

[2023] FWC 2411[Note: An appeal pursuant to s.604 (C2023/6025) was lodged against this decision.]



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Muhammad Ali Qureshi

v

Spotless Services Australia Limited
(U2023/4369)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 19 SEPTEMBER 2023

Application for an unfair dismissal remedy – security officer – failure to report for rostered shifts – custodial detention – whether dismissed – repudiation – no dismissal – obiter – dismissal not harsh, unjust or unreasonable – post-dismissal conduct harsh but not relevant to merit – application dismissed – observations on capacity to notify employers whilst in custodial detention

[1] On 19 May 2023 Muhammad Ali Qureshi (Mr Ali Qureshi or the applicant) lodged an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) in relation to an alleged dismissal by Spotless Services Australia Limited (Spotless, the respondent or the employer).

[2] Spotless filed a response on 7 June 2023.

[3] On 4 July 2023 I decided (EOT Decision)¹ that:

- if Mr Ali Qureshi was dismissed, the dismissal took effect on 27 April 2023 after Mr Ali Qureshi was released from custodial detention; and
- the 21-day time limit for lodgement of the application be extended as the circumstances were exceptional.

[4] The application before me now requires determination of the following issues:

- was Mr Ali Qureshi dismissed?
- if Mr Ali Qureshi was dismissed, was the dismissal unfair; and
- if the dismissal was unfair, what if any remedy should be ordered.

[5] Mr Ali Qureshi submits that he was dismissed by Spotless on or about 18 April 2023 and that his dismissal was unfair. He seeks to be reinstated or, in the alternative, paid compensation.

[6] Spotless raise a jurisdictional issue. It submits that Mr Ali Qureshi was not dismissed. It submits that Mr Ali Qureshi's employment ceased at his initiative by repudiation when he failed to attend rostered shifts without notice. It submits that it accepted the repudiation and notified Mr Ali Qureshi of that fact. It submits that accepting an employee's contractual repudiation is not a dismissal.

[7] In the alternative, Spotless submit that if its conduct was a dismissal, it was fair and for a valid reason in that Mr Ali Qureshi failed to attend rostered shifts without notice or explanation.

[8] In the further alternative, Spotless oppose a reinstatement order and submit that any compensation should be heavily discounted by Mr Ali Qureshi's contribution to the circumstances.

[9] I issued directions on 21 July 2023 (amended 28 August). I received materials from Mr Ali Qureshi and Spotless.

[10] I heard the matter on 5 and 6 September 2023 (in person) and on 8 September 2023 (by video).

[11] Mr Ali Qureshi was self-represented. I granted permission for Spotless to be represented.² I provided a measure of assistance to Mr Ali Qureshi to enable his case to be presented and that of the respondent tested.

[12] Following the hearing I reserved my decision.

Evidence

[13] I received evidence from four persons:

- Mr Muhammad Ali Qureshi (applicant);³
- Mr Touseef Ahmed (called by the applicant);⁴
- Mr Brett Morris (Security Manager) (called by the respondent);⁵ and
- Ms Hayley Valente (Human Resources Manager) (called by the respondent).⁶

[14] In my directions of 21 July 2023, I indicated (by consent) that evidence before me at the earlier extension of time hearing be admitted in this hearing.

[15] The evidence relevant to jurisdiction, merit and remedy necessarily extended beyond that received at the extension of time hearing.

[16] At the outset of this hearing, I indicated that whilst evidence taken in the earlier hearing is before me, it could be supplemented by fresh evidence and further examined or cross examined upon. This meant that findings made in the EOT Decision could be varied.

[17] As is apparent from this decision, whilst those earlier findings largely remain unaltered, in a number of important respects they are varied in light of fresh or additional evidence.

[18] As with the EOT Decision, I have redacted certain content of one exhibit from publication where potential prejudice outweighs the case for publication. The redacted content is known to the parties. The redactions are consistent with a confidentiality undertaking sought and given by the respondent with respect to certain information of a personal nature.

[19] Some factual disputes emerge. Both parties made significant challenges to witness credit. It is appropriate to make general observations as to credit, whilst dealing with specific factual disputes in the body of this decision.

[20] Overall, and with only minor caution, I consider Mr Ali Qureshi to be a witness of credit. He was cross examined for the best part of a day and aspects of his evidence were placed under sustained but fair questioning. I take into account that Mr Ali Qureshi had (for reasons set out below) experienced significant trauma (being held in custody for over three weeks) and had emerged unsettled and depressed. Yet in the witness box he was calm and respectful to the Commission and the cross examiner, aside from occasional frustration when it was apparent that his credit was being questioned. His evidence remained largely consistent with that given at the earlier hearing. For a person who had experienced trauma, Mr Ali Qureshi had relatively good recall other than concerning the days immediately following his release. The respondent called for production of documents. Where those documents were accessible to Mr Ali Qureshi they were produced and were generally consistent with his evidence. The evidence of Mr Ahmed also corroborated key aspects of Mr Ali Qureshi's evidence. Considered overall, Mr Ali Qureshi's evidence is plausible.

[21] The caution is as follows. Past resumes provided by Mr Ali Qureshi to Spotless misstated a tertiary qualification and excluded reference to two former security industry employers. Mr Ali Qureshi was overly defensive when those errors and omissions were pointed out. Mr Ali Qureshi was also evasive when asked why his security licence had been suspended for a temporary period some years ago. As that suspension had been lifted, he considered the questioning irrelevant. In evidence at the earlier hearing Mr Ali Qureshi conveyed the impression that he had no knowledge of the 21-day time frame for making this claim when, under questioning in the merits hearing, it was revealed that he had in fact made an unfair dismissal claim against a former employer in 2019 concerning which the Commission had refused an extension of time.

[22] These shortcomings do not relate to events arising in 2023 but are relevant to credit. Whilst they cause me to more carefully assess the remaining body of evidence they give rise to minor caution only and largely do not lead me to discount the balance of Mr Ali Qureshi's evidence.

[23] Mr Ali Qureshi challenged the evidence of Mr Morris and Ms Valente. This was largely not because of the content of their evidence but because Mr Ali Qureshi objected to the litigation research, resume research and security licence research set out in Ms Valente's statement. With one caveat, I consider the evidence of Mr Morris and Ms Valente a generally reliable basis for fact finding. Mr Morris was willing to make concessions to questions from Mr Ali Qureshi and

the Commission though was less convincing when stating that he could not recall seeing a text message from Mr Ali Qureshi on 5 May 2023. Ms Valente was direct and professional.

[24] The caveat is this. It is perplexing that the two employer witnesses gave different evidence about who was involved in making the decision to end the applicant's employment. Mr Morris clearly stated that it was a joint decision by he and Mr Mason (a HR adviser). Ms Valente stated that it was a decision by a General Manager on joint recommendation from her, Mr Mason, Mr Morris and another manager (Mr Frejer). Moreover, this was revealed by Ms Valente only in cross examination, not as evidence in chief. Whilst ultimately little turns on who made the decision, this discrepancy causes me to apply a measure of caution in assessing the employer evidence.

[25] I have made reference to Mr Ahmed's evidence. He was an impressive witness. I have no hesitation in accepting the truthfulness of his evidence. His evidence was given dispassionately and although a friend and former associate of Mr Ali Qureshi, he did not convey the impression of colouring or tailoring his evidence to suit.

[26] I make the following findings.

Spotless

[27] Spotless is part of the Downer Group. It provides, amongst other operations, security services to the South Australian government including in its health sector. This includes at the Royal Adelaide Hospital (RAH).

[28] Spotless directly employ approximately ninety persons in its security division at the RAH. From time to time it supplements this number with security officers employed by contractors.

Mr Ali Qureshi

[29] Mr Ali Qureshi is an immigrant to Australia. English is not his first language but he speaks clear English. After initially living in Victoria, Mr Ali Qureshi moved to South Australia.

[30] Mr Ali Qureshi was employed by Spotless from 16 May 2022 as a full-time security officer at the RAH. At the time his employment ceased, he worked a five-day roster from Saturday to Wednesday (inclusive) with Thursday and Friday off work.

[31] Mr Ali Qureshi reported to his immediate manager Mr Morris.

[32] Prior to working for Spotless, in the preceding five years Mr Ali Qureshi worked as a security officer in Adelaide with other contractors.

[33] Mr Ali Qureshi is a licensed security officer.

Events 2 April

[34] On Sunday 2 April 2023 Mr Ali Qureshi worked a rostered shift until approximately 10.00pm.

[35] Upon arriving home Mr Ali Qureshi was spoken to by police and taken to the Port Adelaide Police Station where he was charged with certain offences. He was told that he would remain at the station overnight and be presented to a magistrate the next day.

[36] Mr Ali Qureshi was placed in cells at the police station. His mobile telephone was confiscated. He was permitted to make a telephone call. He called a friend (S).⁷ Mr Ali Qureshi's evidence was that he told S of his predicament and, amongst other things, asked S to advise his "friends and family and if possible my work". Mr Ali Qureshi requested this because he was aware that, had he not been detained, he was rostered to work the next day (and throughout that week).

Events 3 April to 26 April

[37] On 3 April Mr Ali Qureshi was presented to a magistrate (by video hearing from the police station). Mr Ali Qureshi had a brief prior discussion with a duty solicitor. The magistrate ordered that he be remanded in custody.

[38] On 3 April Mr Ali Qureshi was taken to the Adelaide Remand Centre.

[39] Mr Ali Qureshi remained in the Adelaide Remand Centre for twenty-three days.

[40] Mr Ali Qureshi was released from the Adelaide Remand Centre on the evening of Wednesday 26 April 2023. He was released when advised that police charges against him were dropped.

[41] Whilst in remand Mr Ali Qureshi's evidence was that he:

- did not have possession of his mobile phone or access to his contacts on his mobile phone;
- had no access to the internet;
- was under the control and supervision of the authorities; and
- was permitted to make telephone calls but only to persons authorised by the authorities. He would then be advised if his request was approved, declined or pending.

[42] I accept this evidence.

[43] Whilst in remand Mr Ali Qureshi requested and was granted permission to speak by telephone to nominated friends but only those whose telephone numbers he knew. A friend sent him an amount of cash by post to allow him to purchase some basic needs.

[44] During his first week in remand Mr Ali Qureshi made a request to “be permitted to speak to my workplace”. Mr Ali Qureshi did not provide the authorities with contact details for a specific Spotless officer as he did not have access to telephone numbers stored on his phone and could not recall their contact numbers. He made the request via a written request (KEX) system used in remand. His request was neither approved nor declined. At the time of his release, it remained “pending”.

[45] Whilst in remand Mr Ali Qureshi’s mental health deteriorated. He was seen by a medical specialist and provided a medication plan. He was spoken to in person (jointly) by a social worker and a psychiatrist. According to Mr Ali Qureshi, in that meeting he repeated the request to speak to someone from his workplace.

[46] During his final week in remand Mr Ali Qureshi met with a solicitor. According to Mr Ali Qureshi, in that meeting he repeated the request that the lawyer speak to someone from his workplace. He was told that the lawyer’s priority was to deal with the police charges, not his employment.

[47] Mr Ali Qureshi was discharged from remand at about 8.00pm on Wednesday 26 April 2023 after being told the charges were dropped. He was released with his mobile phone returned to him.⁸

[48] Upon release, Mr Ali Qureshi’s mobile phone was not working. He walked to a nearby fast-food venue and asked a member of the public if he could use their phone to make a call. The person agreed. The person Mr Ali Qureshi telephoned was a friend and former work colleague Mr Ahmed. It was a brief call. He asked Mr Ahmed to travel to the city to collect him.

[49] Mr Ahmed did so. Mr Ahmed observed Mr Ali Qureshi to be distressed and somewhat incoherent. He helped him into his car and drove Mr Ali Qureshi to Mr Ahmed’s house where he fed him. Mr Ali Qureshi explained that he had been taken into custody, had tried to make contact but did not have his phone on him, and had been placed on a mental health plan for depression. For his part, Mr Ahmed stated that he had, in light of Mr Ali Qureshi’s disappearance, tried to telephone him in the preceding weeks with no answer, and had then travelled to his house where no-one had answered.

[50] Mr Ahmed, noticing Mr Ali Qureshi’s poor state, encouraged him to see a doctor, get rest and try to deal with the trauma and his health.

Action by Spotless

[51] Mr Ali Qureshi had no actual contact, directly or indirectly, with Spotless or from Spotless whilst in remand and vice versa.

[52] Spotless was unaware at all relevant times that Mr Ali Qureshi was in remand.

[53] Spotless had rostered Mr Ali Qureshi to work regular shifts on 3, 4 and 5 April (the completion of that rostered week) and then again in the week of 8, 9, and 10 April 2023.

[54] Mr Ali Qureshi failed to attend these shifts. As no communication had been made by Mr Ali Qureshi to Spotless, the employer was unsure why Mr Ali Qureshi had not attended for work.

[55] Unknown to Mr Ali Qureshi, a Spotless supervisor Mr White tried to call Mr Ali Qureshi three times on his mobile telephone on 4 April 2023. There was no answer.

[56] Unknown to Mr Ali Qureshi, and according to the evidence of Mr Morris, an unnamed person claiming to be Mr Ali Qureshi's wife telephoned the Spotless security control room on 4 April 2023 and asserted that Mr Ali Qureshi had left the country for at least a month.⁹ The control room operator did not ask the caller for her name. The call was overheard by Mr White. This information was reported that day to Mr Morris by Mr White. Mr White proposed to "remove" Mr Ali Qureshi from the roster.

[57] As a matter of fact, the claim that Mr Ali Qureshi was overseas was false. He was in Adelaide, being held in remand.

[58] Mr Morris sought advice from Ms Valente. Ms Valente put a hold on removing Mr Ali Qureshi from the roster. She advised that Mr Ali Qureshi should remain on the roster over the next week, that a phone call should be made each rostered day he does not attend, and that a replacement security officer should also be rostered as a contingency. A letter would be sent to Mr Ali Qureshi on Tuesday 11 April if he had still failed to attend for work.

[59] Mr Morris and the supervisors put this arrangement in place.¹⁰

[60] Spotless made further calls on or about 5, 8, 9 and 10 April which again went to voicemail. Voice messages were left but not responded to.

[61] On 11 April 2023 Spotless sent a letter to Mr Ali Qureshi by email:¹¹

"Dear Ali,

Absence from Duty

I write regarding your failure to report for your rostered shifts and failure to provide notification and evidence to our satisfaction for not doing so. You have also failed to respond to our numerous attempts to make contact with you by phone and voice messages.

On 04/04/2023 you failed to report for your rostered shift. Your Supervisor attempted to call your mobile number at 1410hrs, 1444hrs and 1629hrs with the last of these calls going straight to your voicemail. At 1635 hrs our Security Control Room received a phone call from a female person, who introduced herself as your wife and stated that you had left the country and would not be returning "for at least a month."

When you failed to report for your rostered shifts on 08/04/2023, 9/04/2023 and 10/04/2023 further calls made to your mobile phone to check on your welfare went

straight to your voicemail, with messages left for you to make contact with us, which you have failed to do.

We therefore wish to make it clear that your failure to report for work and failure to provide notification and evidence to our satisfaction for not doing so may be considered to be abandonment of service, leading to the termination of your employment with Downer.

As you have continued to fail to report to work, I advise that we are now considering your ongoing employment. Before we make a decision in this regard, we invite you to provide any additional information regarding the current situation. In your response, we ask that you also provide reason as to why we should not terminate your employment.

So that you are aware of your position, you are advised that should we not receive a reply, which we can regard as satisfactory, by 5pm on Thursday 13 April 2023 we will have no option but to consider terminating your employment. We will consider any response you give before finalising our decision. If you choose not to respond, we will proceed to make a decision based on the information available to us.

You are reminded of your contractual obligations in maintaining company and employment related matters confidential. Accordingly, you are not to approach any employee of the organisation nor any client representative in relation to this matter. Failure to follow this direction may result in disciplinary action.

The direction to refrain from approaching any employee of the organisation or any client representative does not prevent you from contacting me should you wish to discuss this matter.

Yours sincerely,

Brett Morris
Acting Security Manager”

[62] Being in remand with no access to his phone or the internet, Mr Ali Qureshi did not receive this letter.

[63] Spotless took no action immediately following 13 April 2023, despite that being the deadline set by the letter.

[64] On 18 April 2023, after receiving no response from Mr Ali Qureshi, Spotless sent further correspondence in the following terms:¹²

“Dear Ali,

Re: Your Absence from Duty

As you are aware from my previous correspondence dated 11 April 2023 you have not reported for rostered shifts, nor made contact with any representatives of Spotless

Services Australia Limited (Company) to explain your absence from work since 04 April 2023. This is notwithstanding my request to provide information about your situation by 13 April 2023.

By your conduct you have repudiated your contract of employment.

This letter is to confirm that the Company has elected to accept the repudiation and will record your last day of employment as 03 April 2023.

You will be paid any outstanding monies owed. You are required to make arrangements to return any company property as soon as possible to the level 3 Security Desk, including your security access card.

Should you have any questions, please don't hesitate to contact me,

Yours sincerely,

Brett Morris
Acting Security Manager"

[65] The letter was sent by email to Mr Ali Qureshi's correct email address.

[66] The letter was also posted. However, the letter was posted to a former and not current residential address in suburban Adelaide. The posted letter never arrived at Mr Ali Qureshi's current postal address, either whilst he was in remand or subsequently.

[67] Being in remand, Mr Ali Qureshi did not receive the letter of 18 April 2023 electronically or by post. Nor was Mr Ali Qureshi advised by any person of the existence of the letter.

Events 27 April to 12 May

[68] Upon being released from remand, Mr Ali Qureshi felt traumatised and unwell. Armed with the medication plan he was taking an anti-depressant and, encouraged by Mr Ahmed, he made an appointment to see his general practitioner Dr Patel. He saw Dr Patel nine days after release, on 5 May. Dr Patel certified Mr Ali Qureshi as unfit for work from 26 April to 12 May inclusive.¹³

[69] In the days following his release from remand, Mr Ahmed visited Mr Ali Qureshi to check on him. He continued to observe Mr Ali Qureshi appearing depressed and alone in his room with no-one around. Mr Ahmed encouraged Mr Ali Qureshi to take steps to get out and about. In one discussion, Mr Ali Qureshi told Mr Ahmed that services such as his phone and internet account were in arrears and had been disconnected.

[70] Upon release, Mr Ali Qureshi did not feel well enough to go to work even though (as far as he was aware) he would have in the ordinary course been rostered to work on Saturday 29 April and in the week following.

[71] According to Mr Ali Qureshi's evidence, which I accept, once out of remand Mr Ali Qureshi made contact with his friend S and asked if S had made contact with his employer as Mr Ali Qureshi had requested when first in remand. S told Mr Ali Qureshi that he had not done so.

[72] In the days immediately after being released from remand Mr Ali Qureshi also spoke to Mr Ahmed about his job at Spotless. Mr Ali Qureshi asked Mr Ahmed to call Spotless on his behalf. Mr Ahmed stated that it would be better for Mr Ali Qureshi to do that directly as a conversation between Mr Ali Qureshi and his employer would be more meaningful than one with him (Mr Ahmed) as an intermediary.

[73] There is a factual dispute whether Mr Ali Qureshi telephoned Spotless in the first week after being released from remand. Mr Ali Qureshi's evidence was that he did so on at least two occasions and left messages for Mr Morris. Mr Morris stated that he did not receive any messages. It is possible the calls were made as this is consistent with the desire Mr Ali Qureshi had to keep his job, consistent with advice given to him by Mr Ahmed and consistent with Mr Morris's evidence that he may have allowed calls from Mr Ali Qureshi to go un-responded. However, Mr Ali Qureshi could not produce a telephone log of call(s) in that first week. Given his somewhat hazy memory of those early days given that he was home, traumatised and adjusting to anti-depressants, coupled with the fact that Mr Ali Qureshi was unable to make calls immediately upon release because he had no mobile connectivity (see below), the evidence on this point is not strong enough to make the finding sought by Mr Ali Qureshi.

[74] What is more certain is that on 5 May 2023, nine days after release, Mr Ali Qureshi did in fact initiate contact with Spotless. He did so using his mobile phone (once connectivity had been restored). He made a phone call to Mr Morris.¹⁴ When that was not answered he sent Mr Morris the following text:¹⁵

“Good Afternoon Brett

Please give me few minutes to discuss.

I wanted to inform you about the situation I was caught in, I did not have access to any Mobile or communication channel.

Regards

Muhammad Ali Qureshi”

[75] The call and the text went unanswered and were not returned.

[76] Mr Morris was absent from work due to sickness between 5 and 16 May 2023. He was however checking his messages intermittently and responding to those he considered important. Mr Morris acknowledged in questions from me that he did not recall receiving the 5 May 2023 text message but may have received it and may have ignored it because Mr Ali Qureshi's employment had by then ceased. I find this is what occurred. Mr Morris chose not to respond to contact from Mr Ali Qureshi because Mr Ali Qureshi was by then a former employee and his contact had no apparent priority.

[77] Upon being released from remand Mr Ali Qureshi discovered that in light of not having made payments he was in arrears on rent, a car loan, health insurance and his private internet plan.¹⁶

[78] A factual dispute exists over whether Mr Ali Qureshi had his mobile and internet connectivity cut-off whilst in remand and whether it was disconnected upon his release. The Telstra account produced in evidence by Mr Ali Qureshi¹⁷ is not a sufficient basis on which to make this finding.¹⁸ It simply states that his account had been in arrears. However, I do find that Mr Ali Qureshi found his mobile and internet connectivity, which was on the one plan, disconnected upon his release from remand and was only reconnected during the week that followed once Mr Ali Qureshi paid the bills. This finding is consistent with Mr Ali Qureshi asking a member of the public to make a call on a different telephone once released and Mr Ahmed's evidence that the call he received displayed an unknown caller ID number and not Mr Ali Qureshi's. A delay in connectivity of up to a week to allow for payment and service being restored is also consistent with the fact that it was not until 5 May 2023 that a text was sent to Spotless via Mr Ali Qureshi's personal mobile. This likely occurred after Mr Ali Qureshi had read the letters of 11 and 18 April 2023 informing him that his job had ended. That, in turn, was only possible once he could access the internet.

[79] Given this, the finding I made in the EOT Decision that, if dismissed, the dismissal took effect on 27 April 2023 and not 26 April 2023 remains intact. Mr Ali Qureshi could not reasonably have read the 18 April 2023 letter on the day or evening of his release. He could have in the day or days following using a public internet service or a friend's mobile.

[80] As stated in the EOT Decision, upon internet connectivity being restored, on or around 4 or 5 May 2023 Mr Ali Qureshi searched his inbox and found emails from Spotless including the email of 18 April 2023 attaching the letter of same date. Thus, it was on or around 4 or 5 May 2023 that Mr Ali Qureshi first learned, by reading that letter, that his employment had ended.

[81] In light of his text and call to Spotless not being returned, on 7 May 2023 and assisted by a friend (Mr Ahmed) Mr Ali Qureshi sent an email to Spotless in the following terms:¹⁹

“Dear Paul,

I am writing this email to you as I need to inform you regarding the exceptional circumstances I was caught in without my fault.

[REDACTED]

[REDACTED]

██████████ However; until the at the night of 2-April-2023 I was arrested by SAPOL and due to their legal formalities they presented me before court and court sent me to Adelaide Remand centre (while issued me with a Prisoner ID: 190101) under detention, and Police prosecution took around 24 days to verify and drop the charges completely.

When I got release on 26-April-2023 from detention, My Health conditions were deteriorated, This whole Time I was not aware that what was going on at my workplace and at my Home. I am currently under treatment from my GP and He has advised me that I am not fit for work until 12-May-2023 and after that I am fully fit to resume with my duties.

It is pertinent to inform that, There are no charges or anything pending, my profile is fully clean, Security License is active, Working with children check is also active. I was under Government custody for their legal requirements, circumstances were exceptional and beyond my control, Therefore; per the Fairworks Laws and principles of my contract with Spotless/Downer group, my Job a security officer at NRAH should be resume from the date I am medically fit to start the work.

I request you to please cooperate with me and I assure you that I shall work with honesty and determination I have been working under your management before.

Kind Regards,
Muhammad Ali Qureshi”

[82] Spotless responded at 12.08pm on 8 April 2023:²⁰

“Dear Ali,

I refer you to our letter dated 18 April 2023 sent to your email address and mailed to your home address (copy attached)

In that letter you will note that you repudiated your contract of employment your last day of employment with the company was noted 03 April 2023

Regards,

Paul Mason
HR Advisor RAH & WCH”

[83] Mr Ali Qureshi immediately replied:²¹

“Hello Paul

Please read my email again, I did not repudiate anything, I have explained you the circumstances, I was wrongly detained by SAPOL in Remand Centre, There was no one at my home and I didn’t have any to communication channels to contact my workplace and inform you people. Therefore Legally and Ethically it is was not in my control, I

was detained, As soon I come out of the detention and when it become possible to reply you, I am contacting you now and available.

Please tell me the current state, I can come to office anytime in-person. Its my legal and ethical right to resume with my duties from where it got broken without my consent or control.

Regards,
Muhammad Ali Qureshi”

[84] No further reply was sent by Spotless.

[85] After receiving no further contact from Spotless, and believing that he had been treated unfairly, Mr Ali Qureshi asked friends for advice.

Events 13 May to 19 May

[86] On or about 13 May 2023 Mr Ali Qureshi began preparing an unfair dismissal application.

[87] Mr Ali Qureshi, frustrated that his earlier calls to Spotless had not been responded to but still believing that a discussion with Spotless about what had happened could restore his employment and avoid having to take legal action, made one further attempt to speak to Mr Morris.

[88] Using his friend’s telephone, on or around 16 May 2023 he called Mr Morris. Mr Morris answered, not realising it was Mr Ali Qureshi on the line. Mr Ali Qureshi was told that his employment had ended because he hadn’t turned up for work after multiple attempts to contact him. Mr Morris told Mr Ali Qureshi that it had been suggested to Spotless that he had been in India. Mr Ali Qureshi repeated that he had been in remand, not in India and that in any event he was from Pakistan. The call ended without resolution.

[89] On or around this time Mr Ali Qureshi had a further consultation (remotely) with Dr Patel.

[90] On 19 May 2023 Mr Ali Qureshi considered his application complete. He lodged it on-line.

Events since 19 May

[91] On 14 June 2023 Mr Ali Qureshi had a further (in person) consultation with Dr Patel. Dr Patel certified Mr Ali Qureshi as suffering “depression and anxiety disorder” and that he had been on prescribed medication since 5 May 2023.

[92] On 4 July 2023 the Commission granted an extension of time for Mr Ali Qureshi to pursue this unfair dismissal claim.²²

[93] Mr Ali Qureshi has applied for multiple jobs since Spotless declined to re-employ him.²³

[94] In August 2023 Mr Ali Qureshi secured casual work at the Adelaide Airport. It is a less secure role. He currently works fewer hours and is not remunerated at the same level as he was at Spotless.²⁴

Submissions

Mr Ali Qureshi

[95] Mr Ali Qureshi submits that he was dismissed. He submits that it was action by Spotless to send the letter of 18 April 2023 which brought his employment to an end. He submits that the fact of dismissal is supported by the terms of the letter of 11 April 2023 which warned of “no option but to consider terminating your employment”.

[96] Mr Ali Qureshi submits that there was no abandonment of employment or repudiation because he took all steps reasonably open to notify Spotless that he was unable to attend for work. He was forced into remand and denied access to his communication devices by the custodial authorities.

[97] Mr Ali Qureshi submits that there was no valid reason because Spotless did not act reasonably. It acted on false and anonymous information about him being overseas, and did not verify it. Nor did it contact the emergency contact that he had advised when recruited.

[98] Upon his release from remand Spotless deliberately avoided his calls and text messages. It refused to engage in discussion when he wanted to explain his circumstances. Only by using a friend’s telephone and not his own did a Spotless manager answer his call. The dismissive approach by Spotless added hurt and damage. The employer never gave him a fair go or seriously considered his plea to be re-employed.

[99] Mr Ali Qureshi also submits that other Spotless security guards who have not turned up for work have not been sacked like he was.

[100] Mr Ali Qureshi submits that he has been treated unfairly. Unfairly by police and custodial authorities; unfairly by an anonymous caller; let down by some friends; and unfairly by Spotless.

[101] Even though he has been hurt by the way Spotless has dealt with him, Mr Ali Qureshi submits that he is willing to accept that mistakes are made and put these events behind him. He is looking to the Commission to provide the fairness he believes he has been denied and reinstate him to his former job with back wages, and to be a productive employee and rebuild his life.

Spotless

[102] Spotless submit that Mr Ali Qureshi was not dismissed. He repudiated his contract by not turning up over multiple shifts. Abandonment is a form of repudiation. It ended the employment relationship.

[103] Spotless submit that where an employee repudiates an employment contract and the employer accepts the repudiation, the contract comes to an end. However, the act of accepting the repudiation is not a dismissal because it was the abandonment that ended the employment relationship.

[104] In the event Mr Ali Qureshi was dismissed, it was for a valid reason and a fair process was applied.

[105] Mr Ali Qureshi failed to attend for work as required and rostered over a two week period. He did so without notice, without explanation and without contact.

[106] Spotless did not act impulsively or pre-emptively. It continued to roster Mr Ali Qureshi after a week of absences. It made multiple phone calls as both a welfare check and to ascertain his intention. Only in the second week of absence did it send a warning letter and, a week later, a letter advising employment had ceased.

[107] The letters were sent to a last known and current email address and last known postal address provided by Mr Ali Qureshi.

[108] Spotless did not know and had no reasonable grounds to believe that Mr Ali Qureshi was in remand or had an explanation for his absences and non-responsiveness.

[109] Post-dismissal conduct by either party is not relevant to the merits of a dismissal. Nonetheless, in the period following Spotless did not deliberately fail to communicate with Mr Ali Qureshi. Mr Morris did not respond on 5 May 2023 because he was on sick leave. Mr Mason responded in writing on 7 May 2023. Mr Morris discussed the matter with Mr Ali Qureshi on or about 16 May 2023.

[110] The decision by Spotless not to re-employ Mr Ali Qureshi is not relevant to merit. In any event, it was a decision having regard to a reasonably founded loss of trust and confidence given the misrepresentation in resumes submitted to Spotless, a refusal to disclose that his security licence had been temporarily suspended in the past, and unreliable evidence to the Commission about his knowledge of unfair dismissal laws.

[111] In the alternative, any compensation order should be significantly discounted by the lack of effort taken by Mr Ali Qureshi to contact the employer upon his release from remand, and the likelihood of dismissal once information about past litigation, past resumes and past licence suspension came to light.

Consideration

[112] Mr Ali Qureshi 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.

[113] Spotless is not a small business within the meaning of the FW Act. No issue of compliance with the Small Business Fair Dismissal Code arises (s 385(c)). Nor was the dismissal a case of genuine redundancy (s 385 (d)).

Jurisdiction – was Mr Ali Qureshi dismissed?

[114] Mr Ali Qureshi cannot have been unfairly dismissed unless he was dismissed (s 385(a)).

[115] The FW Act requires a dismissal to have occurred as a jurisdictional fact. A mere allegation that a person has been dismissed will not establish this as fact.²⁵ “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1). It provides:

“386 Meaning of dismissed

(1) A person has been dismissed if:

- (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.”

[116] There is no suggestion that Mr Ali Qureshi resigned or was forced to resign. Section 386(1)(b) does not fall for consideration.

[117] If Mr Ali Qureshi was dismissed by Spotless, the dismissal will need to have been a termination of employment “on the employer’s initiative” (s 386(1)(a)).

[118] Termination for these purposes means termination of the employment relationship and not necessarily a particular contract of employment.²⁶ Depending on the circumstances, termination is capable of referring to either the employment relationship or an employment contract, or both.²⁷

[119] As noted by a full bench of the Commission in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli*,²⁸ s 386(1)(a) was intended to capture past case law relating to the meaning of ‘termination at the initiative of the employer’. According to that case law, this arises where the action of the employer is the principal contributing factor leading to the termination of the employment relationship.²⁹

[120] Having raised the jurisdictional issue, Spotless bears the onus of establishing that Mr Ali Qureshi was not dismissed.

[121] It is well established that repudiatory conduct, of itself, does not bring rights and obligations under a contract to an end. Only where the party who is the subject of the repudiatory breach accepts that repudiation will the contract be brought to an end.³⁰

[122] Was Mr Ali Qureshi’s conduct repudiatory?

[123] In *NSW Trains v James* a full bench of the Commission summarised the concept of repudiation.³¹

“The High Court has described repudiation as referring to conduct of a party ‘which evinces an unwillingness or an inability to render substantial performance of the contract’ or ‘which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party’s obligations’. ‘Repudiation of a contract is a serious matter and is not to be lightly found or inferred’. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.” (citations omitted)

[124] I fully take into account that Mr Ali Qureshi did not intend to fail to attend for work and that he made reasonable efforts when in remand to notify Spotless. It was circumstance and not intent that gave rise to the breach of his obligation to turn up for work.

[125] However, the question of whether there has been repudiation of a contract of employment is determined objectively. It is unnecessary to show a subjective intention to repudiate. It is a question of fact not law.³²

[126] Mr Ali Qureshi failed to attend multiple rostered shifts without approval and without prior warning or timely explanation. The obligation to turn up to work at the appointed place and time was an essential feature of his employment as a security officer. The employer had no insight into the reason for his non-attendance. The employer took reasonable steps to alert Mr Ali Qureshi to his obligation on each occasion he missed a shift. After an absence of six shifts, I am satisfied that the failure to attend for work as rostered so struck at the heart of Mr Ali Qureshi’s employment obligations that it objectively signified an inability (although not an intention) to render substantial performance of the contract.

[127] I conclude that the conduct by Mr Ali Qureshi was repudiatory.

[128] I note that it is also arguable, though by no means certain, that the contract of employment ended via the contractual doctrine of frustration; that is, an external event beyond the control of either party in which neither party could be objectively said to have intended to end its operation. Employment ending by frustration does not amount to dismissal on the employer’s initiative. For two reasons however, I do not make this finding. Firstly, the issue was not argued before me. Secondly, it is unnecessary to do so given that I have found (below) that the contract ended by acceptance of repudiatory conduct.

[129] It is not in dispute that the employment ended as a consequence of Spotless’s letter of 18 April 2023 in which the employer alleged repudiatory conduct by Mr Ali Qureshi and accepted that alleged repudiation.

[130] Thus, at least in one sense, the contract terminated at the employer’s initiative.

[131] Was this acceptance of the repudiatory conduct a dismissal within the meaning of the FW Act?

[132] Mr Ali Qureshi submits that it was a dismissal. In essence, Mr Ali Qureshi submits that if his conduct was repudiatory (which he denies) then as there was no obligation on Spotless to accept the repudiatory conduct and as it chose to do so then, on its initiative, the employer brought the employment relationship and the employment contract to an end.

[133] Whilst (given his unrepresented status) Mr Ali Qureshi did not put it in these terms, he essentially argues that it is artificial to conclude, as Spotless submit, that after the last rostered shift he failed to attend (10 April 2023) there remained a continuing employment contract but no continuing employment relationship. He points to the employer's letter of 11 April 2023 which stated that if there was no response within forty-eight hours it "will have no option but to consider terminating your employment". He says that there is no reason to interpret this as a reference only to the employment contract and not the employment relationship.

[134] This line of argument seeks to distinguish the long line of cases which establish that where a party engages in repudiatory conduct it is the conduct of the party responsible for the repudiatory breach which causes the employment relationship (though not the contract) to end and not the party accepting the repudiation.³³ It is said that these cases are distinguishable because they deal with the contractual right to terminate for breach whereas unfair dismissal laws deal with a statutory definition. In support, it is said that when examining the statutory remedy courts have noted that "applying the common law principles relating to termination of the contract of employment may not yield the correct answer in any given case".³⁴

[135] Whilst this submission has some superficial attraction, for three reasons it is rejected.

[136] Firstly, there is nothing in the language of s 386, the FW Act as a whole or in its explanatory memorandum which suggests a legislative intent to vary or set aside established principles concerning termination on account of repudiatory conduct. Absent specific legislative direction, it would not be consistent with the object of providing a "fair go all round"³⁵ to interpret s 386 such that a party committing a repudiatory breach could invoke a statutory cause of action against the innocent party. The legal maxim that 'hard cases make bad law' is apposite. The law should not be strained to manufacture a particular outcome even on the unusual facts presented in this case.

[137] Secondly, the conclusion urged by Mr Ali Qureshi is not the current state of the law. The relevant position was summarised by a full bench of the Commission in the 2018 *Abandonment of Employment* case:³⁶

"[21] "Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment contract, the employment relationship is

ended by the employee’s renunciation of the employment obligations.” (footnotes omitted)

[138] It is well established that decisions of full benches and superior courts should be applied by single members of the Commission for an orderly and just system of law to operate.³⁷

[139] Section 386 is in the same terms in 2023 as it was in 2018 when the full bench made the aforementioned pronouncement.

[140] Applying the established approach, although it was the action of Spotless which terminated the employment contract with Mr Ali Qureshi, this was not a dismissal within the meaning of s 386 because the employment relationship had by then already ended due to Mr Ali Qureshi’s renunciation of his obligation to attend work when rostered.

[141] Thirdly, even if the statutory definition in s 386 was considered in isolation from established case law, it cannot be said that it was conduct by Spotless that was the principal contributing factor which resulted in the termination of employment. The principal contributing factor was that Mr Ali Qureshi did not attend for work when rostered by Spotless across six rostered shifts.

[142] There was no termination “on the initiative of the employer” within the meaning of s 386(1)(a).

[143] For these reasons, I do not find that Mr Ali Qureshi was dismissed by Spotless.

Conclusion on jurisdiction

[144] This being so, Mr Ali Qureshi could not have been unfairly dismissed because he was not dismissed.

[145] The jurisdictional challenge by Spotless is upheld. The application fails for want of jurisdiction. It must accordingly be dismissed.

[146] For these reasons it is not necessary to determine whether ending Mr Ali Qureshi’s employment was harsh unjust or unreasonable, or, if so whether any remedy should be ordered.

[147] However, in the event that this conclusion on jurisdiction is wrong and it is found that there was a termination on the employer’s initiative and thus a dismissal, and out of respect for the cases put, I proceed to consider the merits of the claim.

Merits – was the alleged dismissal unfair?

[148] 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."

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

Valid Reason (s 387(a))

[150] 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".³⁸

[151] Other than in the case of a small business (as defined), in a conduct-based dismissal³⁹ 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.⁴⁰

[152] A valid reason is not assessed simply by reference to a legal right to terminate a contract of employment.⁴¹

[153] 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.

[154] The allegation is that Mr Ali Qureshi failed to attend multiple rostered shifts without cause and without prior notice or explanation.

[155] There is no dispute that Mr Ali Qureshi was rostered for six shifts during the first and second week of April 2023, was required to work those shifts, failed to work those shifts, provided no prior notice of non-attendance and, not until a month later (one week after being released from remand and by which time his employment had ceased), provided an explanation.

[156] As earlier noted, the obligation to attend work at the appointed place and time was an essential feature of Mr Ali Qureshi's duties as a security officer. The failure to do so struck at the heart of his employment obligations. It was conduct in breach over multiple shifts, not a singular failure to attend. Nor was it a minor breach.

[157] The reason for the breach is an important and relevant consideration. I deal with this as well as the surrounding circumstances in considering whether the alleged dismissal was harsh or, in an overall sense, unfair.

[158] Whilst at the time of alleged dismissal the employer had not been informed of the reason for the breach (despite having provided Mr Ali Qureshi an opportunity by its letter sent a week earlier), dismissal for the unexplained failure to attend rostered shifts was sound and defensible.

[159] Considered overall, I find that a valid reason for termination existed.

[160] This weighs against a finding of unfair dismissal.

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

[161] Spotless took immediate steps on 18 April 2023 to notify Mr Ali Qureshi that his employment had ended.

[162] However, for reasons set out above, Mr Ali Qureshi did not read that notification until 4 or 5 May 2023 and could not reasonably have accessed it until 27 April 2023.

[163] In the days and weeks that followed Mr Ali Qureshi communicated his dissatisfaction with the decision – by text, by email, and then by telephone to Mr Morris.

[164] Mr Ali Qureshi disagreed with the reason but knew why he had been dismissed.

[165] This is a neutral conclusion.

Opportunity to respond (s 387(c))

[166] 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.⁴²

[167] 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.⁴³ 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.⁴⁴

[168] Spotless provided Mr Ali Qureshi an opportunity to explain his absences and the prospect that his absences could result in his employment ending. It did so by its letter of 11 April 2023. However, for the same reason that its letter a week later (18 April) was not received, its letter of 11 April was also not received by Mr Ali Qureshi because it was sent to his inbox whilst he was in custody and unable to access electronic communication.

[169] Consequently, through circumstance and not fault of either the employer or the employee the opportunity to respond was not, in practice, enlivened.

[170] In the unusual circumstances of this matter, this is a neutral conclusion.

Opportunity for support person (s 387(d))

[171] 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.

[172] For the foregoing reasons, Mr Ali Qureshi was not able to participate in discussions relating to the decision to end his employment. However, the employer did not unreasonably refuse a support person.

[173] This is a neutral consideration.

Warnings concerning performance (s 387(e))

[174] There were no warnings concerning performance that had been given to Mr Ali Qureshi. He had an unblemished record concerning his performance and conduct. There is no evidence before me of prior instances where Mr Ali Qureshi failed to attend rostered shifts or notify his circumstances when unable to work rostered shifts.

[175] However, as noted, a failure to attend rostered shifts, particularly over repeated days or roster cycles without notification or reasonable excuse is capable of being a valid reason for dismissal and one that does not necessarily require the prior issuance of warnings.

[176] In the circumstances of this matter, this is a neutral consideration.

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

[177] Spotless had human resource capacity and it was used to advise Mr Morris on the management of Mr Ali Qureshi's absence, and ultimately on the letters of 11 and 18 April 2023.

[178] This is a neutral consideration.

Other matters (s 387(h))

[179] Mr Ali Qureshi submits that even if his dismissal was for a valid reason, it was harsh because it was decided in haste and on an incorrect premise.

[180] There are two interrelated elements to this submission:

- that the employer failed to contact the emergency contact person Mr Ali Qureshi had advised on his employment records; and
- the employer acted on information that he was overseas which it chose not to verify, and which was wrong.

[181] It is factually correct that the employer did not contact the emergency contact person Mr Ali Qureshi had advised when first employed. The evidence is that this option did not consciously cross the employer's mind. I accept that the employer could have done so, though there is no evidence to suggest that the person named was still contactable on the details provided let alone knew of Mr Ali Qureshi's whereabouts.

[182] I also take into account that the circumstance confronting the employer was not a typical emergency (such as a health or personal crisis) associated with Mr Ali Qureshi of the type that would ordinarily lead management to reach for emergency contact details. The circumstance was that an employee had not turned up for work for repeated shifts. Spotless did not have any or any reasonable grounds to believe an emergency existed. It simply knew that one of its employees had failed to attend for work and had been unresponsive to calls.

[183] I conclude that whilst recourse to the emergency contact may have been useful, the fact it was not done or thought to be done was not clearly unreasonable such that the alleged dismissal for a valid reason is rendered harsh.

[184] Mr Ali Qureshi also submits that Spotless acted unfairly in that it did not seek to verify information from an unnamed person claiming to be his wife that Mr Ali Qureshi was overseas, information which was in fact false.

[185] For two reasons, the failure to take steps to verify, in the context of this matter, does not render the alleged dismissal harsh.

[186] Firstly, this information was not the trigger for the employer to conclude that Mr Ali Qureshi had repudiated his contract by abandonment. Ms Valente had put a stop to that; on 4 April 2023 she sensibly directed managers to continue to roster Mr Ali Qureshi into the next roster period notwithstanding this information. In other words, the employment relationship continued and work was offered in the ordinary course notwithstanding that information. It was Mr Ali Qureshi's failure to attend the subsequent rostered shifts on 5, 8, 9 and 10 April 2023 that triggered the show cause letter of 11 April 2023. Those shifts all occurred after (not before) the anonymous telephone call to the security control room. Spotless was aware of the unverified information but that information did not materially trigger its decision-making.

[187] Secondly, Spotless had no reason to believe that the information it was advised was wrong any more than it had reason to believe it was right. It had no insight at all into the fact that Mr Ali Qureshi was in custody.

[188] Mr Ali Qureshi also submits that the dismissal was harsh because it had harsh consequences on him. These consequences concern emotional distress, loss of income and an inability to persuade Spotless to reverse its decision once he was released from custody and able to provide an explanation.

[189] These impacts were real. However, for the following reasons they do not render the dismissal harsh.

[190] Firstly, distress and loss of income are consequences of dismissal, not characteristics of it. Whilst the shock and distress experienced by Mr Ali Qureshi had unique elements in that it was accentuated by the fact that he had been in custody and unable to make contact with the employer, Spotless did not know of or contribute to that circumstance. The heightened shock did not inform, directly or indirectly, the alleged dismissal or its characterisation.

[191] Secondly, whilst Spotless consciously chose not to reverse its decision in May 2023 once Mr Ali Qureshi had informed the employer of his circumstances,⁴⁵ this was post-dismissal conduct. Post-dismissal conduct cannot re-characterise a fair dismissal as unfair. The Commission is required to assess the dismissal on 18 April 2023 that took effect on 27 April 2023 for fairness. Conduct that occurred post-dismissal may be relevant to remedy, and whilst it is clearly arguable that the dismissive conduct by Spotless towards Mr Ali Qureshi in May 2023 was harsh and compounded his distress, it is not relevant to whether the alleged dismissal was harsh, unjust or unreasonable.

[192] There is one other matter raised for consideration.

[193] Mr Ali Qureshi submits that other security officers had in the past failed to attend shifts but were allowed to continue as employees. He submits that he was subject to discriminatory treatment.

[194] There is very little evidence before me of the circumstances of other employees who may have missed shifts. Both Ms Valente and Mr Morris acknowledged that this happens from time to time. In a business the size of Spotless that is not surprising, including at its RAH operations. I am not satisfied that the evidence permits any finding of comparability or unfair discrimination. Ms Valente and Mr Morris both indicated that belated contact had been made by a handful of security officers who had inexplicably missed shifts when follow-up contact was initiated by Spotless, and that when this occurred Spotless did not end their employment. This is in contrast to the circumstances in this matter where no contact was made by Mr Ali Qureshi in response to the phone calls and correspondence by Spotless.

Conclusion on unfairness

[195] Unfair dismissal matters are multifactorial.⁴⁶

[196] In considering whether Mr Ali Qureshi's alleged 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.⁴⁷ 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.”

[197] 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.⁴⁸

[198] I have found a valid reason for the alleged dismissal.

[199] I have found that Spotless sought to give Mr Ali Qureshi an opportunity to explain. I have found that Spotless had knowledge of but did not materially act on a single unverified but incorrect phone call from a third party about his whereabouts.

[200] This is clearly a matter where from the perspective of each party the alleged dismissal can be understandably seen as fair or unfair as the case may be.

[201] The Commission’s role however is to consider the matter objectively and not be drawn into the subjective perspective of either party.

[202] Nor should an employer’s decision to dismiss be assessed against a standard of whether it chased every rabbit down every burrow. A failure to do more inside an otherwise reasonable process where an employer did enough to reasonably inform itself of facts that constitute a valid reason does not of itself render a dismissal unfair. This is because the Commission’s task is to assess whether the dismissal was unfair, not whether the employer could or should have made a different decision or done more than what was reasonable in the circumstances.

[203] Further still, and relevant to this matter, the Commission’s assessment is not based on hindsight. With hindsight it is known that Mr Ali Qureshi was in custody and had tried to make contact directly and indirectly with the employer but had been precluded by circumstances beyond his control. In hindsight, a reasonable explanation for failing to work the rostered shifts existed. However, this matter is to be determined by assessing whether the decision, based on the facts that were known or reasonably able to be known to the employer at the time, was unfair. It matters not that a different course may have been fairer on the facts reasonably known or on the facts known only in hindsight.

[204] The facts reasonably known to the employer were that Mr Ali Qureshi had failed to work six shifts over two roster cycles and had made no contact nor provided prior or subsequent notification of why he had not attended for work. The employer did not act impulsively. After failing to attend work on six days and not responding to its contemporaneous calls, the employer wrote to Mr Ali Qureshi. It did this formally by sending a letter to his current and last known email address. It did not impulsively dismiss but warned of the consequences.

[205] It had rostered, it then warned and it then waited for another week after it sent the warning letter.

[206] Waiting this length of time was reasonable in that by 18 April 2023 the employer had allowed an appropriate time for response.

[207] Whilst it may have been fairer to have waited longer, the alleged dismissal as a whole was a reasonably open and rational response to the known circumstances and those reasonably able to be known. The business had a well-founded expectation that its security officers turn up for work when rostered or provide reasonable explanations for not doing so. After a period of two weeks and six rostered shifts being missed, considered objectively it was not unreasonable to end the employment when the employer did so.

[208] Investigating the whereabouts of every employee who does not attend for work or waiting an unreasonable length of time for an employee to turn up or explain their whereabouts is not the standard against which dismissal for failing to attend work should be assessed. If that were so, it would involve an employer unreasonably intruding into the vicissitudes of the private life of its employees, as well as unreasonably deflecting it from the task of running its business.

[209] Rather, in instances of failure to turn up for work the standard is one of reasonableness – were reasonable inquiries made, was reasonable time allowed for attendance and was reasonable warning given that employment would end. Here, Spotless did all three. It made calls to Mr Ali Qureshi contemporaneous with his rostered absences in order to inquire about his welfare and whereabouts. It sent a warning letter immediately following the last rostered absence. It then waited a further week.

[210] Though the dismissal had harsh consequences for Mr Ali Qureshi and was made all the more unpalatable in that it occurred whilst he was in custody and unable to explain himself, for the aforementioned reasons this is a perspective based on hindsight. It is a perspective that was not known nor could have been reasonably known by the employer at the relevant time.

[211] I note the general principle that facts in existence at the time of dismissal but which only become known post-dismissal and were not reasonably able to be known by the employer at the time of dismissal can be taken into account in deciding whether a dismissal was unfair.⁴⁹ However, in this matter the fact that Mr Ali Qureshi was in custody at the time he failed to work the rostered shifts was not known and could not have been reasonably known to Spotless at the time of dismissal.

[212] The conduct by Spotless that I consider harsh was its dismissive attitude towards Mr Ali Qureshi when he tried to explain his circumstances in May 2023. Whilst by then Mr Ali Qureshi was no longer its employee, given the factually accurate story he described and his plea to be re-employed, he was simply re-sent the employer's earlier letter advising repudiation; a letter which he had already read and which had been prepared without the benefit of the facts he was now trying to relay. Mr Ali Qureshi was then left to use a friend's phone so that his caller ID was not identifiable to trigger the conversation with his former manager that he had been seeking. In that one and only conversation he was advised that he was wasting his time because the human resources department had made its decision. Whilst this conduct was objectively harsh because it evidenced a closed mind to his re-employment plea, it was conduct after employment had ended and cannot characterise the alleged dismissal as unfair.

[213] Accordingly, despite the alleged dismissal quite understandably appearing harsh to Mr Ali Qureshi and having harsh consequences compounded by the employer's uncooperative post-dismissal stance, the alleged dismissal was not, when objectively assessed, harsh, unjust or unreasonable.

[214] No issue of remedy arises.

Conclusion

[215] Mr Ali Qureshi was not dismissed within the meaning of the FW Act.

[216] The jurisdictional challenge by Spotless is upheld. The application fails for want of jurisdiction. It must accordingly be dismissed.

[217] Had it been necessary to determine whether the ending of Mr Ali Qureshi's employment was harsh, unjust or unreasonable, I would have found that whilst the alleged dismissal had harsh consequences and that post-dismissal conduct by the employer was harsh, the dismissal itself was not unfair.

Concluding observations

[218] I make two concluding observations.

[219] Firstly, there is no joy in determining matters such as these. This is a fortuitously rare case where circumstance, and not employment-related fault of either the employee or the employer gave rise to an alleged dismissal that was rationally based but which was regrettable. Both Mr Ali Qureshi and Spotless presented cogent reasons why, from the perspective of each, their conduct was not unreasonable. Unfair dismissal determinations are blunt instruments that require a fair go all round but where, in a case such as this, fairness can lie in the eye of the beholder.

[220] Secondly, in the earlier EOT Decision I observed that the evidence suggested a less than acceptable level of sensitivity by custodial authorities to the circumstances where a person placed in remand seeks to communicate that fact to their employer in order to explain their absence or salvage their job.

[221] The further evidence and submissions in this more detailed merits hearing magnifies that concern.

[222] Persons placed suddenly and unexpectedly in remand may be denied liberty for good reason. However, they immediately prior had lives in the outside world including more often than not in the world of work. That Mr Ali Qureshi's request to contact his employer remained 'pending' for a prolonged period is, if correct (and I have found it so), a matter that had potential to cause unjustness to both he and his employer. That potential was realised with regrettable consequences to him (his job) and at cost to the business (double rostering during his unnotified absence).

[223] It is consistent with the fairness objects of the FW Act and Part 3-2 in particular⁵⁰ for decisions about ending employment relationships to be made with as accurate and timely information as possible. There appears to be no good public policy reason why a person taken into remand is not asked three basic questions about employment matters:

- do you have a job?
- does your employer need to know that you are in custody? and
- if so, can we take steps to inform your employer or help you do so?

[224] Had those questions been asked of Mr Ali Qureshi at the outset this regrettable, expensive and damaging episode would likely have been avoided.

[225] Whilst noting that I did not receive evidence from the management of the Adelaide Remand Centre, I request the General Manager of the Commission to refer the findings and observations made in these reasons to the attention of the Chief Executive of the Department for Correctional Services (SA) which is the government agency responsible for that facility.

[226] They may also be of interest to other custodial authorities.



DEPUTY PRESIDENT

Appearances:

Mr M Ali Qureshi, *on his own behalf*

Ms K Stewart, *of counsel, with permission*, with Mr A Lynch, *on behalf of* Spotless Services Australia Limited

Hearing details:

2023
Adelaide

5, 6 and 8 September (in person and by video)

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¹ [\[2023\] FWC 1613](#)

² Directions 21 July 2023, [7]

³ A4

⁴ A9

⁵ R1

⁶ R3

⁷ S is an abbreviation used in this decision for the name provided by Mr Ali Qureshi in evidence

⁸ A10 'Prisoner Pay Discharge Form'

⁹ BM4

¹⁰ BM 5.1, 5.2, 5.3

¹¹ BM6

¹² BM7

¹³ A6 (EOT hearing)

¹⁴ A2

¹⁵ A1

¹⁶ A10, A12, A19

¹⁷ A14

¹⁸ For reasons set out on transcript, on 8 September 2023 and prior to closing submissions I declined a request by Mr Ali Qureshi to admit a statement produced by Telstra dated 7 September 2023

¹⁹ A12

²⁰ A13

²¹ A14

²² [\[2023\] FWC 1613](#)

²³ A18

²⁴ A15, A16

²⁵ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54]

²⁶ *Khayam v Navitas English Pty Ltd* [\[2017\] FWCFB 5162](#), [75]

²⁷ *NSW Trains v James* [2022] FWCFB 55, [45]

²⁸ [\[2017\] FWCFB 3491](#), [33]

²⁹ *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200

³⁰ *Vischer v Guidice* [2009] HCA 34, [53] – [55]

³¹ [2022] FWCFB 55, [125]

³² *City of Sydney RSL & Community Club Limited v Balgowan* [2018] FWCFB 5, [18]

³³ *Byrne v Australian Airlines* [1995] HCA 24, 23 per Brennan CJ, Dawson and Toohey JJ; *Automatic Fire Sprinklers v Watson* [1966] HCA 25 per Dixon J

³⁴ *Searle v Moly Mines Limited* (2008) 174 IR 21, [39]; *Glaxo Smith Kline Australia Pty Ltd v Gauci* (2008) AIRCFB 439, [19]

³⁵ Section 381(2)

³⁶ [\[2018\] FWCFB 139](#)

³⁷ *Sharkey v Life Without Barriers* [\[2019\] FWCFB 7644](#), [114]

³⁸ *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373

³⁹ Except where the Small Business Fair Dismissal Code applies

⁴⁰ *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213 [24]

⁴¹ *Sydney Trains v Hilder* [\[2020\] FWCFB 1373](#) at [26] principle (6)

⁴² *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897, [75]

⁴³ *MIT v Asher* (2010) 194 IR 1 at 14-15

⁴⁴ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7

⁴⁵ [\[2023\] FWC 1613](#), [107]

⁴⁶ *Jones v Brite Services* [2013] FWC 4280, [24]

⁴⁷ *Sayer v Melsteel Pty Ltd* [2011] FWA 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR 915674, [69] (AIRC, 21 March 2002)

⁴⁸ *Selvachandran v Peterson 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] FWA 8868, 2 December 2010 per Kaufman SDP, Richards SDP and Hampton C, [36]

⁴⁹ *Lane and Others v Arrowcrest Group Pty Limited (t/as ROH Alloy Wheels)* (1990) 27 FCR 427, 456; *Metricon Homes Pty Ltd v S Bradley* [2009] AIRCFB 374, [10]

⁵⁰ Sections 3(a) and 381(2)