not one that constituted a valid reason for dismissal and one that, even if it did, would have rendered the dismissal harsh.

[152] I have not found the dismissal to be procedurally unfair despite some valid criticism of aspects of the employer's process.

[153] Mr Ferber's dismissal was harsh, unjust and unreasonable.

[154] I proceed to consider remedy.

Remedy

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

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

[157] I consider it appropriate to order a remedy on the terms outlined below. Having found the dismissal unfair, it would not be just to deny Mr Ferber a remedy.

[158] Reinstatement is the primary statutory remedy. Only if reinstatement is inappropriate are other remedies (compensation) considered.

[159] Mr Ferber seeks an order for reinstatement to his former position accompanied by an order to restore lost pay and an order to maintain continuity of service.

[160] Orana oppose such an order.

[161] As a general proposition, it is inappropriate to order reinstatement if an employment relationship has irretrievably broken down and there are no reasonable prospects of it being restored.³⁵

[162] This proposition flows from the fact that trust and confidence is a necessary ingredient in an employment relationship. However, the mere fact that an employer asserts that trust and confidence has been eroded to such an extent that the relationship is irretrievable is not, of itself, a sufficient ground on which to conclude that reinstatement is inappropriate. An objective consideration of the question needs to be made and the conclusion reached should be soundly and rationally based.³⁶

[163] Further, mere embarrassment or difficulty on the part of an employer is not necessarily indicative of a loss of trust or confidence sufficient to render the employment relationship irretrievable.³⁷

[164] However, a finding of no valid reason for dismissal does not automatically mean that reinstatement is the appropriate remedy.³⁸

[165] In this matter, the considerations that weigh in favour of reinstatement are:

- That Orana's loss of trust and confidence in Mr Ferber was not reasonably based;
- That restoring the employment relationship at a local level is made easier by the fact that Mr Ferber's former immediate manager (Mr Harrison) is no longer in the workplace;

- External services (providing supported activities to clients) continue to need to be performed in Port Augusta;
- Given his age and residency, the task of finding alternative comparable employment in the regional labour market is likely to continue to be difficult for Mr Ferber; and
- Mr Ferber's subsequent employment with the council is less secure casual work.

[166] The considerations that that weigh against reinstatement are:

- Mr Ferber engaged in a careless act, albeit one that was minor, whilst driving clients – and would again be required to drive clients if reinstated;
- Mr Ferber's former role has been filled by another person and is not vacant;
- The Port Augusta workplace is small with no other role in Port Augusta in external services or otherwise (day operations) available for which Mr Ferber has the requisite skills and expertise; and
- Mr Ferber has secured alternative employment with the council at broadly comparable remuneration.

[167] Considering all relevant factors, my provisional view is that the factors in favour of reinstatement weigh more strongly than those against, and that reinstatement is appropriate with continuity of service but backpay discounted by an appropriate quantum.

[168] However, I will provide Mr Ferber and Orana seven days to consider this provisional view and privately consult on remedy (reinstatement or compensation) in light of this decision.

[169] This process may lead to an agreed outcome not requiring Commission orders. It provides Mr Ferber the opportunity to consider whether reinstatement continues to be sought in light of his recently acquired employment. It also provides an opportunity for Orana to consider the impact a reinstatement order may have on its intended restructure.

[170] If no agreement on remedy is reached, I will provide a further seven days for written submissions (if any) on remedy (reinstatement or compensation) before finally determining the question and making appropriate orders.

Conclusion

[171] I find that Mr Brett Ferber, a person protected from unfair dismissal, was dismissed by Orana Australia Ltd on 29 May 2023 and that his dismissal was harsh, unjust and unreasonable.

[172] I consider it appropriate to order a remedy.

[173] I direct the parties to confer on remedy in light of these reasons.

[174] The parties are directed to advise the Commission by no later than 4 September 2023 whether agreement on remedy has been reached and, if not, provide any further written submissions on remedy by no later than 11 September 2023.

[175] Directions to this effect are issued in conjunction with the publication of this decision.³⁹



DEPUTY PRESIDENT

Appearances:

Mr A Wright, *with permission*, on behalf of Mr B Ferber

Mr M Eleftheriou, *with permission*, with Ms M L Hii, on behalf of Orana Australia Ltd

Hearing details:

2023
Adelaide (by video)
21 August

Printed by authority of the Commonwealth Government Printer

<PR765436>

¹ Application amended by fresh F2 9 June 2023

² A1 Statement 24 July 2023

³ R1 Statement 3 August 2023

⁴ R2 Statement 7 August 2023

⁵ MD1

⁶ MD1 clause 23

⁷ LZ2

⁸ LZ3

⁹ LZ4

¹⁰ LZ5

¹¹ Name anonymised

¹² LZ6

¹³ A1 paragraph 36

¹⁴ R1 paragraph 15

¹⁵ R1 paragraph 16

¹⁶ R2 paragraph 16

¹⁷ R1 paragraph 20 (Ms Drake); R2 paragraph 30 (Mr Zappia)

¹⁸ R2 paragraphs 29 and 30

¹⁹ R2 paragraph 30

²⁰ R1 paragraph 20

²¹ BF4

²² BF5

²³ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373

²⁴ Except where the Small Business Fair Dismissal Code applies

²⁵ *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213 [24]

²⁶ *Sydney Trains v Hilder* [2020] FWCFB 1373 at [26] principle (6)

²⁷ R1 MD1 clause 7.4(a)

²⁸ *IGA Distribution (Vic) Pty Ltd v Nguyen* [2011] FWAFB 4070, [14]

²⁹ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897, [75]

³⁰ *RMIT v Asher* (2010) 194 IR 1 at 14-15

³¹ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7

³² *Jones v Brite Services* [2013] FWC 4280, [24]

³³ *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR 915674, [69] (AIRC, 21 March 2002)

³⁴ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 as cited in *Potter v WorkCover Corporation* (2004) 133 IR 458 per Ross VP, Williams SDP, Foggo C and endorsed by the Full Bench in *Industrial Automation Group Pty Ltd T/A Industrial Automation* [2010] FWAFB 8868, 2 December 2010 per Kaufman SDP, Richards SDP and Hampton C, [36]

³⁵ *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186

³⁶ *Ibid* at [191]

³⁷ *Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [27]

³⁸ *Brambleby v Australian Postal Corporation T/A Australia Post* [2014] FWCFB 9000 at [56]

³⁹ [PR765437](#)