



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**James Michael Casey**

v

**Mildura & District Pest Management Pty. Ltd.**

(U2023/6198)

COMMISSIONER CONNOLLY

MELBOURNE, 27 OCTOBER 2023

*Application for an unfair dismissal remedy - jurisdiction objection – whether small business fair dismissal code complied with – code not complied with – jurisdictional objection dismissed – dismissal from employment found to be harsh, unjust and unreasonable – compensation ordered.*

## Introduction

[1] On 10 July 2023, Mr James Michael Casey made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that his dismissal from Mildura & District Pest Management Pty. Ltd. (the Respondent) on 4 July 2023 was harsh, unjust or unreasonable. The Respondent denies these allegations and asserts they complied with the Small Business Fair Dismissal Code.

[2] The Respondent operates in the Pest Control industry in Irymple, Victoria. It is uncontested that at the time of Mr Casey’s dismissal, the Respondent employed fewer than 15 employees and is therefore a small business. The Directors and Co-owners of the Respondent are Mr Leslie O’Conner and Ms Kaylene O’Conner.

[3] On 14 August 2023, Directions were issued for the filing of submissions and evidence in relation to the Jurisdictional Objection and the Merits, to be heard concurrently on 22 September 2023.

[4] For the reasons that follow, I have found that the Respondent was a small business employer within the meaning of the Act at the time of Mr Casey’s dismissal, this being the relevant time. Further, I have also found that the Respondent failed to comply with the Small Business Fair Dismissal Code (SBFDC) in dismissing Mr Casey. The consequences of that finding are also dealt with at the conclusion of this Decision.

## Legislation

[5] Section 385 of the Act outlines the meaning of “unfair dismissal”:

“385 What is an unfair dismissal

A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.”

[6] Section 396 of the Act sets out the following:

“The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- (a) Whether the application was made within the period required in subsection 394(2);
- (b) Whether the person was protected from unfair dismissal;
- (c) Whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.”

[7] Section 388 of the Act outlines the Small Business Fair Dismissal Code objection:

**“388 The Small Business Fair Dismissal Code**

(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.

(2) A person’s dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person’s employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.”

[8] As set out above in s.396 of the Act, consideration as to whether the dismissal was harsh, unjust, or unreasonable cannot occur unless the Commission is first satisfied that the provisions of s.396 have been met. In the present case, it is not contested, and I am satisfied that Mr Casey’s application was made within the required timeframe. It is also not contested, and I am satisfied that Mr Casey was a person protected from unfair dismissal.

[9] There is no contention, and I am satisfied that this not a case of genuine redundancy.

[10] Consideration as to whether the dismissal was harsh, unjust, or unreasonable cannot occur if the dismissal was consistent with the SBFDC pursuant to s.388 of the Act. The Commission is satisfied that the Respondent employed fewer than 15 employees as of 4 July 2023 and is therefore a small business.

[11] In broad terms, the second element of the Respondent's jurisdictional objection involves an assessment as to whether the Respondent believed on reasonable grounds that Mr Casey's conduct was sufficiently serious to justify immediate dismissal. The context and substance of the exchange between Mr Casey and Ms Hatfield relied upon by the Respondent in this respect are disputed.

[12] The Code provides as follows:

### **“Small Business Fair Dismissal Code**

#### **Commencement**

The Small Business Fair Dismissal Code comes into operation on 1 July 2009.

#### **Summary Dismissal**

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

#### **Other Dismissal**

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

#### **Procedural Matters**

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.”

**[13]** The effect of s.385(c) of the Act is that when a dismissal is consistent with the Code, it is not an unfair dismissal, and the application must then be dismissed. In the instance that the dismissal is not consistent with the Code, the Commission must then consider whether the dismissal is unfair on the basis of the general criteria in s.387 of the Act. The Code deals with “summary dismissal” on the ground of serious misconduct and “other dismissal” on the basis of the employee’s conduct or capacity to do the job.

**[14]** Section 387 of the Act provides for the criteria for consideration whether a dismissal was harsh, unjust or unreasonable:

**“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.”

## Background

[15] The uncontested factual background to this matter is set out as follows:

- Mr Casey began employment with the Respondent through a traineeship in Cert 111 Urban Pest Management on 5 November 2021.
- On 4 July 2023, the Applicant entered the administrative office of the employer seeking information about their decision not to stand a co-worker down after a positive drug and alcohol test. The Applicant complained that the employee in question was being treated differently to how he and other co-workers had been treated, complained that this was unfair and sought an explanation from the employer for this differential treatment.
- The Applicant addressed his comments to Ms Hatfield (Office, Workplace and Administrative Manager) for the Respondent. Ms Tracey Ryan (Administrative Assistant) was also present in the office.
- The details of this **first conversation**, (the behaviour of both the Applicant, Ms Hatfield and who is responsible) are the subject of dispute that will be addressed below. It is not disputed however, that the conversation descended into an argument between the Applicant and Ms Hatfield during which the Applicant indicated his intention to resign and that Ms Hatfield asked the Applicant to leave the workplace and return with a written resignation.
- Approximately 1 hour after the **first conversation**, the Applicant again entered the administrative office of the employer and commenced a **second conversation** with Ms Hatfield seeking to return his letter of resignation as requested. Again, the details of this conversation are disputed and will be addressed below. It is not disputed however, that during the course of this second conversation Ms Hatfield placed a call to the Police over concerns with the Applicant’s behaviour and failure to leave the workplace.
- Without resolution or the attendance of the Police, the Applicant then left the workplace with his letter of resignation and met the Owner/Director of the Respondent, Mr Leslie O’Conner, where he sought to resign from his employment and had his resignation accepted by Mr O’Conner.
- Following this meeting, Mr O’Conner returned to the workplace and was made aware by Ms Hatfield what had occurred earlier in the day.
- Following this discussion, the Respondent decided that the behaviour of the Applicant was “conduct sufficiently serious to justify immediate dismissal”. The Respondent informed the Applicant in writing of this decision and advised that:

*“Your employment dismissal effective as of today 4<sup>th</sup> July, 2 weeks' notice not excepted because of serious misconduct result dismissal without Notice, days worked any Annual leave owing will be paid 6<sup>th</sup> July.”*

[16] The Applicant alleges that his dismissal was unfair, and the Respondent refutes this.

[17] Question 3.2 of the Form F2 asks the Applicant what happened and why the dismissal was unfair. In response, the Applicant stated:

*“We had a drug test on the day I was dismissed – last year a coworker and I got stood down for 2-3 days for failing it for THC. This time round a different worker failed it but was allowed to work, although our contract states there is 0 tolerance for drugs and alcohol. I went into the office and expressed how unfair I believed it to be on behalf of myself and all my co-workers. The Office lady did not like it being debated so after her screaming at me (all on recording) she said I was suspended and I said I’ll give my 2 weeks resignation instead due to finding different employment. She told me to “Give me your letter by today or you get nothing”. By the time I had gotten home to get my letter which was already written up, they had put another add online for my position. I arrived at the office, recorded our next interaction when I gave her my resignation letter and said it was address to the actual boss of the company. I told her “Here is my 2 weeks” and she said “Yeah if I accept it”. I asked what would be some reasons for her not to accept it. She wouldn’t tell me, just kept telling me to get out of the office and wouldn’t explain the reasons to me. She physically grabbed me and tried to drag me out of the office and when I asked her not to touch me she said “That’s it, I’m calling the police” and proceeded to dial 000 (all on record). I ended up leaving, meeting my boss somewhere to give him the letter, explained what had transpired and told him I was still fine to work the remaining 2 weeks. He’s arrived at the office, called me and said I was harassing and bullying his office ladies, and because of that he was dismissing me and not paying me out my 2 weeks pay, regardless of me giving him my letter beforehand. He told me I had better delete my videos because they wouldn’t hold in a court of law because I illegally filmed them without telling them, but I only recorded for my own safety due to the office ladies previous arguments toward myself and coworkers.”*

[18] In its Form F3 response, the Respondent refutes the Applicant’s claims and states, in summary, that:

- The Respondent is a small business employer of 9 employees and complied with the SBFDC and has a jurisdictional objection to this application.
- It is fair to dismiss an employee without notice for serious misconduct and that the Applicant’s conduct was sufficiently serious to justify immediate dismissal.
- The Applicant’s behaviour, language and approach to the administrative staff in two conversations on 4 July 2023 were repeatedly aggressive, abusive and threatening so much so that the staff were worried for their health and safety and had reason to make a call to the police.

- The Applicant has been previously counselled for poor workplace performance and poor behaviour and treatment of other staff members.
- The employer's decision to terminate the Applicant's employment without notice on the grounds of serious misconduct warranting instant dismissal and withholding the notice period was lawful and justified in the circumstances.

### **The Determinative Conference**

[19] As there are facts which are in contest, the Commission is obliged by s.397 of the Act to conduct a conference or hold a hearing.

[20] The matter was listed for Hearing on 22 September 2023 by video using Microsoft Teams. Both parties were self-represented, and taking into account the parties circumstances, I considered it appropriate to deal with the matter as a determinative conference, as the most effective and efficient way to resolve the matter.

[21] The Applicant represented himself and Ms Hatfield appeared for the Respondent.

### **Materials Before the Commission**

[22] Directions were issued to both parties on 14 August 2023. The Applicant was directed to file his materials on both the jurisdictional objection and merits by 8 September 2023. The Respondent was directed to file their submissions on the jurisdictional objection by 25 August 2023 and 15 September 2023 in reply.

[23] Both the Applicant and Respondent complied with these directions and the materials before the Commission respectively are set out below:

#### **For the Applicant:**

- A Form F2 filed 10 July 2023, including termination letter dated 4 July 2023 and copies of text messages between the Applicant and Ms Hatfield for the Respondent, dated 24 November 2022.
- Audio recordings of 2 conversations alleged to have occurred on 4 July 2023 between the Applicant and Ms Hatfield.
- Written Statement and submissions filed on the 8 September 2023.

#### **For the Respondent:**

- A Form F3 filed 19 July 2023, including a warning letter dated 7 December 2022, termination letter of 4 July 2023 and Statements of evidence from Ms Tracey Ryan (Office Assistant), Ms Hatfield, Mr O'Conner and Ms O'Conner (Directors and Co-owners of the Respondent).

- Written submissions filed on 15 September 2023, including supporting documentation, previous letters of warning to Mr Casey and other staff members and witness statements of Ms Ryan, Ms Hatfield, Mr O’Conner, Ms O’Conner and Mr Andrew Douglas.

### **Audio Recording of 4 July 2023**

[24] At the outset of the determinative conference, I sought the views of both parties on whether or not they objected to the audio recordings submitted by the Applicant being tendered into evidence.

[25] The Applicant submitted that he relied on the recordings as significant evidence in support of his case.

[26] The Respondent raised concerns that the recordings were not lawfully obtained, that all parties to the recordings were not aware they were being recorded and had not consented to being recorded. The Respondent also submitted that the recordings were only partial, as prepared by the Applicant, and that they did not present the complete evidence of what had occurred.

[27] Further, the Respondent submitted that *‘they did not have anything to hide’* and did not formally object to the recordings being referred to by the Applicant in support of his case, on the basis that their concerns would be noted and they were provided the opportunity to refute the Applicant’s evidence.

[28] As noted in the decision of *Haslam v Fazche Pty Ltd t/as Integrity New Homes*,<sup>1</sup> the Commission is not bound by the rules of evidence and procedure as Courts are. It can nonetheless have regard to such rules when making its decision. In the circumstances and noting that the Respondent does not formally object to the admission of these audio recordings, I have determined to allow the recordings to be admitted as evidence to the extent that they are relevant. Copies of the recordings were played during the course of the determinative conference.

### **Evidence and Submissions**

[29] As the matter was dealt with by way of determinative conference, the parties were put on notice that I would ask questions of the parties that may be relevant to the considerations of the Act and would direct their submissions to the relevant legislative provisions.

[30] As the Applicant, Mr Casey filed written submissions and gave evidence on his own behalf at the determinative conference.

[31] Ms Hatfield filed a written statement as submissions and gave evidence on behalf of the Respondent, along with Mr Leslie O’Conner, Ms Kaylene O’Connor and Mr Andrew Douglas (Pest Technician and Second-in-charge).



[32] All witnesses made an affirmation prior to giving their evidence. I found all participants gave evidence to the best of their recollection and sought to provide genuine assistance to the Commission in its deliberations.

[33] All parties conducted themselves with respect to each other and the Commission. I did not favour the evidence of one party over the other in proceedings. However, as indicated and explained further below, I found the evidence of Mr Casey as to the events of 4 July 2023 more compelling as to the questions relevant to the Commission.

### Consideration

*Did the Respondent believe on reasonable grounds that Mr Casey had engaged in conduct sufficiently serious to justify immediate dismissal?*

[34] Whether the Respondent, and namely Ms Hatfield, genuinely held the belief that Mr Casey's conduct on 4 July 2023 justified immediate dismissal is a question of fact.<sup>2</sup> Facts that, in the present matter, are disputed between the parties.

[35] The approach required to the question of Code compliance has been described by a Full Bench of the Commission in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo (Pinawin)* in the following terms:

“[29] ... There are two steps in the process of determining whether this aspect of the Small Business Fair Dismissal Code is satisfied. First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.

[30] Acting reasonably does not require a single course of action. Different employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned.”<sup>3</sup>

[36] The context for these observations was set by the Full Bench in the discussion that led to this point:

“[27] Deputy President Bartel in *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* said:

“[60] At the outset it is appropriate to note that unlike a consideration of the dismissal of an employee of a business that is not a small business employer, the function of FWA is not to determine on the evidence whether there was a valid

reason for dismissal. That is, the exercise in the present matter does not involve a finding on the evidence as to whether the applicant did or did not steal the money. The application of the Small Business Fair Dismissal Code involves a determination as to whether there were reasonable grounds on which the respondent reached the view that the applicant's conduct was serious enough to justify immediate dismissal. As such, the determination is to be based on the knowledge available to the employer at the time of the dismissal, and necessarily involves an assessment of the reasonableness of the steps taken by the employer to gather relevant information on which the decision to dismiss was based."<sup>4</sup>

[28] Senior Deputy President O'Callaghan in *Harley v Rosecrest Asset Pty Ltd T/A Can Do International* said:

“[8] For an employer to believe on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal, it is firstly necessary for the employer to establish that the employer did in fact hold the belief that as a matter of fact that (i) the conduct was by the employee; (ii) the conduct was serious; and (iii) that the conduct justified immediate dismissal. This is to be contrasted to the provisions of s.387(a) where FWA, in determining whether there was a valid reason for the dismissal, must find whether the conduct in fact occurred.

[9] Secondly, it is necessary for the employer to establish that there are reasonable grounds for the employer holding the belief. It is thus necessary for the employer to establish a basis for the belief held which is reasonable. In this regard it would usually be necessary for the employer to establish what inquiries or investigations were made to support a basis for holding the belief. It would also ordinarily be expected that the belief held be put to the employee, even though the grounds for holding it may not be. Failure to make sufficient inquiries or to put the accusation to the employee in many circumstances might lead to a view that there were no reasonable grounds for the belief to be held.” (references omitted)

[37] In written submissions, the Respondent failed to provide an argument in support of its reliance on the exemption provided for by the SBFDC but for a reference to it being a small business.

[38] In proceedings, both Ms Hatfield and Mr O'Conner submitted that after Mr Casey left the premises on the 4 July 2023, and after both Ms Hatfield and Mr O'Conner had received and agreed to accept Mr Casey's resignation, Ms Hatfield was provided with legal advice. This advice stated that due to what had occurred that afternoon the employer was entitled to withhold any notice period due to Mr Casey and effectively summarily dismiss him for serious misconduct in accordance with the provisions of the SBFDC.

[39] Specifically, it was Ms Hatfield's evidence that during the **second conversation** when Mr Casey entered the office to provide his formal letter of resignation as she had requested, an argument between herself and Mr Casey occurred where she requested him to leave the

workplace. This request was not complied with, causing her to make a call to the local police due to him becoming aggressive and argumentative.

[40] Significantly, the evidence of Ms Hatfield and Mr O’Conner is that the act of calling the police was determinative in the decision to summarily dismiss Mr Casey in reliance on the provisions of the SBFDC. Notwithstanding that the Respondent did not make a formal police complaint, I am satisfied that they did bring the matter to the attention of the police, who ultimately did not attend the site. Regardless, the test required under the SBFDC is not that a formal complaint is made.<sup>5</sup>

[41] While much of the evidence in this matter is contested, it is not disputed that Ms Hatfield did in fact call the police on the afternoon of 4 July 2023 and that this was due to Mr Casey’s refusal to leave the office.

[42] As I am not required to make a finding on whether the conduct occurred, I am satisfied that the Respondent held a belief that Mr Casey had engaged in conduct sufficiently serious to justify immediate dismissal. The evidence however, that I will set out further below, does not support a conclusion that this belief was based on reasonable grounds.

[43] The SBFDC defines serious misconduct as ‘theft, fraud, violence and serious breaches of occupational health and safety procedures’.<sup>6</sup> None of which, in my view, occurred in these circumstances.

[44] Additionally, there is nothing before the Commission that suggests Mr Casey had, or was threatening to engage in any acts of violence. Whilst it may have been reasonable for Ms Hatfield to call the police to request Mr Casey leave the employer’s premises, I do not find that there was reasonable ground for a report of violence to be made to the police. The Respondent did not make any submissions or provide any evidence that Mr Casey had threatened or engaged in conduct that was violent in the past.

[45] Beyond this, there has been no further submissions or evidence presented before me by the Respondent on the question of whether the Respondent reasonably believed that Mr Casey had engaged in conduct sufficiently serious to justify immediate dismissal.

[46] Based on the considerations above, in dismissing Mr Casey on 4 July 2023, I am not convinced that Ms Hatfield, and by extension the Respondent, on reasonable grounds believed that Mr Casey engaged in conduct sufficiently serious to warrant summary dismissal.

[47] Accordingly, I am not satisfied that the Respondent complied with the Code. The jurisdictional objection is dismissed.

*Was the dismissal harsh, unjust or unreasonable?*

[48] A dismissal may be unfair, when examining if it is ‘harsh, unjust or unreasonable’ by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:<sup>7</sup>

“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[49] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter,<sup>8</sup> and now turn to each of these criteria.

*s.387(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)*

[50] In order to be a valid reason, the reason for the dismissal should be “sound, defensible, or well founded” and should not be “capricious, fanciful, spiteful or prejudiced”.<sup>9</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>10</sup>

[51] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>11</sup> The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which result in termination.<sup>12</sup>

### **The Applicant’s Evidence.**

[52] In his form F2, the Applicant submits that he sought to resign from his employment and only after this had occurred, was he made aware of the employers concerns with his conduct and decision to terminate his employment without notice for serious misconduct. His evidence and the uncontested background to this matter supports this submission.

[53] Mr Casey’s evidence is that on the 4 July 2023 he became aware that a co-worker had failed a drug and alcohol test and had been allowed to continue working. Mr Casey concedes that he was upset by this and thought it was unfair because it was not consistent with what had previously happened to him and another co-worker who had been stood down.

[54] He contends that in entering the office to talk to Ms Hatfield, his intention was to express this dissatisfaction and seek an explanation from the employer why he had been treated differently.

[55] He concedes that while he raised his voice in both the conversations with Ms Hatfield he did not “lose his cool”, remained calm and just attempted to seek an explanation and subsequently be heard. He submits that is Ms Hatfield that first raised her voice and lost her cool.

[56] At no stage did he resort to violence or behave in a way that would give any indication to Ms Hatfield that he was likely to do so.

[57] Further, Mr Casey submits that it was Ms Hatfield who resorted to physical contact by grabbing his shoulder and attempting to remove him from the office.

### **The Respondent's Evidence**

[58] The Respondent's submissions are that the Applicant had previously being counselled for performance and disrespectful and aggressive behaviour. Therefore, that the Applicant's behaviour and treatment of Ms Hatfield on both the **first** and **second conversations** on 4 July 2023 were inappropriate conduct sufficient enough to justify dismissal without notice.

[59] Specifically, that Ms Hatfield and Ms Ryan were so concerned with the behaviour of and potential for the Applicant to engage in violence that they had legitimate concern as to their safety to the extent that they had reason to call the Police.

[60] In support of this submission, the Respondent's witnesses (Mr O'Conner, Ms O'Conner, Ms Hatfield and Mr Douglas) all gave evidence about the tendency of the Applicant to "lose his cool" and resort to aggressive and abusive language in these circumstances.

[61] There was no evidence the Applicant had ever resorted to physical violence or threatened to do so. However, all of the Respondent's witnesses expressed a concern that they 'thought' this could occur.

[62] Ms Hatfield evidence was that Mr Casey was demanding, inappropriate and aggressive throughout the conversations of 4 July 2023. That he first demanded an explanation as to why he was treated differently, or so he believed, from the other employee in relation to the positive drug and alcohol test. That he then became frustrated, irate and more demanding when he was not told what he wanted to hear.

[63] In the circumstances where Ms Hatfield was aware that Mr Casey had previously been counselled and warned about aggressive and inappropriate conduct towards other staff, Ms Hatfield submitted that she was concerned things could get out of hand, indicating in her written submissions that:

*"I did talk louder on this day and asked him (Mr Casey) to go home, that did not work and I then said I would stand him down for the day as there was no settling his anger. His response was I am sick of your shit Lynne, I quit anyway, my response was ok but bring me back a letter so you can be paid out your entitlements."*

[64] In the **second conversation**, when the Applicant returned to the office to hand in his resignation letter, Ms Hatfield's further evidence is relevantly that:

*"James began his argumentative behaviour over and over again was abusive.... I asked him to leave as I was done listening to the insults, he said he will not leave, I got up opened the sliding door, and with my hand on his arm to usher him out... James was*

*then saying “get your hands off me, that’s assault” I said James come on, I’m asking you to leave, there was no force at all...*

*...I was worried as he was repeating everything over and over, so my last resort was to call the police... Both Tracy and I were unsure what James was going to do next, I decided not to wait to violence and our safety was why we called the Police...*

*...I cannot remember James’s last words both myself and Tracy felt intimidated and not sure what next verbal abuse he would come out with or do next.”*

[65] Additional evidence from the Respondent was provided by Mr Leslie O’Conner, Co-owner and Director. Mr O’Conner provided a short witness statement and provided oral evidence in proceedings. Mr O’Conner’s evidence was that he had a conversation with the Applicant offsite on the afternoon of 4 July 2023 where the Applicant resigned. He accepted the Applicant’s resignation and indicated he would get back to him with regards to what he was owed and would happen next.

[66] Mr O’Conner further submitted that it has never been the employer’s practice to not accept employees’ resignations if they want to resign and that in all the previous circumstances of resignations from the company, employees have either worked or being paid out their notice period and entitlements after resigning.

[67] In the Applicant’s circumstance, Mr O’Conner’s evidence is that after the meeting with Mr Casey he returned to the workplace where Ms Hatfield made him aware of what had occurred earlier in the day, the Applicants aggressive and inappropriate behaviour and the calling of local police. Mr O’Conner then rang the Applicant and asked for an explanation. Mr Casey denied he did anything wrong, said he simply wanted his two weeks’ pay and apportioned blame on Ms Hatfield and became agitated in doing so. Mr O’Conner told Mr Casey he needs to calm down and that we would look into what was owed and get back to him. Ms Hatfield then told Mr O’Conner that because of what had occurred earlier in the day, it was her view that the Applicant should not be returning to the workplace.

[68] Following this conversation, both Mr O’Conner and Ms Hatfield’s evidence is that they contacted the Fair Work Ombudsman for advice and were referred to a legal representative who told them that in the circumstances of the report to police, the behaviour of the Applicant and being a small business, they could terminate the Applicant without notice. The employer then acted on this advice and sent the Applicant a letter by email terminating his employment without notice on the same day of the incident. The Applicant responded to this email the following day acknowledging the Respondent’s decision and sought clarification as to his pay and entitlements without an explicit reference to the 2-week notice period.

## **Findings**

[69] It is not disputed that there were a series of heated conversations between the Applicant and Ms Hatfield on 4 July 2023 in which the Applicant sought to resign from his employment and that in the **second conversation** the Respondent saw reason to place a call to the local police.

[70] Relevantly, the Respondent asserts that it was the aggressive and inappropriate conduct of the Applicant in these conversations and his previous aggressive conduct for which he had been counselled, along with report to the local police, that are the valid reasons for the decision to terminate his employment.

[71] The Applicant does not dispute having previously been counselled for behaviour and conduct at work but submits that both his behaviour and performance at work improved as a result. The Respondent accepts that the Applicant's work performance did previously improve but maintained that the employer continued to remain concerned that Applicant had a tendency to behave aggressively towards other staff and lose his cool and that this could get out of hand in the future. Each of the Applicant's witnesses provided evidence to this effect.

[72] Despite this concern, there is no evidence that the Applicant has a history of violence or aggressive behaviour either in the workplace or otherwise. He had not been provided with a formal **final** warning or previously been advised that his employment could be terminated if he failed to improve. It is partly on this basis that I have not accepted the employer had a reasonable belief to pending violence to warrant a call to the local police on the day in question, relevant to the Respondent seeking to rely on the SBFDC.

[73] Consequently, it is the conduct of the Applicant on 4 July 2023 that must be examined. Relevantly, the audio recording of the conversations that occurred are instructive as to what actually occurred. Given the means they were obtained and weight to be given to these recordings, I see no reason for them to be reproduced here.

[74] On reviewing this material in the present circumstances, it suffices to say that neither party's version of events is resoundingly supported by this material. The Applicant comes across as clearly behaving in a demanding, demeaning and inappropriate manner towards Ms Hatfield, that is clearly inappropriate conduct for an employee in any circumstance.

[75] Ms Hatfield does not always maintain her composure. However, there is nothing in this material to lead me to conclude Ms Hatfield had a reasonable concern that the Applicant was threatening violence or was at risk of resorting to violence warranting a phone call to the police. Further, there is no question on this material that the Applicant sought to resign from his employment and on request of Ms Hatfield sought to provide written resignation. It was Ms Hatfield's response to the Applicant attempting to provide written resignation that seemed to escalate the situation into the incident that eventuated. Ms Hatfield's response, which was repeated approximately 3 times despite the Applicant inquiring as to what she meant by it, was:

“...that's if I accept what's written in the letter”.

[76] As a consequence, for the reasons set out above, I have found that the decision to terminate the Applicant was not sound or defensible. Rather that it was only based on convenient advice in the circumstances, and that it was not properly considered. Accordingly, I am not satisfied that the employer had a valid reason to terminate the Applicant's employment.

*s.387(b) Whether the person was notified of that reason*

[77] Proper consideration of s.387(b) requires a finding to be made as to whether the Applicant “was notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).<sup>13</sup>

[78] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,<sup>14</sup> in explicit,<sup>15</sup> plain and clear terms.<sup>16</sup>

### **The Applicant’s Evidence**

[79] The Applicant’s evidence is that in his last telephone conversation with Mr O’Connor on 4 July 2023 where he restated his position as to what occurred earlier that day and reiterated his request to be paid his 2-week notice period, Mr O’Conner told him he would look into what he (the Applicant) was owed and get back to him.

[80] The Applicant submitted that at no stage did either Mr O’Conner or Ms Hatfield advise him that he was being dismissed without notice, the reasons for this decision and that he would not be paid his 2-week notice period as a consequence until he received a letter of termination on the evening of 4 July 2023. The Applicant submits that this was after he had resigned from his position and had his resignation accepted by Mr O’Conner.

[81] The relevant part of the termination letter is as follows:

*“Mildura and District Pest Management dismiss you on the grounds that the conduct is sufficiently serious to justify immediate dismissal...*

*...dismissal effective as of today 4<sup>th</sup> July, 2 weeks’ notice not excepted because of serious misconduct result dismissal without Notice...”*

[82] In oral evidence, the Applicant acknowledged replying to this letter on 5 July 2023, accepting the employer’s decisions but seeking further information and clarification as to his pay and entitlements.

### **The Respondent’s Evidence**

[83] The Respondent’s submissions and evidence are that the Applicant was provided with written notice of the reasons for their decision to terminate his employment immediately within the termination letter itself.

[84] The Respondent further submits that this letter was provided as soon as practically possible once the decision, based on external advice, to terminate the Applicant’s employment for serious misconduct in accordance with the SBFDC had been made.

### **Findings**

[85] It is not disputed that the Applicant received this email and that in fact the Applicant replied the following day thanking the Respondent for the opportunity his employment provided.



[86] Critically however, it is not contended by the Respondent that this letter and notification of this decision was provided to the Applicant after he had sought to resign from his employment.

[87] Further, as I have found that the conduct of the Applicant was not a valid reason for the termination of employment, it follows that the Applicant was not notified of a valid reason for the termination of his employment by the Respondent.

*s.387(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person*

[88] In the circumstances, while the evidence of Mr O’Conner is that he telephoned Mr Casey and sought an explanation as to what had occurred in the office earlier in the day, there is no evidence that Mr Casey was made aware that this was done in the context of allegations of serious misconduct or that the termination of his employment without notice, or otherwise, was being considered. The facts here indicate that as far as Mr Casey was aware he had resigned from his employment prior to this conversation and that this resignation had been accepted by his employer, who had undertaken to inquire about his entitlements.

[89] The first time Mr Casey was made aware of the allegations of serious misconduct purporting to justify the termination of his employment was in his receipt of the letter of termination by email on 4 July 2023.

[90] Accordingly, I am not satisfied that Mr Casey was provided with an opportunity to respond to the reason for the dismissal prior to the dismissal.

*s.387(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*

[91] As stated above, Mr Casey’s dismissal was immediate and made prior to him being given an opportunity to respond to the allegations of serious misconduct. There was no discussion in relation to the dismissal. Accordingly, there was no unreasonable refusal by the Respondent to allow Mr Casey a support person because no meeting ever occurred between the time the allegations arose, were considered and resulted in his termination.

*s.387(e) If the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal*

[92] Mr Casey was issued with a formal written warning for disrespectful attitude and behaviour in December 2022. The evidence of the Respondent is that the Applicant was also subsequently provided with a number of verbal warnings, including in April and May 2023 in relation to completing the study required under his traineeship. At no time is there evidence however, that Mr Casey was warned formally or informally, that the termination of his employment was being considered or that if it related to unsatisfactory performance.

*s.387(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 s.387(g) - Whether The*

*degree to which the absence of dedicated human resource management specialists or expertise in the enterprise impacted on the procedures followed*

[93] It is not contested that the Respondent is a small family run business of 9 employees. I have had regard to the Respondent's size, the nature of their activities and lack of any formal staff management resources or experience. I am satisfied that the size of the Respondent's business and the absence of any dedicated staff management resources impacted on the procedures followed in effecting the dismissal.

*s.387(h) Any other matters that the FWC considers relevant*

[94] The circumstances of this matter are such that following a series of contested conversations on 4 July 2023, the Applicant met with the Director and C-owner of the business and resigned from his employment and had this resignation accepted. It was only subsequent to this resignation that the employer sought to consider and then justify the termination of employment without notice.

[95] While the Applicant's conduct on 4 July 2023 was certainly not appropriate for an employee to engage in, the evidence is that what was said and what occurred during these conversations was not entirely the responsibility of the Applicant. Ms Hatfield also has some responsibility for what occurred during that exchange.

[96] In any event, I have found that the conduct of Mr Casey on 4 July 2023 was not sufficiently serious enough to justify a termination of employment without notice or a concern of impending violence. The Respondent had other options open to it to consider and sought to rely on ill-founded advice that it could terminate without notice and withhold the Applicant's notice period because of Mr Casey's decision to resign and the decision of Ms Hatfield that he was not to return to the workplace and not entitled to work his notice period or be paid in lieu.

## **Conclusion**

[97] I have determined that there was not a valid reason for the dismissal.

[98] I am not satisfied that Mr Casey was notified of the reason for his dismissal prior to this decision being made.

[99] I am not satisfied that Mr Casey was given an opportunity to respond to any reason related to his capacity or conduct.

[100] There was no unreasonable refusal by the Respondent to allow Mr Casey a support person because no meeting ever occurred.

[101] I am not satisfied that there was relevant unsatisfactory work performance prior to the dismissal that was a contributing factor.

[102] I consider that the size of the Respondents business and the absence of employed dedicated human resource management specialists impacted on the procedures followed.

[103] I have had regard to the other matters I consider are appropriate to take into consideration.

[104] I determine that Mr Casey's dismissal was harsh, unjust and unreasonable.

### **Remedy**

[105] Being satisfied that the Applicant:

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

I may, subject to the Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[106] Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

- (a) I am satisfied that reinstatement of the Applicant is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all of the circumstances of the case.

### **Is reinstatement of the Applicant inappropriate?**

[107] In the circumstances of this case, the Applicant submitted that part of the reason for him seeking to resign on 4 July 2023 was that he had found similar alternative employment in the industry that was due to commence at the end of the month and commenced employment with his new employer 3 weeks after the date of termination. As such, I consider that reinstatement is not appropriate.

### **Is an order for payment of compensation appropriate in all the circumstances of the matter?**

[108] Having determined that reinstatement is not appropriate, it does not automatically follow that a payment from compensation is appropriate. As noted by the Full Bench:

“[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one...”<sup>17</sup>

[109] Where an Applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.<sup>18</sup>

[110] As noted above, when the Applicant thought he ended his employment he had an expectation of being paid out his 2-week notice period. The Applicant was unemployed from 4 July 2023 for a period of 3 weeks until the end of that month when he commenced his role. I am satisfied that the Applicant incurred financial loss during this period and in these circumstances, I am satisfied that some compensation is appropriate.

### **Compensation – what must be taken into account in determining an amount?**

[111] Section 392(2) of the Act requires all the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

- (a) the effect of the order on the viability of the Respondent's enterprise;
- (b) the length of the Applicant's service;
- (c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;
- (d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
- (e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
- (f) the amount of any income reasonably likely to be earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[112] Whilst neither party has made explicit submissions about these criteria, I am satisfied that considering all the circumstances of this case and the evidence that has been presented I am able to form a view as to compensation on the materials available and consider each of these criteria below.

#### *(a) Effect of the order on the viability of the Respondent's enterprise*

[113] I do not have any evidence before me that would indicate that an order for compensation would have an effect on the viability of the employer's enterprise. Submissions from the Respondent are that the business's viability had nothing to do with the decision to withhold payment of the Applicant's notice period. I have therefore regarded this as a neutral factor in the calculation of compensation.

#### *(b) Length of the Applicant's Service*

[114] The Applicant commenced employment with Respondent in a full-time capacity on 5 November 2021 until the day of termination, a period of approximately 20 months.

[115] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

*(c) Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed*

[116] As stated by a majority of the Full Court of the Federal Court:

“...in determining the remuneration that the Applicant would have received, or would have been likely to receive.... the Commission must address itself to the Question whether, if the actual termination has not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as the likelihood of a further termination in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination”.<sup>19</sup>

[117] In the present circumstances, the Applicant’s evidence is that he was seeking to resign his employment with 2 weeks’ notice and commence a new role he had already secured at the end of July 2023. His letter of resignation was already prepared and his decision to tender his resignation on 4 July 2023 was made on that day only in part because of what had occurred. In these circumstances, I consider it likely that the Applicant would have resigned his employment on or around the 4 July and either remained in employment for his notice period for a further 2 weeks or paid out this 2-week period by his employer at termination.

*(d) Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal*

[118] I am satisfied that the Applicant took reasonable steps to mitigate his loss as evidenced by the fact he had secured and commenced new employment at the end of July 2023.

*(e) Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation and (f) an amount of income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation*

[119] The Applicant’s evidence is that from the commencement of his new role at the end of July 2023 he has earned at least, if not more, than what he was earning from his employment with the Respondent, and I am satisfied that the Applicant will continue to do so between the making of the order for compensation and the payment of compensation.

### **Compensation – how is the amount calculated?**

[120] As noted by the Full Bench:

“[t]he well established approach to the assessment of compensation under s.392 of the FW Act ... is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licenced Festival*

*Supermarket (Sprigg)*.<sup>20</sup> This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*".<sup>21</sup>

[121] The approach in Sprigg is as follows:

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

Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an Applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

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

[122] The Applicant was being paid a gross salary of \$1,025.00 per week and receiving \$854.00 net per week. I have found that the Applicant would have remained in employment for a further period of two weeks. Accordingly, I have estimated the remuneration the Applicant would have received, or would likely to have received, if the Respondent had accepted the Applicant's resignation and not terminated the employment immediately to be \$2,050.00 gross.

[123] The Applicant did not earn any income in the two weeks following his dismissal and was not paid in lieu of notice of termination.

[124] No adjustment has been made for contingencies. I have considered the impact of taxation but have elected to settle a gross amount of \$2,050.00 and leave taxation for determination.

[125] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate have regard to all the circumstances of the case."<sup>22</sup> I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the Act.

#### **Compensation – is the amount to be reduced on amount of misconduct?**

[126] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by s.392(3) of the Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[127] I am satisfied that the misconduct of the Applicant, involving the behaviour of the Applicant in his employment and in the language, tone, action and inappropriate way in which he conducted himself in the conversations on 4 July 2023 contributed to the employer's decision to terminate his employment.

[128] In all the circumstances, I am satisfied that the appropriate amount by which to reduce the amount of the order for compensation on account of misconduct is 50%.

[129] Applying this reduction to the amount determined at step 4, the gross amount of compensation to be ordered is \$1,025.00.

[130] In light of the above, an Order [\[PR767699\]](#) will be issued concurrently with this decision requiring the Respondent to pay \$1,025.00 gross, less taxation as required by law, plus an additional component for superannuation.



COMMISSIONER

*Appearances (via videoconference):*

Mr J Casey, *on his own behalf*  
Ms L Hatfield, *on behalf of the Respondent*

*Hearing details:*

2023.  
Melbourne.  
22 September.

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<sup>1</sup> [\[2013\] FWC 5593](#).

<sup>2</sup> [\[2015\] FWCFB 5264](#) at [43].

<sup>3</sup> (2012) 219 IR 128.

<sup>4</sup> [\[2010\] FWA 7891](#) at [60].

<sup>5</sup> *Ibid* at [64].

<sup>6</sup> Small Business Fair Dismissal Code. See also reg 1.07 of the Fair Work Regulations.

<sup>7</sup> (1995) 185 CLR 410 at [465].

<sup>8</sup> *Sayer v Melsteel* [\[2011\] FWAFB 7498](#) at [20].

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<sup>9</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at [373].

<sup>10</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at [685].

<sup>11</sup> *Edwards v Justice Giudice* [1999] FCA 1836 at [7].

<sup>12</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].

<sup>13</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWC FB 6429](#) at [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWC FB 533](#) at [55].

<sup>14</sup> *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [151].

<sup>15</sup> *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWC FB 7198](#) at [9].

<sup>18</sup> *Vennix v Mayfield Childcare Ltd* [\[2020\] FWC FB 550](#) at [20]; *Jeffery v IBM Australia Ltd* [\[2015\] FWC FB 4171](#) at [5]-[7].

<sup>19</sup> *He v Lewin* [2004] FCAFC 161 at [58].

<sup>20</sup> (1998) 88 IR 21.

<sup>21</sup> [\[2013\] FWC FB 431](#).

<sup>22</sup> *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [2016] FWC FC 7206 at [17].