DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Faau Faau
v
Canopy Tree Pty Ltd
(U2023/4669)

COMMISSIONER MATHESON SYDNEY, 8 NOVEMBER 2023

Application for unfair dismissal remedy

[1] On 29 May 2023, Mr Faau Faau (Applicant) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Canopy Tree Pty Ltd (Respondent). The Applicant seeks financial compensation.

When can the Commission order a remedy for unfair dismissal?

[1] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[2] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[3] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;
(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high-income threshold.

When has a person been unfairly dismissed?

[4] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

Background

[5] The uncontested factual background to the matter is as follows:

- The Respondent is a small business based in the Southern Highlands that undertakes tree removal, cutting and pruning and services undertaken by arborists.
- The Applicant commenced employment with the Respondent in March 2022.
- A letter, incorrectly dated 17 October 2023 (Termination Letter), was given to the Applicant on 17 May 2023 stating that the termination of the Applicant's employment would be effective from 12 May 2023 and that the reasons for termination included:
    - using company fuel cards for personal use without authorisation between June and August 2022;
    - being "implicated" in a personal item being stolen from a truck in February 2023;
    - not communicating regarding leaving site on 8 May 2023;
    - "deliberately deceiving the workers compensation insurer" regarding the time he left on site on 8 May 2023.
- The Applicant was off work and had made a workers' compensation claim at the time of his dismissal.

The hearing

[6] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[7] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a conference for the matter (s.399 of the FW Act).

[8] The hearing was held on 16 August 2023. The Applicant sought the assistance of his friend Mr Gene Balamoan who is not a lawyer or a paid agent on the basis that he has some

difficulties with language and literacy. I was satisfied that these difficulties impede the Applicant's communication and enabled Mr Balamoan to assist the Applicant during the proceedings. The Respondent was self-represented before the Commission.

Witnesses

[9] Neither the Applicant nor Mr Ford, Director of the Respondent, filed witness statements. During the hearing I apprehended that both the Applicant and Mr Ford would be making representations about relevant matters. When I made that observation Mr Ford noted that those matters are detailed in his submissions and the Applicant said the same of his submissions. In the circumstances and given the contested facts between the parties, who did not have the benefit of legal representation, I asked both the Applicant and Mr Ford to take an oath or affirmation and to the extent that the parties addressed matters raised in their submissions I would treat that as their evidence. Both parties were content with that course of action.

[10] As such, the Applicant gave evidence on his own behalf and the following witnesses also gave evidence on his behalf:

- James Tansey, a former co-worker of the Applicant;
- Gene Balamoan, a friend of the Applicant.

[11] The following witnesses gave evidence on behalf of the Respondent:

- Mr Nicholas Ford, Director of the Respondent;
- Matthew Roberts, a full-time employee of the Respondent who has recently completed a Certificate III in Arboriculture;
- Christopher Sean Holmes, a full-time employee of the Respondent who is currently studying toward a Certificate III in Arboriculture with funding assistance from the Respondent.

Submissions

[12] The Applicant filed submissions in the Commission on 12 July 2023. The Respondent filed submissions in the Commission on 1 August 2023.

[13] Final written submissions were filed by the Applicant on 9 August 2023. A further statutory declaration of Christopher Sean Holmes was filed by the Respondent on 10 August 2023 together with submissions appearing in the body of an email.

Has the Applicant been dismissed?

[14] A threshold issue to determine is whether the Applicant has been dismissed from his employment.

[15] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[16] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[17] There was no dispute and I find that the Applicant's employment with the Respondent was terminated at the initiative of the Respondent.

[18] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[19] Under section 396 of the FW Act, the Commission is obliged to decide the following matters 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.

Was the application made within the period required?

[20] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[21] It is not disputed, and I find that the Applicant was dismissed from his employment on 17 May 2023 and made the application on 29 May 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[22] I have set out above when a person is protected from unfair dismissal.

Minimum employment period

[23] It was not in dispute, and I find that the Respondent was a small business employer, having fewer than 15 employees at the relevant time.

[24] It was not in dispute, and I find that the Applicant was an employee.

[25] In his Form F2 unfair dismissal application (Form F2) the Applicant indicates that he commenced employment on 28 March 2022. The Respondent indicated in its 'Form F3 –

Employer response to unfair dismissal application' (Form F3) that the Applicant commenced employment on 30 April 2023. It is apparent that this is an error as a copy of the Applicant's employment contract was filed by the Respondent indicating that the Applicant's start date was 30 March 2022 and certain events referred to by the Respondent in relation to the Applicant's employment pre-date 30 April 2023. During the hearing Mr Ford clarified that the Applicant's commencement date was 30 March 2022, and this was not disputed by the Applicant. I find that the Applicant commenced employment with the Respondent on 30 March 2022.

[26] In his Form F2 the Applicant states that he was dismissed on 17 May 2023. The Termination Letter is incorrectly dated 17 October 2023 and refers to the Applicant's employment having been terminated effective 12 May 2023. The Respondent indicates in its Form F3 that the dismissal took effect on 15 May 2023 but also states that it notified the Applicant of his dismissal on 17 May 2023.

[27] A dismissal does not take effect unless it is communicated to the employee[1] and where the communication is in writing only, the communication must be received by the employee in order for the termination to be effective.[2]

[28] It is not in contention that the Applicant was first notified of his dismissal by way of the Termination Letter on 17 May 2023 and this is when it was received by the Applicant. As such I find that 17 May 2023 was the date of the Applicant's dismissal.

[29] As I have found that the Applicant commenced employment on 30 March 2022 and was dismissed on 17 May 2023, I find that the Applicant was employed for a period in excess of 12 months.

[30] I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period.

Applicant's annual rate of earnings and modern award coverage

[31] The Respondent indicated in its Form F3 that the Applicant was earning a gross amount of $1440 per week at the time of his dismissal. This is consistent with the Applicant's Contract of Employment filed by the Respondent which indicates a base salary of $74,880.

[32] It was not in dispute, and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings being $74,880, was less than the high-income threshold, which, for a dismissal taking effect on or before 30 June 2023, is $162,000.

[33] Further, the Applicant's Contract of Employment states that the Applicant will be 'employed under the Horticulture Award 2020' and I am satisfied that the Applicant is a modern award covered employee.

[34] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal a case of genuine redundancy?

[35] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

(a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[36] It was not in dispute, and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[37] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[38] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code (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.

[39] As mentioned above, I find that the Respondent was a small business employer within the meaning of s.23 of the FW Act at the relevant time, having fewer than 15 employees (including casual employees employed on a regular and systematic basis).

[40] It is therefore necessary to consider whether the Respondent complied with the Code in relation to the dismissal.

[41] In deciding whether the Code has been complied with it is necessary to consider the nature of the dismissal to determine which part of the Code would have application. This is because the Code divides the different types of dismissal into the categories of "Summary Dismissal" and "Other Dismissal" and states:

"**The Code**

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 Fair Work Australia, 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".

[42] In its Form F3, the Respondent states that the reasons for the Applicant's dismissal were:[3]

1. Using a company fuel card without authorisation from June to August 2022.
2. A belief that on 7 March 2023 the Applicant removed Nicholas Ford's (a Director of the Respondent) wallet from a truck, took approximately $600 in cash from that wallet and "chucked" the wallet in a neighbouring property 3 metres from where the Applicant was working.
3. Abandonment of work with no communication to Nicholas Ford on 15 May 2023 (I note this appears to have been intended as a reference to 8 May 2023).
4. Deceiving/lying to the Respondent's workers' compensation insurer regarding the time he left site on Monday 15 May 2023.

[43] This is broadly consistent with the reasons for termination provided in the Termination Letter which were stated as:

- "Using Company Fuel Cards for personal use, without authorisation June to August 2022."

- "Implicated in person item being stolen from truck February 2023."
- "No communication regarding leaving site on the 8 May 2023."
- "Deliberately deceiving workers compensation insurer regarding time left site on 8 May 2023."

[44] In its submissions filed on 5 August 2023, the Respondent refers a further reason for dismissal being "failing to report an injury to [the Respondent] in a timely manner".

[45] In *Ryman v Thrash Pty Ltd T/A Wishart's Automotive Services*[4] the Full Bench considered the Code and said, drawing on its earlier conclusions and the ratio in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo*[5] and, in considering whether the Summary Dismissal section of the Code had application, found that the Code operates in the following way:

> "(1) If a small business employer has dismissed an employee without notice – that is, with immediate effect – on the ground that the employee has committed serious misconduct that falls within the definition in reg.1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the "Summary dismissal" section of the Code. All other types of dismissals by small business employers are to be considered under the "Other dismissal" section of the Code.
>
> (2) In assessing whether the "Summary dismissal" section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal and, second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element".

[46] It is not in dispute, and I am satisfied that in this case that the Applicant's dismissal occurred with immediate effect, without provision of notice.

[47] The next consideration is whether the dismissal was on the grounds of serious misconduct. Regulation 1.07 of the FW Regulations defines serious misconduct as follows:

> "**Meaning of serious misconduct**
>
> (1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.
>
> (2) For subregulation (1), conduct that is serious misconduct includes both of the following:
>
> (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
>
> (b) conduct that causes serious and imminent risk to:
>
> (i) the health or safety of a person; or
>
> (ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:
(i) theft; or
(ii) fraud; or
(iii) assault; or
(iv) sexual harassment;

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform."

[48] I consider the dismissal grounds provided by the Respondent in further detail below.

The company fuel card issue

[49] In its submissions filed with the Commission on 1 August 2023, the Respondent provided the following account of events:

- All of the Respondent's vehicles run on diesel fuel. Only its chainsaws and stump grinders (which are rarely used) take unleaded fuel.
- The Applicant had been loaned a work utility vehicle so he could get to work as his own car was in for repairs.
- While the Applicant was not charged for the use of the utility vehicle, he was told he had to fill the vehicle with diesel fuel using his own money when travelling to and from work and if he used the utility vehicle on weekends.
- The Applicant would also take a small white truck home at the end of the day if working close to where he lived the next day and occasionally on weekends for the same reason. The Applicant would also borrow the truck occasionally on weekends to move things from his home.
- On Monday 19 September 2022, Mr Ford received a call from a petrol station located in Moss Vale to advise that a fuel card for the truck had been found there over the weekend.

- Mr Ford messaged the Applicant asking him to pick up the fuel card as the Applicant lived in Moss Vale and Mr Ford believed he had used the fuel card. The Applicant did not reply to the message.
- Mr Ford went to the petrol station the following day to pick up the fuel card.
- On Sunday 2 October 2022 Mr Ford looked at the online statement and transactions for the fuel cards as statements arrive by email on the second day of each month. Mr Ford noticed a charge on the card for the utility vehicle at 6.10pm on 19 September 2022 for unleaded fuel. Mr Ford became curious as the Applicant did not have a work vehicle that afternoon and no diesel was purchased.
- Mr Ford looked into the statements and transactions further and found another six transactions for unleaded fuel with all transactions being recorded after hours and with two being on a weekend. The Respondent attached the relevant statements to its submissions.
- Mr Ford also checked whether the fuel card for the utility car was in the car and discovered it was not.
- On 3 October 2022 Mr Ford questioned the Applicant about the transactions. The Applicant admitted that he had used the card to fill up his own car and apologised. Mr Ford asked the Applicant where the fuel card for the utility vehicle was and the Applicant said he had it, took it out of his wallet and gave it to Mr Ford.
- Mr Ford gave the Applicant a verbal warning in the presence of Christopher Holmes and explained that the fuel cards were not for personal use and must stay in their respective vehicles. Mr Ford did not ask the Applicant to refund the money taken.

[50] Mr Ford's evidence during the hearing was broadly consistent with this account of events.

[51] The Applicant submitted that the accusation that he used the company fuel card for personal use without authorisation is false and that the company fuel card was used to fill up company vehicles and company fuel storage containers.

The missing wallet

[52] By way of summary, the Form F3 filed by the Respondent together with the Respondent's submissions filed with the Commission on 1 August 2023 provide the following account of events on 7 March 2023:

- On 7 March 2023 the Respondent was carrying out work on a property in the southern highlands in a very quiet street.
- Mr Ford drove a truck to the site in the morning and the Applicant drove his car to the site with another employee James Tansey.
- The Respondent had been given access to a property to carry out hedge work bordering the site (access site).
- Mr Ford left the site at around 10am to undertake a quotation.
- Christopher Holmes, an employee of the Respondent, rang Mr Ford to tell him that he had left his wallet in the truck.
- Mr Ford returned to the site within 45-50 minutes of leaving and discovered his wallet was missing.

- Mr Ford asked all employees if they had seen it and asked them to empty their pockets. The Applicant was in the mobile platform (EWP) at this time and emptied his pockets while he was still in the EWP. The Applicant did not come down from the EWP while Mr Ford was on site.
- The client and the resident at the access property said they had not seen anyone walk or drive past.
- Mr Ford cancelled his cards believing the wallet had been lost.
- Later in the day Christopher Holmes told Mr Ford that the Applicant had left site, brought drinks and food for employees and brought them back to site. The Respondent suggests this was unusual as the Applicant "never seemed to have money on his person". In its submissions the Respondent elaborates on this stating that Christopher Holmes told Mr Ford that the Applicant had come down from the EWP not long after Mr Ford had left the site, gone into the truck and went to Mittagong to go to the toilet and was back by the time Mr Ford got back to site, bringing back food and without asking or telling other crew members he had left site in the first place. The Respondent submitted that the Applicant could have used the client's toilet instead of going to Mittagong.
- The following day Mr Ford received a call from the owners of a property near where the Applicant had been working advising that their dog had found his wallet on their back fence line.
- The Applicant was working from the EWP in the northwest corner of the access site, 3 metres from and which backs onto the property where the wallet was found. The Applicant was the only one working from the EWP. There was no public access from the street to where the wallet was found.
- When the wallet was found it was slightly damaged by the dog, but all of its contents were in place except for $600 in cash which was missing.
- On his way home Mr Ford called into Mittagong Police Station and spoke to a police officer over the phone who advised it would be too difficult to take fingerprints from the wallet as it had been outside overnight and had been in a dog's mouth. As a result, Mr Ford decided not to pursue the matter further.
- On 9 March 2023 Mr Ford spoke to all employees in the yard before they left for their first job of the day, both individually and as a group, including the Applicant. Mr Ford asked employees about the incident and what they thought, and all employees said they suspected the Applicant of taking the wallet. Mr Ford gave employees until the following Monday to decide if they felt comfortable about the Applicant still working for the Respondent and gave the Applicant time to "rethink his position".
- The following Monday morning Mr Ford spoke to employees other than the Applicant who said it was up to Mr Ford to decide what to do. Mr Ford spoke to the Applicant and "explained that all evidence pointed to him regarding the missing wallet". Mr Ford said he "did not accuse him directly" but "just pointed out the facts" and that the Applicant did not "put up an argument". Mr Ford chose not to take the incident any further and gave the Applicant a second verbal warning.
- Mr Ford said on 15 March 2023 he received a phone call from a person asking for the Applicant and who would not give her name or reason for ringing. The person rang a second time and when Mr Ford called back later that day, he got a message service and realised the person was a lawyer.

[53] Mr Ford's evidence during the hearing was broadly consistent with this account of events.

[54] The Applicant filed a statutory declaration of James Tansey, a former employee of the Respondent who had worked with the Respondent for 12 weeks. Mr Tansey also appeared as a witness during the hearing. In his statutory declaration Mr Tansey alleges racial discrimination by Mr Ford in relation to the Applicant and states that he was present when Mr Ford accused the Applicant of stealing his wallet and asked him to empty his pockets.

[55] The Respondent filed a statutory declaration of Christopher Holmes who also appeared to give evidence during the hearing. Mr Holmes' evidence was that:

- On 7 March 2023 Mr Ford came to a site on which Mr Holmes and the Applicant were working and left at around 10am to go and do a quote elsewhere.
- After Mr Ford left, the Applicant went to Mittagong to go to the toilet and also brought back food and drinks for employees which Mr Holmes said, "seemed strange and out of character".
- Mr Holmes went into the truck and found Mr Ford's wallet on the truck dashboard. Mr Holmes' evidence during the hearing was that the Applicant had already left to go to the toilet and buy food when he found Mr Ford's wallet in the truck.
- Mr Holmes then rang Mr Ford to let him know his wallet was in the truck as Mr Ford had mentioned he may not be back on site that day.
- Mr Ford came back and went to get the wallet, but the wallet was missing.
- Mr Ford spoke to Mr Tansey who had only been employed by the Respondent for a week at that time and asked him to empty his pockets.
- Mr Ford went over to the Applicant who was in the EWP and asked him to empty his pockets. The Applicant did so but stayed in the EWP.
- Mr Ford spoke to the client and person in the neighbouring property used to access the site who said they had not seen anybody except the Respondent's employees on site that morning.
- At no point was Mr Ford aggressive or racist and did not call the Applicant or Mr Tansey any racist or other names.
- Mr Ford notified employees via group text that the neighbour had found the wallet in a hedge.

[56] The Respondent also filed a statutory declaration of Matthew Roberts who also appeared to give evidence during the hearing. In his statutory declaration Mr Roberts states, with reference to other employees of the Respondent that "we all had our suspicions it was him", suggesting that Mr Roberts suspected the Applicant of stealing the wallet. However, during the hearing Mr Roberts clarified that he wasn't on site but suspected two or three people who may have taken the wallet as he understood there were four or five people on the ground.

[57] In its Form F3 the Respondent stated based on "deception and lies about fuel card misuse in 2022" and that Mr Ford "had lent small amounts of cash to [the Applicant] when he had asked and [the Applicant] had not returned the cash", it had strong suspicions the Applicant had taken the wallet. The Respondent goes on to say that Mr Ford "had given him the benefit of the doubt as [he] did with the fuel card incident." Mr Ford's evidence during the hearing was that he never outrightly accused the Applicant of stealing the wallet. However, in its submissions the Respondent states that "all reasonable evidence points to [the Applicant] taking the wallet

from the truck and discarding the wallet in [a] hedge…where it was found, by the dog, the next day". This has the character of an accusation of theft.

[58] The Applicant submits that the allegation is false, and he was subjected to racial and verbal abuse after being called down from the EWP and forced to turn out his pockets.

Allegation of abandonment and failure to report injury in a timely manner

[59] In its submissions filed with the Commission on 1 August 2023, the Respondent provided the following account of events:

- On Monday 8 May 2023 at 7.30am, Mr Ford, the Applicant, Mr Holmes and Justin Rigby, another employee of the Respondent, attended a site in Bargo. Mr Ford showed employees what was required to be done and how before leaving the site at around 8am to attend to another job.
- Mr Ford returned to the Bargo site with a truck load of cuttings at 10am and was then informed that the Applicant had gone back to the yard with Mr Rigby and had gone home. The Respondent submitted that Applicant had not told anyone why he left the site and did not text or ring Mr Ford with a reason.
- At 2.29pm the following day, Tuesday 9 May 2023, Mr Ford received a text message from the Applicant of a picture of a WorkCover NSW – Certificate of Capacity (Certificate) with no description. Mr Ford replied and said he would "organise with iCare". The Applicant did not reply to the text, did not return to work and did not offer any explanation.
- The Certificate indicated the Applicant had sustained an injury to his finger on Tuesday 2 May 2023.
- Mr Ford had noticed a bandage on the Applicant's finger on Friday 5 May 2023 and asked him what had happened. The Applicant said he had cut his finger but believed it was getting better and did not need treatment. Mr Ford said to him he should get it looked at and did not hear anything else about this until receiving the text from the Applicant on Tuesday 9 May 2023.
- The Applicant was paid for the full week of work that week on Friday 12 May.
- The Applicant only provided reasons for leaving working after the termination of his employment.

[60] The Applicant provided the following account of events regarding his leaving site on 8 May 2023 and in the days that preceded this:

- On Tuesday 2 May 2023 the Applicant cut his hand at work and asked Mr Rigby to assist him in strapping the injury. Mr Rigby and Mr Holmes assisted him with this.
- The Applicant continued working on Wednesday 3 May and Thursday 4 May 2023. On Thursday 4 May 2023 the Applicant saw Mr Ford at the work site, told Mr Ford about his injury and said he was letting him know about the injury in case it became infected, and he needed to see a doctor or go to hospital. The Applicant said that Mr Ford responded by saying "you'll be fine, keep it clean and keep it covered up."
- On Friday 5 May 2023 the Applicant was working in Sydney and Mr Holmes offered to buy coffee, with the Applicant accepting the offer. At lunch time the Applicant asked Mr Holmes if he could order some food for the employees on site and the Applicant

volunteered to meet the cost of the food. Mr Holmes ordered four pizzas and some drinks, the employees finished eating and continued work.

- On Monday 8 May 2023 the Applicant attended for work and Mr Ford helped employees on site set up for a job before leaving to attend to another job. Mr Holmes told the Applicant that on Friday Mr Ford had questioned him about who had purchased coffee and Mr Holmes told Mr Ford he had paid for it. Mr Holmes also said that Mr Ford had asked who bought the pizzas and Mr Holmes told Mr Ford that he had ordered the pizzas and the Applicant had paid for them to which Mr Ford responded, "do I need to go check my wallet?"
- When the Applicant heard this, he became very upset and angry and felt he needed to leave site to "cool down".
- The Applicant told his colleagues, including Mr Holmes who was his supervisor, that he was leaving the site and Mr Rigby dropped him back to the yard.
- During the hearing the Applicant said he was very angry and upset, he did not recall what time he left, he did not communicate with Mr Ford about leaving the site and did not communicate with Mr Ford at all until he texted him a copy of the medical certificate on Tuesday 9 May 2023.

[61] The Respondent filed a further statutory declaration of Mr Holmes on 10 August 2023 that provides a different account of events. In that Statutory declaration Mr Holmes indicates that on Friday 5 May after the pizzas had been bought by the Applicant that he said to the Applicant as a joke "Nick said does he need to check his wallet". Mr Holmes also states in his statutory declaration that when the Applicant left the site on Monday 8 May, the Applicant didn't tell him he was going, and he only found out from another employee that the Applicant had left site. Mr Holmes clarified this was Mr Rigby when he returned from dropping the Applicant back to the yard. Mr Holmes confirmed that he acts as site supervisor when Mr Ford is not on site.

[62] During cross examination Mr Holmes was asked whether Mr Ford had made the comment about the wallet or whether it was a joke that Mr Holmes had made. Mr Holmes responded saying Mr Ford had "said something like that" but "it was not to that point" and that the comment was "more of a joke". Mr Holmes' evidence was that he made the comment about the wallet to the Applicant on the Friday and that the Applicant "brought it back up" on Monday.

[63] During the hearing Mr Ford's evidence was that he found out from other employees that the Applicant had left site between 8am and 9am in the morning on Monday 8 May and that he did not receive any communication from the Applicant about this. Mr Ford said he had believed that the Applicant had left work because of the "workers' compensation issue" and did not find out until the Thursday or Friday before the hearing the reasons for the Applicant leaving site, being that Mr Holmes had made the comment about the wallet. Mr Ford indicated that he now believes the Applicant made his workers' compensation claim out of spite and that he didn't come to this realisation until the Thursday or Friday before the hearing when he had discussions with other employees.

[64] Mr Ford's evidence was that he did not contact the Applicant when he found out he had left site and did not have any conversations with the Applicant about why he left work prior to his dismissal.

Allegation that the Applicant lied to workers' compensation insurer

[65] In its submissions filed with the Commission on 1 August 2023, the Respondent provided the following account of events:

- Mr Ford received a call from Ibrahim H of EML, the appointed claims manager for iCare, confirming the Applicant's workers' compensation claim. Ibrahim wanted to confirm that the Applicant had finished work at 12.30pm on Monday 8 May 2023.
- Mr Ford was shocked by this information that the Applicant was said to have been provided and told Ibrahim that the Applicant had been taken back to the yard between 8am and 9am on 8 May 2023 and that this was confirmed by Mr Rigby who drive him back to the yard and told Mr Ford about this upon his return to site at 10am.
- Mr Ford believed the Applicant was deliberately deceiving iCare and issued him with a termination letter given previous incidents.

[66] The Applicant submitted that he did not deliberately deceive anyone and that his workers compensation payments did not commence until 9 May 2023. The Applicant submits he was stressed, bullied, humiliated and racially discriminated against and, in addition to the injury to his hand, "was in no mental mind frame to return to work". During the hearing the Applicant's evidence was that he told the insurer he was unsure about the time he left site and explained what had happened.

Findings regarding the Code

[67] As noted above, the Respondent provided a series of reasons for dismissing the Applicant. These included that the Applicant:

1. used a company fuel card for personal use without authorisation from June to August 2022;
2. removed Mr Ford's wallet from a truck, took approximately $600 in cash from that wallet and discarded the wallet when at a work site on 7 March 2023;
3. abandoned work with no communication on 8 May 2023 and failed to report an injury in a timely manner;
4. lied to the Respondent's workers' compensation insurer on 15 May 2023 regarding the time he left site on 8 May 2023.

[68] I note that the none of the first three reasons resulted in the Applicant's immediate dismissal. Rather, it appears to have been the fourth reason that triggered the Applicant's dismissal without notice, notwithstanding that the other reasons provide relevant context such that the fourth reason may be considered as 'the final straw' for the Respondent.

[69] During the hearing Mr Ford was asked why his belief that the Applicant had lied to the workers' compensation insurer was the deciding factor in relation to the Applicant's dismissal. In response Mr Ford said that he did "not like lying" and did "not like people distorting the facts in their favour". The evidence leads me to a conclusion that certain events dating back to 2022 had led Mr Ford to form the view that the Applicant was a dishonest person.

[70] In relation to the circumstances surrounding the fuel card usage, I accept Mr Ford's evidence that the Respondent's vehicles driven by the Applicant took diesel fuel. This is evident in the fuel card statements that show transactions for diesel fuel in relation to each of these vehicles. I also accept that that the Applicant used these cards to purchase premium unleaded fuel. While the Applicant submits that the fuel card was used to fill up company vehicles and company fuel storage containers, the Respondent submitted that only the Respondent's chainsaws and two stump grinders (which are rarely used) take unleaded fuel (rather than premium unleaded) and that the unleaded fuel container is kept in another vehicle. The Respondent submitted that a fuel container is 20 litres, and the Respondent has four of them which are filled up at the same time. The fuel card statements filed by the Respondent highlight a number of transactions. These include purchases:

- on Wednesday 24 August 2022 for 40.15 litres of 'VPower' fuel at Moss Vale;
- on Sunday 28 August 2022 for 30.43 litres of 'VPower' fuel at Moss Vale;
- on Friday 2 September 2022 for 39.93 litres of premium unleaded fuel at Balaclava;
- on Saturday 3 September 2022 for 39.99 litres of 'VPower' fuel at Moss Vale;
- on Friday 9 September 2022 for 41.5 litres of 'VPower' fuel at Moss Vale;
- on Monday 12 September 2022 for 40.15 litres of 'VPower' fuel at Moss Vale.
- on Monday 19 September 2022 for 37.77 litres of premium unleaded fuel at Balaclava.

[71] I note that Moss Vale is where the Applicant lives, that some of the transactions are on non-working days and that the transactions are for a similar quantum of fuel each time and that the purchases are for premium unleaded or 'VPower' fuel and that purchases for diesel fuel are made on different dates. On the balance of probabilities, I accept that the transactions appear to be fuel purchases for a vehicle other than the Respondent's vehicle, that the Applicant was not authorised to make these purchases and that this constituted misconduct. However, it is apparent that Mr Ford had given the Applicant another chance and decided not to dismiss the Applicant at this time. While this is the case, following the initial issue concerning the fuel card it is apparent from subsequent events that Mr Ford became suspicious of the Applicant, and this leads to the circumstances surrounding the missing wallet.

[72] At least one other employee of the Respondent, Mr Holmes, was aware of the existence of wallet in the truck that Mr Ford had parked near the worksite on 7 May 2023 as this had prompted him to call Mr Ford and let him know that he had left it in the truck on the dashboard. It is apparent that Mr Holmes did not attempt to move the wallet to a secure location until Mr Ford's return. The Respondent appears to infer that the fact the Applicant left site to drive to the toilet and purchase food and drinks suggest that he had stolen the wallet in order to do this. However, the evidence of Mr Holmes is that the Applicant had already left the worksite when Mr Holmes found the wallet and made the call to Mr Ford. Mr Holmes' evidence was that when the Applicant returned from the shops, he told him that Mr Ford was coming back to pick up his wallet. It is unclear why Mr Holmes felt the need to tell the Applicant this. It is possible that money could have been removed from the wallet prior to the Applicant leaving for the shops but this would mean that when he returned and was told by Mr Holmes that Mr Ford was on his way back, he would have needed to have taken the wallet from the truck and disposed of it and risk getting caught in the process.

[73] The Respondent appears to attach some weight to the location where the wallet was found in drawing an inference that the wallet was taken by the Applicant however the

Respondent's own evidence was that the wallet was found by a dog. It is possible that the dog could have moved the wallet from its original location. It is also possible that the persons who found the wallet may have interfered with its contents and while the client and person in the neighbouring property used to access the site may have told Mr Ford they had not seen anybody except the Respondent's employees on site that morning, at the very least multiple employees of the Respondent and persons residing at the site and neighbouring property were in the vicinity.

[74] Mr Ford's evidence was that on 9 March 2023 he spoke to all employees about the incident and what they thought, and all employees said they suspected the Applicant of taking the wallet. In a small business where there are only six employees and where there is a risk that other employees may have been suspected this may have been a self-serving response from those who were on site at the time. Mr Roberts, for example, who was not on site at the time said in his evidence that he suspected two or three people may have taken the wallet.

[75] However, it is apparent from the evidence that Mr Ford believed the Applicant took the wallet as he took the unusual step of asking the Applicant's colleagues on 9 March 2023 whether they felt comfortable about the Applicant still working for the Respondent. The Applicant suggests a racial motivation for this belief and the witness evidence is contradictory regarding whether racially offensive comments were made to the Applicant in connection with the situation. I do not conclude that the suspicion was racially motivated however it seems likely that Mr Ford was already suspicious of the Applicant given the previous incident involving the fuel card at the time the wallet went missing. Having regard to the evidence available to Mr Ford, I do not however accept that there was a reasonable basis for Mr Ford's belief. There were a number of employees on site as well as owner of the occupants and at least one other employee who was aware of the existence of the wallet in the truck and the evidence does not point to one particular person. It is likely a lack of evidence that led to Mr Ford's decision not to dismiss the Applicant.

[76] It is apparent to me that Mr Ford's distrust of the Applicant persisted. Mr Holmes' evidence suggests that on Friday 5 May 2023, Mr Ford made a comment to him after learning that the Applicant purchased pizzas for the crew that was along the lines of "should I go and check my wallet". I am satisfied that Mr Holmes communicated this to the Applicant. It is unclear to me whether this was communicated to the Applicant on the Friday or Monday however it is apparent to me that the Applicant became very angry and upset as a result of learning of the comment. I am satisfied that the Applicant was so upset and angry about this comment that when he saw Mr Ford on site on Monday 8 May he became enraged to the point that he felt he needed to leave the site. The Applicant does not deny that he did not tell Mr Ford he was leaving however did say he had told Mr Holmes who was acting site supervisor in Mr Ford's absence.

[77] I accept that Mr Ford believed that the Applicant had left site without communication to him however I am not satisfied that Mr Ford believed that this conduct justified immediate dismissal at this point. To the contrary, when the Applicant next made contact with Mr Ford via a text message that attached his medical certificate expressed that he would facilitate the claim, did not make enquiries of the Applicant about the reasons for his conduct and continued to pay the Applicant's wages for the balance of the week. Mr Ford's evidence during the hearing was that he assumed the Applicant left work because of the 'workers' compensation issue' and

that he didn't know the reason why the Applicant left the site until the Thursday or Friday before the hearing.

[78] During the hearing Mr Ford said the reason for the Applicant's dismissal was because the Applicant had lied to the workers' compensation insurer, EML. In these circumstances I am satisfied that the Applicant's dismissal occurred with immediate effect, without provision of notice, on the ground of serious misconduct and as such, the provisions of the Code in relation to 'Summary Dismissal' warrant consideration.

[79] In *Harley v Rosecrest Asset Pty Ltd T/A Can Do International*[6] Deputy President McCarthy 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.

[80] It is apparent to me that Mr Ford believed that the Applicant had lied to the workers' compensation insurer following his conversation with the EML representative, that he considered this to be a serious matter and that, in the context of previous concerns he had about the Applicant, Mr Ford believed this justified immediate dismissal.

[81] A subsequent question arises as to whether this belief was, objectively speaking, based on reasonable grounds.

[82] In ***N****arong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* Deputy President Bartel 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."

[83] As such, the Commission does not have to make a finding, on the evidence, whether the conduct occurred but needs to find whether the employer had a reasonable belief that the conduct of the employee was serious enough to warrant immediate dismissal.[7] It is not necessary for the Commission to determine whether the employer was correct in the belief that it held.[8]

[84] As to whether a belief is held on reasonable grounds in *Harley v Rosecrest Asset Pty Ltd T/A Can Do International*[9] Deputy President McCarthy said:

> [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 inquires 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."

[85] For the reasons that follow, I am not satisfied that Mr Ford held reasonable grounds for holding the belief that the Applicant had lied to the workers' compensation insurer. In particular, Mr Ford did not ask the Applicant for his side of events regarding what was said to the insurer and why. Rather, Mr Ford unreasonably jumped to his conclusion. The Applicant's evidence was that he told the insurer he was unsure about the time he left site and explained what had happened. The Applicant also indicated he could not remember the specific time he left site on 8 May 2023 because he was so upset and angry at that time, following the comment made about the wallet by Mr Holmes that inferred Mr Ford continued to suspect he had stolen it. Had Mr Ford made enquiries of the Applicant before acting to dismiss him, Mr Ford would have been better placed to form a view about the events that had transpired, including why and when the Applicant left site and what was said to the insurer, and whether his belief was held on reasonable grounds. The discrepancy in time is also a minor discrepancy involving a few hours of difference that seems immaterial as the Applicant submitted that the payment for workers' compensation did not commence until 9 May 2023.

[86] From an objective viewpoint it is also difficult to see why Mr Ford held the belief that the Applicant's representation to the workers' compensation insurer, even if it was made, justified immediate dismissal. It seems that Mr Ford's decision was unreasonably influenced by a series of earlier events including Mr Ford's belief that the Applicant had stolen the money from his wallet and discarded it, a belief that I do not consider was held on reasonable grounds.

[87] In all the circumstances, I am not satisfied that the Respondent has proved that it has complied with the Code and find that the Code has not been complied with.

[88] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[89] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[90] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[10]

[91] I set out my consideration of each below.

Section 387 (a) - Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[92] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[11] and should not be "capricious, fanciful, spiteful or prejudiced."[12] 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.[13]

[93] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[14] "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 the 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 resulted in termination."[15]

[94] As I have noted above, the Respondent provided a series of reasons for dismissing the Applicant. These included that the Applicant:

1. used a company fuel card for personal use without authorisation from June to August 2022;

2. removed Mr Ford's wallet from a truck, took approximately $600 in cash from that wallet and discarded the wallet when at a work site on 7 March 2023;
3. abandoned work with no communication on 8 May 2023 and failed to report an injury in a timely manner;
4. lied to the Respondent's workers' compensation insurer on 15 May 2023 regarding the time he left site on 8 May 2023.

[95] The Respondent submitted that the Applicant's employment was "not terminated for being on workers compensation, more that he had deliberately lied to Ibrahim H (appointed claims manager for ICARE) and mislead him about the time he had left site. This was the final straw that broke the camel's back regarding [the Applicant's] employment with [the Respondent]."

[96] I have earlier noted the none of the first three reasons resulted in the Applicant's immediate dismissal. Rather, it appears to have been the fourth reason that triggered the Applicant's dismissal; however, the earlier events provide relevant context in that they led Mr Ford to form a view that the Applicant was a dishonest person who he could no longer employ.

[97] I have earlier found that between August and September 2022 the Applicant did use the company fuel card for personal use to buy premium unleaded fuel without authorisation. However, Mr Ford did not dismiss the Applicant at this time and decided to give him another chance.

[98] When Mr Ford's wallet went missing on 7 March 2023 it was the Applicant that Mr Ford suspected. As I have earlier noted, the evidence regarding the stolen wallet does not point to any one person and does not establish that the Applicant took the money from the wallet and discarded it.

[99] The Respondent also contended that the Applicant abandoned work with no communication on 8 May 2023 and failed to report an injury in a timely manner. The Applicant's evidence was that he started working but became very angry and upset and felt that he needed to leave site and go home to 'cool down'. The Applicant said he told his colleagues, Mr Rigby, Mr Tansey and Mr Holmes, that he was leaving, and that Mr Rigby dropped him off into the yard. The Applicant said he was not in the right frame of mind and could not recall what time he left. The Applicant said he was so upset at that point that he did not communicate with Mr Ford about leaving the site and that he did not communicate with Mr Ford until he sent him the doctor's certificate.

[100] Mr Holmes' evidence was that the Applicant did not tell him he left site on 8 May and that he found out from Mr Rigby when he had returned from dropping him off at the yard. Mr Holmes also said that he made the wallet comment to the Applicant on Friday and that that the Applicant brought it back up on the Monday.

[101] It seems likely that Mr Holmes, who was acting supervisor in Mr Ford's absence, knew that the Applicant was upset and angry on the Monday morning and I accept that at least one of the Applicant's colleagues knew that he left site as a consequence. While I accept the Applicant's evidence that he was very angry and upset about the comment that Mr Holmes had made to him regarding the wallet and felt he needed to remove himself from the situation, his

communication about his reasons for doing so and about his inability to attend work due to illness or injury could have been better. In particular, he should have contacted Mr Ford to let him know he was unfit for work and would not be in the following day. While I accept that the Applicant was angry there is no evidence before me to establish that his illness or injury was such that he was not able to contact Mr Ford for this purpose.

[102] However, I am not satisfied based on the evidence before me that the Applicant lied to the workers' compensation insurer. I accept the Applicant's evidence that at the time he left site and returned to the yard on 8 May 2023 he was very angry and upset and that when gave the insurer his account of events he may not have known the precise time he left his workplace. Even if the Applicant did tell the insurer that he left site at 12.30pm rather than between 8am and 9am, I consider it unlikely that the Applicant was intending to deceive the insurer as it is not apparent to me that the Applicant stood to gain anything from making this representation.

[103] In summary, I have earlier found that the Applicant did use a company card for personal use in August and September 2022, but this was not the ultimate reason for the dismissal seven months later, with the Applicant having been given another chance. I am not persuaded based on the evidence before me that the Applicant stole Mr Ford's wallet or the money from it or that he lied to the workers' compensation insurer or that he was otherwise dishonest since the issue concerning personal use of the company fuel card 8 months prior to his dismissal.

[104] While Mr Ford suggests that the workers' compensation claim was made "out of spite" due to the comments made in relation to the wallet, the WorkCover NSW Certificate of Capacity filed by the Applicant indicates that the Applicant was assessed by his treating doctor as having no work capacity up until at least 26 May 2023 as a result of his finger injury. While the Applicant's communication with Mr Ford about leaving site on 8 May 2023 could have been better, the Applicant submitted that in addition to the injury to his hand he "was in no mental mind frame to return to work". The medical certificate does not state the Applicant's mental state impacted his ability to attend for work, however I accept that the Applicant was very angry when he left site after he became aware of comments made by Mr Ford that related to earlier and unsubstantiated allegations of theft concerning the wallet. While this does not entirely excuse the Applicant's poor communication with Mr Ford concerning his leaving site on 8 May 2023 and the reasons for this, the Applicant's poor communication is not enough in itself to establish a "sound, defensible or well founded"[16] reason for the dismissal. It also seems likely that the decision to dismiss the Applicant was prejudiced in that Mr Ford had made his mind up about the Applicant being a dishonest person, in part on account of a belief he formed about the Applicant's theft of the wallet absent evidence to substantiate such theft.[17] In all the circumstances of this matter, I find that there is no valid reason for the dismissal.

Section 387 (b) - Was the Applicant notified of the valid reason?

[105] 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).[18]

[106] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[19]

Section 387 (c) - Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[107] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[20]

Section 387(d) - Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[108] There were no discussions relating to the dismissal prior to the Applicant's dismissal and this factor is not relevant to the present circumstances.

Section 387(e) - Was the Applicant warned about unsatisfactory performance before the dismissal?

[109] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

Section 387(f) and (g) - To what degree would the size of the Respondent's enterprise and absence of dedicated human resource management specialists or expertise be likely to impact on the procedures followed in effecting the dismissal?

[110] It is apparent that the Respondent was a small business and did not have any human resources management specialists or experts at the time of the Applicant's dismissal.

[111] Notwithstanding this, while the FW Act recognises that "small business are genuinely different in nature both organisationally and operationally",[21] it does not follow that such an employer's procedures in effecting a dismissal can be entirely devoid of fairness. Further, the absence of dedicated human resource management specialists does not relieve an employer of extending an appropriate degree of courtesy to its employees "even when implementing something as difficult and unpleasant as the termination of a person's employment."[22] The size of the business and absence of human resources did not, in my view, prevent the Respondent from providing the Applicant with an opportunity defend himself before the decision to dismiss him was made. This was an opportunity that should have been extended to the Applicant in a common sense way.

What other matters are relevant?

[112] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[113] Procedural fairness is a factor that the Commission may take into consideration when deciding if a dismissal has been harsh, unjust or unreasonable. It concerns the decision-making process followed or steps taken by a decision maker, rather than the actual decision itself. Ordinarily, procedural fairness requires that an allegation be put to a person and they be given an opportunity to answer it before a decision is made.[23] I do not consider that the Applicant had a proper opportunity to answer the allegations of misconduct or defend himself before the

decision to dismiss him was made and consider that he was not afforded procedural fairness in this regard.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[114] I have made findings in relation to each matter specified in section 387 as relevant.

[115] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[24]

[116] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh, unjust and unreasonable because the Applicant was dismissed without notice and without an opportunity to defend himself before the decision to dismiss him was made and because in all the circumstances there was no valid reason for the dismissal.

Conclusion

[117] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[118] Being satisfied that the Applicant:

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

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

[119] Under section 390(3) of the FW 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 the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[120] The Applicant did not seek an order for reinstatement and does not wish to return to the workplace given the poor relationship between himself and Mr Ford who is the owner of the business. As stated by a Full Bench, "[i]n assessing whether reinstatement is an appropriate remedy, it is obviously relevant as to whether the dismissed employee has obtained alternative employment. Where that new employment is satisfactory to the employee, it will be no remedy

at all to reinstate the employee to the pre-dismissal employment to which the employee, for well-founded reasons, has no desire to return."[25]

[121] Having regard to the matters referred to above, I consider that reinstatement is inappropriate. I will now consider whether a payment for compensation is appropriate in all the circumstances.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[122] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for 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…"[26]

[123] 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.[27]

[124] The Applicant has indicated that he did not find another job until 11 September 2023, and I am satisfied that he has suffered financial loss as a result of the dismissal.

[125] In all the circumstances, I consider that an order for payment of compensation is appropriate.

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

[126] Section 392(2) of the FW Act requires all of 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 so 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.

[127] I consider all the circumstances of the case below.

Section 392(2)(a) - Effect of the order on the viability of the Respondent's enterprise

[128] As the Commission observed in the context of earlier legislation, "where an employer seeks to rely on the circumstances referred to in s.170CH(7)(a) [which was in terms substantially the same as s.392(2)(a)], the employer must present evidence and/or argument as to the financial situation of the undertaking and the likely effect that an order for compensation would have on the viability of the undertaking..."[28]There is no evidence before me to establish that an order for compensation would have an effect on the viability of the employer's enterprise.

Section 392(2)(b) - Length of the Applicant's service

[129] The Applicant's length of service was 1 year and two months. This is not a particularly long period of time and does not support reducing nor increasing the amount of compensation ordered.

Section 392(2)(c) - Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[130] As stated by a majority of the Full Court of the Federal Court, "[i]n 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 had 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 to 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."[29]

[131] It is apparent that the relationship between the Applicant and Mr Ford was not a good one and it is likely that at some stage in the foreseeable future the Applicant would have left his employment with the Respondent as a result. However, the Applicant resides in a regional area, and it seems likely that had the Applicant not been dismissed he would not have continued working with the Respondent until he found a new job. Given that the Applicant was only successful in doing so on 11 September 2023, 16 weeks and 5 days post his dismissal, I consider it likely that he would have continued working for a further period of 18 weeks.

[132] The Applicant provided information after the hearing suggesting that the Applicant's average earnings over six particular pay periods between January 2023 and March 2023 was $1,828.16 including overtime and penalties. However, this information was not provided during the hearing, and I am not satisfied that it should be taken into account in an assessment of what would have been earned post dismissal. The Applicant's guaranteed base earnings were $1440 per week during his employment with the Respondent and I estimate the remuneration he would have been likely to receive as $25,920.

Section 392(2)(d) - Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[133] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[30] What is reasonable depends on the circumstances of the case.[31] The Applicant said he had been searching for a job and was ultimately able to secure alternative employment on 11 September 2023. I am satisfied that the Applicant has taken steps to mitigate the loss suffered.

Section 392(2)(d) and (f) - Amount of remuneration earned and reasonably likely to be earned

[134] The Applicant's evidence is that he has not found alternative employment. I have earlier found that the Applicant would have remained in his role for a further 18 weeks.

[135] I sought to clarify what the Applicant had be paid in respect of workers' compensation since the dismissal and in response the Applicant provided an email from the insurer suggesting the Applicant received gross payments totalling $3,897.60 in respect of workers compensation. Further, since commencement of his employment on 11 September 2023 up until the date being 18 weeks post dismissal (i.e. 20 September 2023) the Applicant earned a gross taxable income of $797.60.

Section 392(2)(g) - Other relevant matters

[136] I have found Applicant used the Respondent's fuel card for personal use. While this was not the ultimate reason for the Applicant's dismissal, this misconduct occurred only 8 months prior to his dismissal and the Applicant was fortunate that the Respondent did not dismiss him for this at that time. Further, the manner in which the Applicant left the site on 8 May 2023 and the poor communication with Mr Ford upon becoming angry with him, while not in itself constituting behaviour warranting dismissal in the circumstances of this case, falls short of behaviour that would reasonably be expected of an employee who had to leave work due to a work-related injury. I have dealt with this further below.

Compensation – how is the amount to be calculated?

[137] 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 Licensed Festival Supermarket* (***Sprigg***).[32] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[33]."[34]

[138] 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.

Step 1

[139] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be $25,920 on the basis of my finding that the Applicant would likely have remained in employment for a further period of 18 weeks. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment".[35]

Step 2

[140] Only monies earned since termination for the anticipated period of employment are to be deducted[36] and I have found that the Applicant received $3,897.60 in respect of workers compensation and $797.60 from new employment.

[141] I therefore deduct these amounts from the amount of $25,920, bringing the total to $21,224.80.

Step 3

[142] I do not consider there are any contingencies that would have impacted the amount likely to be earned by the Applicant for the remainder of the anticipated period of employment and have not made any adjustments on this basis.

Step 4

[143] I have considered the impact of taxation but have elected to settle a gross amount with taxation to be deducted as required by law.

[144] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[37] '

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

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

[146] I am not satisfied that the Applicant lied to the workers' compensation insurer, being the ultimate reason that triggered the Applicant's dismissal without notice. However, as I have noted earlier, I find that Mr Ford had come to view the Applicant as a distrustful employee and in that regard, I consider that earlier misconduct contributed to the Respondent's decision to dismiss the Applicant, such misconduct being the Applicant's used of the Respondent's fuel card for personal use. This was likely exacerbated by Applicant's act of leaving site without communicating this to Mr Ford.

[147] Having regard to the nature of the misconduct and the timing of this prior to the dismissal consider it appropriate to reduce the amount of compensation ordered by 30%.

[148] 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 FW Act.

Compensation – how does the compensation cap apply?

[149] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under section 392(6); and

(b) half the amount of the high-income threshold immediately before the dismissal.

[150] The amount worked out under section 392(6) is the total of the following amounts:

(a) the total amount of the remuneration:

(i) received by the Applicant; or

(ii) to which the Applicant was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the Applicant was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by the Applicant for the period of leave in accordance with the regulations.

[151] The amount of compensation calculated above is $21,224.80. Applying a 30% reduction for the earlier stated reasons, the amount of compensation is reduced to $14,857.36. This is below the compensation cap.

[152] In light of the above, I order that the Respondent pay to the Applicant $14,857.36 gross less taxation as required by law to the Applicant in lieu of reinstatement within 30 days of the date of this decision.

COMMISSIONER

Appearances:

Mr *Gene Balamoan* for the Applicant
Mr *Nicholas Ford* for the Respondent

Hearing details:

2023.
Sydney (in person)
August 16

Printed by authority of the Commonwealth Government Printer

<PR768079>

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[1] *Burns v Aboriginal Legal Service of Western Australia (Inc)* Print T3496 (AIRCFB, Williams SDP, Action SDP, Gregor C, 21 November 2022) at [24].

[2] *Ayub v NSW Trains* [2016] FWCFB 5500 at [17].

[3] Response to Q3.1 in 'Form F3 – Employer response to unfair dismissal application'.

[4] [2015] FWCFB 5264.

[5] [2012] FWAFB 1359.

[6] [2011] FWA 3922.

[7] *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* [20210] FWA 7891 at [60]; *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 at [27], [29]; *Steri-Flow Filtration (Aust) Pty Ltd v Erskine* [2013] FWCFB.

[8] *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 at [29].

[9] [2011] FWA 3922.

[10] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[11] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[12] Ibid.

[13] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[14] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[15] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[16] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[17] Ibid.

[18] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[19] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[20] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[21] *Williams v Top Image Hair Design* [2012] FWA 9517, [40].

[22] *Sykes v Heatly Pty Ltd t/a Heatly Sports* PR914149 (AIRC, Grainger C, 6 February 2002), [21].

[23] *Kioa v West* [1985] HCA 81, [22] (per Wilson J).

[24] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

[25] *Seitz v Ironbay Pty Ltd t/a City Beach IGA* [2018] FWCFB 1341, [24].

[26] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[27] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

[28] *Moore v Highpace Pty Ltd* Print Q0871 (AIRCFB, Boulton J, Watson SDP, Whelan C, 18 May 1998).

[29] *He v Lewin* [2004] FCAFC 161, [58].

[30] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[31] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[32] (1998) 88 IR 21.

[33] [2013] FWCFB 431.

[34] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

[35] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

[36] Ibid.

[37] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].