



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Rodney Hickey

v

Mt Alexander Timber & Hardware Pty Ltd
(U2023/3708)

COMMISSIONER CIRKOVIC

MELBOURNE, 29 NOVEMBER 2023

Application for an unfair dismissal remedy

[1] Mr Rodney Hickey (Applicant) was employed by Mt Alexander Timber & Hardware Pty Ltd (Respondent) in the role of General Manager from 13 December 2017 to 11 April 2023,¹ and became a Director of the Respondent on or about 6 November 2020.²

[2] The termination of the Applicant’s employment was based on substantiated allegations that the Applicant failed to disclose a sexually intimate relationship (the relationship) with Ms Harding (Ms H), the estranged wife of Mr Maltby, a co-director of the Respondent (the first valid reason) and/or his dishonesty in “denying the sexual relations on multiple occasions” (the second valid reason).³

Background

[3] In late 2017, following discussions between the Applicant, Mr Butcher, and Mr Maltby, a hardware business trading as Mt Alexander Timber & Hardware Pty Ltd was established by Mr Butcher and Mr Maltby, operating in the Castlemaine region of Victoria.⁴ The Applicant was initially employed as General Manager on 13 December 2017 and became both a co-director and employee of the Respondent on 6 November 2020.⁵

[4] The termination of the Applicant’s employment arose following a series of written communications between the Applicant, his legal representatives and the Respondent that commenced on 21 March 2023 when the Applicant was served with a show cause letter (show cause letter). The show cause letter sets out four allegations that essentially relate to the Applicant’s out of hours conduct identified as misuse of position, conflict of interest, dishonesty and engaging in conduct causing serious and imminent risk to the reputation and/or profitability of the company.⁶ The fourth allegation, engaging in conduct causing serious and imminent risk to the reputation and/or profitability of the company, is no longer pressed.⁷ I have made some further observations at paragraphs [28]-[31] as to the reasons for termination advanced by the Respondent.

[5] On 11 April 2023, the Applicant was issued with a termination letter stating *inter alia* “We have concluded that several allegations, including allegations of serious misconduct have been substantiated.....While we are of the view that you could be terminated for serious misconduct, which would mean you would not be entitled to notice or payment in lieu of notice, in good faith, we provide you 4 weeks’ payment in lieu of notice”.⁸ On 4 May 2023, the Applicant was removed as a Director of the Respondent.⁹

[6] At the time of termination, the Applicant’s remuneration was \$95,311.84 per annum plus superannuation.¹⁰

[7] On 2 May 2023, the Applicant made an application for relief from unfair dismissal under section 394 of the *Fair Work Act 2009* (Cth) (the Act). The matter did not resolve at conciliation and proceeded before me to arbitration on 8 August 2023 and 9 October 2023.

[8] Both parties sought permission under s.596 of the Act to be legally represented. Having weighed the considerations in s.596 of the Act and the circumstances before me, I granted permission to the parties to be represented.

Initial matters to be considered.

[9] There is no dispute between the parties regarding the Commission’s jurisdiction and I am satisfied on the evidence that:

- (a) the Applicant’s application was made within the period required in s.394(2) of the Act;
- (b) the Applicant was a person protected from unfair dismissal;
- (c) the Respondent was not a “*small business employer*” as defined in s.23 of the Act, meaning that the Small Business Fair Dismissal Code does not apply; and
- (d) the Applicant’s dismissal was not a case of genuine redundancy.

[10] Consequently, I am satisfied that the Commission has jurisdiction to determine the merits of the application.

Evidence

[11] The Applicant relied on a witness statement and gave oral evidence at the hearing.

[12] The Respondent relied on witness statements from the following:

- Mr Trevor Butcher, Director, Mt Alexander Timber and Hardware Pty Ltd; and
- Mr Lachlan Maltby, Director, Mt Alexander Timber and Hardware Pty Ltd.

[13] Each of the witnesses were subject to cross examination. I am satisfied that by and large the witnesses gave reliable evidence.

The disputed evidence.

[14] On day 1 of the hearing, counsel for the Respondent sought to admit photographs of greeting cards (the disputed evidence) obtained by Mr Butcher from premises at McKenzie Hill (the premises) as “the contents of those cards go to evidence or provide evidence of the duration of the relationship, which is contrary to the responses that Mr Hickey gave to the employer on multiple occasions when he was given opportunities to respond”.¹¹

[15] The Applicant objects to the admission of the disputed evidence on the grounds that it was improperly obtained pursuant to s.138(1)(a) of the *Evidence Act 1995*. In support of this submission, the Applicant states that the disputed evidence was obtained from a private area in the premises, Mr Butcher had no authority to search the private area or to take photographs¹² and it is “hearsay evidence relied upon to support an inference of a sexual relationship to bolster an attack on Mr Hickey’s credibility and support an allegation of dishonesty”¹³ and as such has limited probative value. Essentially, the Respondent asserts that the probative value of the disputed evidence outweighs the undesirability of admitting it.¹⁴

[16] Section 591 of the Act provides that the Commission is not bound by the rules of evidence in relation to a matter before it. However, that does not mean that the rules of evidence are irrelevant. In the decision of *Re: Michael King*¹⁵ a Full Bench of the Commission agreed with the following observation of the Industrial Commission of New South Wales in *PDS Rural Products Ltd v Corthorn*, which relevantly stated:

“... it is correct to say, as the Commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence (s 83). It should be borne in mind that those rules are founded in experience, logic, and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence.”¹⁶

[17] Section 138 of the *Evidence Act 1995* is set out below:

“138 Discretion to exclude improperly or illegally obtained evidence

(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law; is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) ...

(3) Without limiting the matters that the court may take into account under subsection

(1), it is to take into account:

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and

- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note: The International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*.”

[18] Having considered the material before me including the authorities relied on by the parties, I exercised my discretion to exclude the disputed evidence. My reasons for excluding the disputed evidence are set out below:

- First, Mr Butcher gives evidence that on 10 February 2023, he attended the premises (co-owned by the three directors) and whilst there he went into the Applicant’s bedroom, opened the drawer in the Applicant’s bedside table and took out cards and photographs.¹⁷ It is not in dispute that the premises are rented by the Applicant. It is also not in dispute that the Applicant was not in the room at the time and had not given Mr Butcher permission to look through his private items.¹⁸
- Second, I reject the suggestion that Mr Butcher was entitled to obtain the disputed evidence because he is a co-owner of the premises. As stated above, there is no dispute that the Applicant rented the premises from “the collective three”¹⁹ and did not give Mr Butcher permission to open his drawer.²⁰ I have not been provided with written evidence as to the contractual arrangements entered into by the parties as to the purchase of the premises, nor is there a written tenancy agreement in evidence before me. That said, I regard the circumstances before me as analogous to that of a landlord and tenant. It is uncontroversial that a landlord is entitled to inspect premises occupied by a tenant on notice, but this does not entitle the landlord to go through the personal property of the tenant without the tenant’s permission.
- Third, the tribunal should not condone the actions of employers who search the private property of employees without their consent or knowledge.

[19] On the material before me, I find that the disputed evidence was improperly obtained.

[20] Further, I have considered the Respondent’s submissions as to the probative value of the disputed evidence. In the circumstances I am not persuaded that the probative value of the disputed evidence outweighs the prejudicial value of admitting it. I have therefore determined to exclude the disputed evidence.

Matters not seriously in dispute or not otherwise substantially contested.

- Mr Butcher and Mr Maltby registered the company Mt Alexander Timber & Hardware Pty Ltd on 16 August 2017.²¹
- The Applicant joined the Respondent as General Manager on 13 December 2017 with the understanding that he would become a one third shareholder when he was able to obtain finance. He was appointed Director on 6 November 2020.²²
- Mr Maltby and Ms H separated in the first half of 2022.²³
- Originally, Ms H performed work for the Respondent via Mr Maltby's accounting entity.²⁴ From February 2022, she performed work for the Respondent directly as a contractor.²⁵ Ms H continued to perform work for the Respondent as a contractor providing marketing and information technology services to the Respondent, working approximately 2 to 3 hours a week on site, and an additional 8-15 hours a week from home.²⁶
- From January 2023, the Applicant and Ms H had a "close friendship that involved sexual relations".²⁷
- On or around 20 March 2023 or 21 March 2023, the Respondent gave a direction to Star Electronics to remove the Applicant's access to the store security camera system and alarms.²⁸
- On 21 March 2023 at 7.00am,²⁹ a meeting was held at Mt Alexander Timber and Hardware³⁰ attended by the Applicant, Mr Butcher, Mr Maltby, Ms Wright, Yard Manager of the Respondent, and Mrs Butcher.³¹
- At the 21 March 2023 meeting, a letter titled "Show Cause – Allegations of Serious Misconduct" was given to the Applicant³² outlining four allegations under the headings misuse of position, conflict of interest, dishonesty, and engaging in conduct causing serious and imminent risk to the reputation and/or profitability of the company.³³ The correspondence requested the Applicant provide a response in writing by 7.00am, 22 March 2023³⁴, and attend a meeting on 22 March 2023 at 1.00pm to discuss his response.³⁵
- During the 21 March 2023 meeting, Mr Maltby said to the Applicant words to the effect of "I want to know when you stopped being my mate".³⁶ After the meeting had concluded, the Applicant walked back to his office, collected some of his personal effects, and walked outside to his car,³⁷ where Mr Maltby said to the Applicant "you've got one week".³⁸
- On or around 22 March 2023, the Respondent gave a direction to Amajer Park Computers to block the Applicant's IT access and change the passwords for his email and computer.³⁹
- On 23 March 2023, the Applicant provided a response to the show cause letter by email. The Applicant's response stated that he was too unwell to meet with the Respondent

and to “email through to me any other further questions or clarifications you need from me and I will respond further in writing within a reasonable time frame”.⁴⁰

- On or around 23 March 2023, the Respondent gave a direction to Bendigo Locksmiths to change all the locks on the building at the Mt Alexander Timber and Hardware premises.⁴¹
- On or around 23 March 2023, the Respondent gave a direction to remove the Applicant from the “Deputy rostering system”, change his password and transfer his profile to another employee.⁴²
- From 23 March 2023 until 11 April 2023, the Applicant, the Applicant’s legal representatives and the Respondent exchanged a series of written correspondence.⁴³
- On 11 April 2023, the Applicant’s employment was terminated by email. The Applicant was given 4 weeks’ payment in lieu of notice.⁴⁴

Was the dismissal harsh, unjust and/or unreasonable?

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

Valid reason (s.387(a))

[22] The Commission is required to undertake an objective analysis of all the relevant facts in determining whether there was a sound or defensible reason to terminate. The reason must not be capricious, spiteful or prejudiced. In cases relating to alleged conduct, such as the present matter, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.⁴⁵

[23] In cases such as this that involve allegations of misconduct, the Commission must make a finding on the evidence provided as to whether, on the balance of probabilities, the conduct occurred.⁴⁶ It is not enough for the Respondent to establish that it had a reasonable belief that the Applicant’s termination was for a valid reason.⁴⁷ In *Gelagotis v Esso Australia Pty Ltd* and *Hatwell v Esso Australia Pty Ltd*,⁴⁸ it was noted by Deputy President Colman:

“[69] Where allegations of misconduct are made, the standard of proof in relation to whether the alleged conduct occurred is the balance of probabilities. However, as the High Court noted in *Briginshaw*,⁴⁹ the nature of the relevant issue necessarily affects the ‘process by which reasonable satisfaction is attained’⁵⁰ and such satisfaction ‘should not be produced by inexact proofs, indefinite testimony, or indirect inferences’⁵¹ or ‘circumstances pointing with a wavering finger to an affirmative conclusion’.⁵² The application of the *Briginshaw* standard means that the Commission should not lightly make a finding that an employee engaged in the misconduct alleged.⁵³

[70] The rule in *Briginshaw* has elsewhere been described as reflecting a conventional presumption that members of society do not ordinarily engage in fraudulent or criminal behaviour.⁵⁴ In *Greyhound Racing Authority*, Santow JA noted:

‘... The notion of “inexact proof, and indefinite testimony or indirect inferences” needs to be translated to a comfortable level of satisfaction, fairly and properly arrived at, commensurate with the gravity of the charge, achieved in accordance with fair processes appropriate to and adopted by [a Tribunal]’.⁵⁵

[71] The ‘level of comfort’ referred to means that the finder of fact must ‘feel an actual persuasion of the occurrence or existence of the fact in issue’; the ‘mere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact.’⁵⁶

[24] As was held by Santow JA in *Greyhound Racing Authority (NSW) v Bragg*,⁵⁷ the *Briginshaw* standard requires inferences to be reached upon a comfortable level of persuasion, commensurate with the gravity of what is alleged.

[25] In *Rose v Telstra Corporation Limited*⁵⁸ Vice President Ross (as he was then) considers the capacity of an employer to regulate out of hours conduct. As noted by Vice President Ross:

“It is clear that in certain circumstances an employee’s employment may be validly terminated because of out of hours conduct. But such circumstances are limited,:

- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer’s interests; or
- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.

Absent such considerations an employer has no right to control or regulate an employee’s out of hours conduct”.⁵⁹

[26] The approach set out in *Rose v Telstra Corporation Limited* has been extensively applied in decisions of the Commission dealing with dismissal for reasons related to out of hours conduct. That approach was restated more recently in *Ventia Australia Pty Ltd v Martin Pelly*⁶⁰ (*‘Ventia’*). In *Ventia*, the Full Bench stated:

“[92] It is not necessary that the conduct said to constitute a valid reason for dismissal is repudiatory of the employment contract, but in essence, it must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.

[93] It is axiomatic that to indicate a rejection or repudiation of the employment contract, the out of hours conduct must be sufficiently connected to the employee's employment. Not every connection between out of hours conduct and employment, will constitute a valid reason for dismissal, and the necessary connection has been described as follows:

- To constitute a valid reason for dismissal, the out of hours conduct must touch the employment, or touch the duties or the abilities of the employee in relation to the duties.
- To determine whether conduct engaged in privately, out of hours or outside work has a relevant connection with employment to constitute a valid reason for dismissal, it is necessary to consider the entire factual matrix including:
 - o the nature of the out of hours conduct and what it involved;
 - o where the out of hours conduct occurred;
 - o the circumstances in which the out of hours conduct occurred;
 - o the nature of the employment;
 - o the role and duties of the employee concerned;
 - o the principal purpose of the employee's employment;
 - o the nature of the employer's business; express and implied terms of the contract of employment; and
 - o the effect of the conduct on the employer's business; and
 - o the effect of the conduct on other employees of the employer.

....

The critical distinction between cases where a relevant connection is established is that something beyond mere expectation is required. The connection must relate to an inherent requirement of the employee's position or an attribute which the employee must have to undertake the required duties of the employee's position. It is the conduct which must involve incompatibility, conflict or impediment to the employment relationship or be destructive of confidence. An actual repugnance between the employee's acts and the relationship must be found, and it is not enough that there is ground for uneasiness about future conduct, or a mere apprehension that the employee will act in a manner incompatible with the employee's duty or fidelity."⁶¹

[27] I have considered the relevant authorities in coming to my decision noting that it is necessary for me to consider the entire factual matrix before me.⁶²

Findings as to Valid Reason

[28] The reasons for termination relied on by the Respondent can be gleaned from the termination letter dated 11 April 2023, the written submissions in evidence, the written outline of closing submissions provided on the morning of the second day of hearing and the oral submissions advanced by counsel.

[29] Essentially, the case for the Respondent was conducted on the basis that the reasons for termination were the Applicant's failure to disclose the relationship with Ms H and his dishonesty in "denying the sexual relations on multiple occasions".⁶³ It is worth observing that on the morning of day 2 of the hearing the Respondent proffered an additional reason for termination in a written document headed "Respondent's Outline of Closing Submissions". The additional reason for termination cited was "sexual relations occurring between the Applicant and the separated wife of his fellow director of the Respondent, Mr Lachlan Maltby (Sexual Relations).....".⁶⁴

[30] During the course of oral submissions on day 2 of the hearing, I note the following exchange between the Commission and counsel for the Respondent:⁶⁵

THE COMMISSIONER: You are not relying on the conduct, the sexual relations - - -

MR RINALDI: Itself, no.

MR RINALDI: And if – it is in combination with the denials, the denials of that sexual – those sexual relations and the failure to disclose those sexual relations, and if indeed they had been disclosed, we probably would not be here because the valid reason would not exist. There might be another argument about whether there is a valid reason constituted by the sexual conduct itself or the sexual relations itself, but we are not relying on that in this case (emphasis added).⁶⁶

[31] Given the above and having regard to the totality of the material before me, I have proceeded on the basis that the Respondent's case as to valid reason is that the Applicant failed to disclose the relationship with Ms H (valid reason 1) and/or his dishonesty in "denying the sexual relations on multiple occasions"⁶⁷ (valid reason 2).

[32] The Respondent submits that;

- The Applicant as a senior employee and Director of the Respondent was obliged to disclose the intimate nature of his relationship with Ms H as it "could be a matter that would affect the relationship between employer and employee".⁶⁸ The Respondent submits the Applicant's failure to disclose his relationship with Ms H was incompatible with his employment relationship and that his failure to do so constitutes a valid reason.⁶⁹
- The Applicant's conduct when viewed objectively was "likely to cause serious damage to the relationship between the employer and the employee"⁷⁰ and is "incompatible with the employee's duties as an employee".⁷¹
- The failure to disclose constitutes a valid reason to terminate the Applicant's employment and comes within the first and third limb of the decision of Vice President Ross (as he then was) in *Rose v Telstra Corporation Limited*.⁷²
- The conduct viewed objectively is likely to cause serious damage to the relationship between employer and employee or is conduct that is incompatible with the employee's duty as an employee.⁷³

- The failure to disclose amounts to a misuse of his position and constitutes a valid reason because “it’s the wife of a fellow director” and that if “it was not a spouse of one of the other directors or senior managers, that it may have been a different matter”.⁷⁴ Further, if the Applicant was not a “superior” of Ms H and had “no ability or influence or favour” Ms H it “might have been a different matter”.⁷⁵
- As a senior employee and Director, the Applicant owed a fiduciary duty of care higher than the obligation of good faith and fidelity that an ordinary, lower-level employee, who is not a director, owes.⁷⁶
- The Applicant’s denials and failure to disclose this relevant matter in his capacity as the General Manager and a Director of the Respondent company demonstrate an inherent dishonesty and breach of fiduciary duty, and clearly risks an irreparable erosion of trust in the relationship between the parties.⁷⁷
- The failure to disclose the relationship is of such gravity as to indicate a rejection or repudiation of the employment contract.⁷⁸

[33] The Applicant contends that:

- The Respondent had made a decision to terminate the Applicant prior to the show cause meeting on 21 March 2023 and that “if termination was a foregone conclusion any alleged dishonesty cannot amount to a valid reason”.⁷⁹ Any dishonesty that occurred must have occurred prior to 21 March 2023 or 23 March 2023 when the repudiatory conduct occurred.⁸⁰
- Even if the Applicant was dishonest in his characterisation of his relationship with Ms H, and the Commission is satisfied that there was a requisite connection of the employment, the dishonesty was not sufficient to justify termination.⁸¹
- The Applicant’s dismissal was motivated by personal reasons related to Mr Maltby’s jealousy of the Applicant because of his interactions with Ms H.⁸² There was no valid reason for termination because the actual reason is capricious, spiteful and prejudiced.⁸³
- The Respondent does not point to a contract or policy that contains a term obligating the Applicant to disclose the nature of his relationship with Ms H.⁸⁴
- The Applicant had a right to silence about the nature of his sexual and other interactions with Ms H.⁸⁵
- Ms H was a contractor working 2 to 3 hours on site and the remainder of the time remotely and as such the Applicant’s private dealings with Ms H had no impact on the fulfilment of the Applicant’s duties as an employee.⁸⁶ Ms H was not a subordinate employee of the Respondent, and the Applicant’s friendship with Ms H was inherently

private, lacked a requisite connection with employment and the Applicant was not subject to any positive obligation to disclose his friendship with Ms H.⁸⁷

- The Applicant's conduct viewed objectively cannot be said to be likely to cause serious damage to the relationship between the Applicant and the Respondent.⁸⁸

[34] It is worth noting at this juncture the Respondent submitted that the Applicant and Ms H were involved in the relationship from May 2022.⁸⁹ On the balance of probabilities, I do not accept that the evidence before me supports this submission. On the material, I find that the relationship between the Applicant and Ms H commenced in January 2023. On that basis I find that any alleged failure to disclose and/or dishonesty could only have occurred from that time.

[35] I observe that there is no evidence before me of a written policy governing out of hours conduct and the parties have not adduced evidence of a written contract of employment between the Applicant and the Respondent. Despite the lack of written regulation, it is apparent from the authorities that out of hours conduct can form the basis of disciplinary action, including termination of employment where, considered objectively, the conduct is incompatible with the employee's duties as an employee. The conduct "must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract".⁹⁰

[36] I make the following contextual observations;

- The Respondent was essentially a small business.
- The Applicant, Mr Maltby, and Mr Butcher became "mates".⁹¹
- At the time of termination, the Applicant was the most senior operational employee and a co-director of the business.⁹²
- Ms H performed work for the Respondent as a contractor.⁹³
- The written contractual terms governing the arrangement between the Respondent and Ms H are not before me.
- Prior to February 2022, Ms H was initially engaged to perform IT and marketing services for the Respondent via Mr Maltby's accounting entity⁹⁴ and that from February 2022 onwards, was engaged directly by the Respondent as a contractor.⁹⁵
- Ms H provided marketing and IT services to the Respondent and worked 2-3 hours on site and an additional 8-15 hours per week from home.⁹⁶
- Ms H was the estranged wife of the Applicant's co-director Mr Maltby.⁹⁷
- The Applicant and Mr Maltby worked and lived in a small community.⁹⁸

- The Applicant and Mr Maltby engaged in social interactions including trips to the gym.⁹⁹
- The Applicant and Ms H had grown up in the same local area,¹⁰⁰ and had many mutual friends and families that knew each other.¹⁰¹

[37] It is worth reiterating that the Applicant was the only Director of the business who worked in the business on a day-to-day basis and that the three directors met regularly “each week on a Friday to discuss the business and how things were going”.¹⁰² Mr Maltby gave evidence that it became known as the “Friday roast”.¹⁰³ The Applicant did not disagree with Mr Maltby’s descriptor¹⁰⁴ and it is not in contest that on some occasions aspects of the Applicant’s performance were raised and discussed by the three directors at the Friday meetings.¹⁰⁵

Findings as to valid reason 1 – failure to disclose the relationship.

[38] There is no contest between the parties that the Applicant did not disclose the relationship with Ms H to the Respondent.¹⁰⁶ The Applicant submits that he “is entitled to a private life and what he does in his private life and the nature of his friendship and interactions with Ms Harding is a matter for him and it does not pertain to his employment”.¹⁰⁷ I accept that not all romantic relationships formed in the workplace will warrant disclosure and in appropriate circumstances it is not suitable for an employer to govern the activities of an employee’s out of hours conduct. Nor is it in my view appropriate for this tribunal to sit in moral judgment of members of the community with respect to what are essentially private matters.

[39] I observe the paucity of evidence before me as to the operational and reporting structure of the Respondent, but in light of the evidence before me I am satisfied that the Applicant was the most senior operational employee of the Respondent¹⁰⁸ and Ms H performed a subordinate role. That Ms H was a contractor and not an employee and that she performed her functions primarily from home and in the office for 2 to 3 hours per week does not alter my finding. The Applicant and Ms H may have worked “collaboratively”¹⁰⁹ but the fact remains that the Applicant is the General Manager and Director of the Respondent. As the most senior operational employee of the Respondent the potential for conflict and misuse of position was a live issue in the work dynamic between the Applicant and Ms H. In this case I am satisfied that the relationship between the Applicant and Ms H was connected to the Applicant’s employment and the Applicant was obliged to disclose the relationship with Ms H.

[40] It is worth repeating that the conduct the subject of valid reason 1 is not the relationship itself. Rather, it is the failure to disclose the relationship.

[41] Whilst I cannot speculate as to what may or may not have occurred had the Applicant disclosed the relationship, it is uncontroversial to observe that the Respondent would have been armed with knowledge, enabling it to take whatever steps it deemed necessary to manage the potential conflict of interest. The failure to disclose the relationship deprived the Respondent of that opportunity.

[42] On the material before me, I agree with the Respondent that the failure to disclose the relationship with Ms H, viewed objectively, is likely to cause serious damage to the relationship

between employer and employee, or is conduct that is incompatible with the employee's duties as an employee.¹¹⁰ I note that during cross examination, the Applicant concedes that his failure to disclose the nature of his relationship with Ms H "could cause a loss of trust, and a breakdown in the employment relationship".¹¹¹

[43] I have found that the relationship between the Applicant and Ms H was connected to employment and that the Applicant had a duty to disclose the relationship with Ms H. There is no dispute that the Applicant did not disclose the relationship with Ms H.¹¹²

Findings as to valid reason #2 – dishonesty in denying the sexual relations on multiple occasions.

[44] I have carefully reviewed the chain of correspondence between the Applicant, the Applicant's legal representatives and the Respondent following the show cause meeting on 21 March 2023. In my view, on the balance of probabilities, the cumulative effect of the correspondence is that the Applicant was dishonest in responding to questions concerning his relationship with Ms H. For completeness I note that there is no suggestion that the Applicant's solicitors acted outside the scope of instructions from the Applicant.

[45] In the interests of efficiency, I have not reproduced each of the written communications exchanged between the parties following the show cause meeting on 21 March 2023. It is not in contest that the Applicant was provided with correspondence at the show cause meeting stating, *inter alia*, "it is alleged you have and/or are engaging in a relationship with Jenna Harding".¹¹³

[46] In correspondence of 23 March 2023, the Applicant states that he and Ms H had been "friends" for many years and that "as stated above, we have become closer since the break-up but let me state again that we are not in a relationship as I understand that term".¹¹⁴ He also states in that correspondence "I have become closer to Jenna since the marriage broke up. We are friends but we have never been de facto partners, we have never lived together, and I am not financially supporting her. I do not consider her my girlfriend or partner".¹¹⁵ The Applicant submits that on a fair reading of that response "that involves no dishonesty".¹¹⁶

[47] On 25 March 2023, the Respondent again questions the Applicant's position that his relationship with Ms H is a friendship.¹¹⁷

[48] On 30 March 2023, the Applicant's legal representatives responded stating, *inter alia*, that "our client is not, and at the time of making the alleged comments, was not in a relationship with Ms Harding".¹¹⁸

[49] On 3 April 2023, the Respondent states "to be clear, we are not asking for the semantic differences of a de facto relationship as opposed to a sexual relationship (emphasis added)".¹¹⁹ In response, on 5 April 2023, the Applicant's legal representatives state, *inter alia*, "our client again affirms that he categorises his relationship with Ms H as a friendship (emphasis added)".¹²⁰

[50] On a fair reading of the correspondence exchanged between the parties it is in my view reasonable to infer that following the show cause meeting of 21 March 2023, the Respondent

was asking the Applicant to confirm that he was engaged in a sexual or romantic relationship with Ms H. It is not in dispute that from January 2023, the Applicant and Ms H had a “close friendship that involved sexual relations”.¹²¹

[51] The Applicant was put on notice during the investigative process that his dishonesty was placing his employment in jeopardy.¹²² The Applicant’s responses, particularly the response on 5 April 2023 which followed the unequivocal question put to him as to the characterisation of his relationship with Ms H, are essentially dishonest.

[52] I accept that not all untruthful answers constitute a valid reason for dismissal. In my view, for the reasons set out above at paragraphs [38]-[43], it was reasonable for the Respondent to question the nature of the relationship between the Applicant and Ms H despite the inherent private nature of the relationship. In the circumstances, I am satisfied the Applicant’s dishonesty was incompatible with his duties as an employee. The relationship of trust and confidence between the Applicant and the Respondent was thereby destroyed.

[53] The Applicant submits that the decision to terminate his employment was made on or before 21 March 2023, and as such, any alleged dishonesty had to have occurred before that date as the “valid reason cannot postdate a decision to terminate”.¹²³ I reject this submission. Section 387(a) requires me to take into account whether there was a valid reason for the dismissal related to the person’s capacity or conduct. The dismissal took effect on 11 April 2023 and not earlier.

[54] The Applicant further submits that the reasons for termination were “capricious, spiteful and prejudiced”¹²⁴ and could not form the basis for a finding that there was a valid reason for termination. I have considered the Applicant’s submissions and evidence. I have considered Mr Maltby’s evidence that he felt anger and disappointment towards Mr Hickey,¹²⁵ and the Applicant’s submission that I should accept his evidence of what occurred at the 21 March 2023 meeting. On the material before me I am unable to resolve the conflict, but I observe that even if I were to accept the Applicant’s version of what occurred I am not satisfied that the evidence before me rises to the level required to make a finding that the reasons for termination were “capricious, spiteful, and prejudiced”.¹²⁶

[55] As stated above, I have concluded at paragraphs [38]-[43] that the Applicant had a duty to disclose the relationship and there is no contest that he did not disclose the relationship. I am not satisfied that on its own the failure to disclose the relationship was sufficiently serious to constitute a valid reason for termination.

[56] I have also found at paragraphs [44]-[52] above that the Applicant was dishonest as to the characterisation of the relationship and conclude that of itself this was sufficiently serious to constitute on its own a valid reason for termination. If I am wrong, on the evidence before me I find that when taken together the failure to disclose and the dishonesty are sufficiently serious collectively to constitute a valid reason for termination. In my view, collectively the conduct is of “such gravity or importance as to indicate a rejection or repudiation of the employment contract”.¹²⁷

[57] Consequently, on the material before me I am satisfied that the conduct upon which the dismissal was based was significant to the extent that it could constitute a sound, defensible and

well-founded reason for dismissal. Therefore, I conclude that the Respondent had a valid reason for termination.

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

[58] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether the person was notified of the reason.¹²⁸ Procedural fairness requires that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment.¹²⁹ The notification of the valid reason must be in explicit, plain and clear terms.¹³⁰

[59] On the basis of the material before me, I have found that the reasons for termination were the Applicant's failure to disclose the relationship with Ms H and his dishonesty in responding to questions as to the true nature of the relationship. I note that the Applicant does not seriously contest that he was notified of the reasons for termination.¹³¹

[60] I find that the Applicant was given notice of the reasons for his dismissal. This weighs in favour of a finding that the dismissal was not harsh, unjust and/or unreasonable.

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

[61] Section 387(c) requires the Commission to take into account whether an employee was provided an opportunity to respond to any reason for their dismissal relating to their conduct or performance. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.¹³²

[62] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.¹³³ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.¹³⁴

[63] In *Wadey v YMCA Canberra*¹³⁵ Moore J stated the following principle about the right of an employee to appropriately defend allegations made by the employer:

"[T]he opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend."

[64] The Applicant submits that the decision to terminate the Applicant's employment was made on or about 21 March 2023 and well before his dismissal on 11 April 2023¹³⁶ and that the Respondent was going through the motions of giving the Applicant an opportunity to respond during the show cause process when in fact a decision to terminate had already been made.¹³⁷

[65] In support of its submissions the Applicant points to the following factors;

- The Show Cause Letter only permitted the Applicant one day to respond to four allegations, indicating the Applicant's ability to provide a considered response was not a priority for the Respondent.¹³⁸
- On 21 March 2023, Mr Maltby made a comment of 'one week, you've got one week' to Mr Hickey, indicating his intention to remove the Applicant from the business immediately.¹³⁹
- On or around 21 March 2023, Star Electronic were engaged to remove the Applicant's access to the store cameras and alarm system.¹⁴⁰
- On or around 22 March 2023, the Applicant's IT access was blocked, and passwords were changed for his email and computer.¹⁴¹
- On or around 23 March 2023, the Applicant's profile for the Respondent's rostering system, Deputy, was renamed and transferred to another staff member. His password details were also changed.¹⁴²
- On or around 23 March 2023, Bendigo Locksmiths changed the locks to the Respondent's business.¹⁴³
- On 23 March 2023, a meeting was held with the Respondent's management, where Mr Maltby and Mr Butcher communicated that, in effect, the Respondent would not be returning to work.¹⁴⁴
- The Applicant was not invited to weekly meetings with his fellow directors after the dismissal.¹⁴⁵

[66] The Respondent submits that the Applicant was given an opportunity to respond through the show cause process and that the decision to terminate the Applicant was made after consideration of the Applicant's responses provided during that process.¹⁴⁶

[67] The Respondent does not seriously contest the Applicant's assertions that his access to the Respondent's IT systems was removed, nor that it made temporary "systems changes" and that these were made well before the termination of the Applicant's employment.¹⁴⁷ The Respondent submits the changes were made to protect itself against any potential damage the Applicant may cause as a precautionary measure in case a final decision was later made to terminate the Applicant's employment.¹⁴⁸ The Respondent disputes the allegation that its management were informed on 23 March 2023 that the Applicant would not be returning to work.¹⁴⁹

[68] Having considered the material before me, I am not satisfied that the Applicant was given an opportunity to respond to the allegations levelled against him.

[69] In coming to my conclusion, I have considered the following.

[70] First, the show cause letter of 21 March 2022 was provided to the Applicant in a meeting on 21 March 2023 at approximately 7.00am¹⁵⁰ in which he was requested to provide a written response by 7.00am the next morning¹⁵¹ effectively giving the Applicant less than 24 hours to provide a written response to the allegations made against him.

[71] Second, I am satisfied that at least from 21 March 2023, the Applicant was effectively excluded from the operational activities of the business.

[72] Third, Mr Maltby concedes that at the conclusion of the 21 March 2023 show cause meeting that he said words to the effect of “one week, you’ve got one week” to Mr Hickey.¹⁵²

[73] I agree with the Applicant that the Respondent was “going through the motions” of providing the Applicant an opportunity to respond to allegations when a decision to end employment had been made before 11 April 2023.¹⁵³ This weighs in favour of a finding that the Applicant was unfairly dismissed.

Any unreasonable refusal to allow the Applicant to have a support person present (s.387(d))

[74] The Applicant submitted that he did not make a request for a support person, and this is not a relevant consideration in this case.¹⁵⁴ The Respondent does not contest this submission.¹⁵⁵

[75] I am satisfied that there was no refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussion relating to his dismissal, and this is a neutral consideration in determining whether the Applicant’s dismissal was harsh, unjust, or unreasonable.

Warnings about unsatisfactory performance (s.387(e))

[76] In this instance the reasons for dismissal related to the conduct of the Applicant, rather than his performance, and so s.387(e) is not relevant.

Impact of size of the Respondent on procedures followed in effecting the dismissal and absence of dedicated human resource management specialists or expertise (s.387(f)&(g))

[77] The Applicant submitted that the Respondent relied heavily on external legal advice up to and including dismissal and that it is open to the Commission to draw an inference that this advice assisted the Respondent in the decisions it took and procedures it followed.¹⁵⁶

[78] The Respondent submitted that the Applicant did not lead any evidence as to what level of legal advice the Respondent received¹⁵⁷ and that the “Applicant (sic) does not have a dedicated Human Resources (HR) Department”.¹⁵⁸

[79] I have considered the submissions of the parties and consider this a neutral factor in this case.

Other relevant matters (s.387(h))

[80] Section 387(h) provides the Commission with broad scope to consider any other matters it considers relevant. It is well established that a dismissal may be “*harsh, unjust or unreasonable*”, notwithstanding the finding that there is a valid reason for the dismissal.¹⁵⁹ The gravity of an employee’s conduct and the proportionality of dismissal to that conduct are important matters to be taken into account. The Commission should consider all the circumstances and weigh the gravity of the misconduct and other circumstances telling against a dismissal being unfair with any mitigating circumstances and other relevant matters that might support the Applicant’s claim that the dismissal was harsh, unjust or unreasonable.¹⁶⁰

[81] The Applicant submits that termination was disproportionate and points to the following factors in support of this submission:

Private Character of Relationship

- That in reposing the Commission with the statutory function of determining unfair dismissal claims, Parliament did not intend for the Commission to forensically assess and determine the character of a private relationship between two consenting adults in facts such as those currently before the Commission.¹⁶¹ The Applicant stated that any invitation by the Respondent that the Commission should do so, should be resisted in the Applicant’s submission.¹⁶²
- The Commission is not an appropriate forum for assessing the Applicant’s relationship with Ms H as if the matter were an “episode in a daytime television soap opera” and that the Applicant is entitled to a private life.¹⁶³

Business Ownership and Harshness

The decision to terminate the Applicant’s employment was harsh in the circumstances where:

- The Applicant sparked the initial idea and invested significant time, energy, and resources into establishing the Respondent’s business.¹⁶⁴
- The impact of the termination has been significant on the economic situation of the Applicant. He has lost the income and social standing of being Managing Director of a successful business, is now on an income \$20,311.84 below his previous remuneration, and no longer has a company car.¹⁶⁵
- The Applicant has had to relocate 2.5 hours away to Swan Hill in order to find alternative employment and turn his mind to buying a new house and car. This has caused significant disruption in his life.¹⁶⁶
- In the circumstances and in light of the severe consequences for the Applicant’s, termination was “manifestly disproportionate”.¹⁶⁷

[82] The Respondent submits that dishonesty about an affair, particularly where there are multiple occasions of dishonesty, has been held to constitute a valid reason for dismissal,

especially in cases where such gives rise to a reasonable apprehension of a conflict of interest in relation to employment.¹⁶⁸

[83] Further, the Respondent submits that if there was any procedural defect in the termination process, which is denied, then it would not have taken long for the procedural defects to be overcome by providing further procedural fairness by way of further opportunities to respond.¹⁶⁹ The time taken would not have exceeded 4 weeks, being the amount of pay in lieu of notice given to the Applicant on termination.¹⁷⁰

[84] The Respondent additionally contends that if the dismissal is held to be harsh, unjust or unreasonable, any compensation should be reduced by 100% having regard to the fact that, but for the Applicant's conduct, the dismissal would not have occurred.¹⁷¹

[85] In assessing the harshness of the dismissal, I have considered the personal and economic impact which the dismissal has had on the Applicant. It is fair to say that the Applicant's dismissal has had a significant impact on his personal and economic circumstances.

[86] The degree of seriousness of the misconduct is a factor to be considered in determining whether the dismissal was the proportionate response to the conduct in question. The Applicant was the Respondent's most senior operational employee engaged in a relationship with Ms H, a subordinate. In those circumstances, the work dynamic involves a conflict of interest where the Applicant's relationship with Ms H may unduly influence decisions and conflict with the proper performance of his duties.

[87] I have found that the failure to disclose the relationship is not of itself sufficiently serious to constitute a valid reason for termination. I have found that the Applicant was dishonest during the show cause investigative process in the characterisation of his relationship with Ms H. This conduct on its own is sufficiently serious to constitute a valid reason for termination. If I am wrong, I have found that collectively the failure to disclose the relationship with Ms H and the Applicant's dishonesty in characterising the relationship was conduct sufficiently serious to constitute a valid reason for termination.

[88] That the Applicant was also a Director of the Respondent owing fiduciary duties to the company is a matter of relevance, but I agree with the Applicant that the obligations of the Applicant as a Director ought not be conflated with his duties and obligations as an employee to his employer.¹⁷²

[89] I note that the Applicant was paid four weeks' notice in lieu of termination.¹⁷³

Conclusion as to whether the dismissal was harsh, unjust and/or unreasonable.

[90] After considering each of the matters specified in s.387 of the act, my evaluative judgment is that the Respondent's dismissal of the Applicant was not harsh, unjust, or unreasonable. The Respondent had a valid reason for dismissal.

[91] An examination of the other relevant factors has established that there were procedural errors or defects with the process the Respondent adopted, and the Applicant was not afforded an opportunity to respond to the allegations made against him. I have considered that the

dismissal has caused him significant personal and economic harm. These matters weigh in the Applicant's favour. However, in my assessment, these are outweighed by the reasons for the dismissal. If I am wrong, I agree with the Respondent that any compensation order would be limited to the time it would have taken to overcome any procedural defects and that time would have not exceeded four weeks, being the amount paid in lieu of notice by the Respondent to the Applicant on termination. Further, I observe that any compensation order would be significantly reduced, having regard to the fact that, but for the Applicant's conduct, the dismissal would have not occurred.

[92] In these circumstances I am not persuaded that the dismissal was harsh, unjust or unreasonable. The Applicant's dismissal was not unfair and his application for an unfair dismissal remedy will therefore be dismissed.



COMMISSIONER

Appearances:

Mr J McKenna, of counsel, for the Applicant.
Mr M Rinaldi, of counsel, for the Respondent.

Hearing details:

2023.

Melbourne.

8 August and 9 October.

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¹ Transcript PN343-PN352, Digital Hearing Book (DHB) p117.

² Transcript PN343-PN352.

³ Transcript PN2308.

⁴ Transcript PN70, PN1082-1088.

⁵ Transcript PN343-PN352.

⁶ DHB p90-92.

⁷ Transcript PN948.

⁸ DHB p117.

⁹ Transcript PN666.

¹⁰ Applicant's Outline of Submissions at [5].

¹¹ Transcript PN185.

¹² Transcript PN154.

¹³ Transcript PN157.

¹⁴ Transcript PN187.

¹⁵ Print S4213, 17 March 2000, per Ross VP, Williams SDP, Hingley C.

¹⁶ (1987) 19 IR 153 at 155, per Fisher P, Bauer & Glynn JJ.

¹⁷ Transcript PN1170-1178.

¹⁸ Transcript PN1178.

¹⁹ Transcript PN1163-1164.

²⁰ Transcript PN1171-PN1178.

²¹ Transcript PN915.

²² Transcript PN911.

²³ Transcript PN1509, Witness Statement of Rodney Hickey at [11].

²⁴ Transcript PN1517-1521.

²⁵ Transcript PN1520.

²⁶ Witness Statement of Rodney Hickey at [17].

²⁷ Transcript PN885, PN952, PN2447.

²⁸ Transcript PN1250-1258.

²⁹ Transcript PN1330.

³⁰ Transcript PN1689-1691.

³¹ Transcript PN1209.

³² Transcript PN1215.

³³ DHB p198-200.

³⁴ DHB p199, Transcript PN1218.

³⁵ DHB p199, Transcript PN1220.

³⁶ Transcript PN1215-PN1217.

³⁷ Transcript PN1222.

³⁸ Transcript PN435, PN1732.

³⁹ Transcript PN1260-1263.

⁴⁰ DHB p67.

⁴¹ Transcript PN1265-1268.

⁴² Transcript PN1270-1275.

⁴³ DHB p104-117.

⁴⁴ DHB p117.

⁴⁵ *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213, [24].

⁴⁶ *Edwards v Giudice* (1999) 94 FCR 561, at 564; *King v Freshmore (Vic) Pty Ltd*, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000, Print S4213 [24].

⁴⁷ Ibid.

⁴⁸ [\[2018\] FWC 2398](#).

⁴⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁵⁰ Ibid at 363.

⁵¹ Ibid per Dixon J at 362.

⁵² Ibid per Rich J at 350.

⁵³ *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J.

⁵⁴ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450.

⁵⁵ *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388, [35]; approved in *Karakatsanis v Racing Victoria Ltd* (2013) 306 ALR 125 at [35] - [37].

⁵⁶ *NOM v Director of Public Prosecutions* (2012) 38 VR 618, [124].

⁵⁷ [2003] NSWCA 388.

⁵⁸ [1998] AIRC 1592 (**Rose v Telstra**).

⁵⁹ [1998] AIRC 1592 (**Rose v Telstra**).

⁶⁰ [\[2023\] FWCFB 201](#).

⁶¹ [\[2023\] FWCFB 201](#) at [98].

⁶² [\[2023\] FWCFB 201](#) at [93].

⁶³ Transcript PN2307.

⁶⁴ Respondent's Outline of Closing Submissions at [2].

⁶⁵ Transcript at PN2289-2294

⁶⁶ Transcript PN2313-2318.

⁶⁷ Transcript PN2308.

⁶⁸ Transcript PN943.

⁶⁹ Transcript PN942-943.

⁷⁰ Transcript PN944.

⁷¹ Transcript PN945.

⁷² Transcript PN944-948.

⁷³ Ibid.

⁷⁴ Transcript PN957.

⁷⁵ Ibid.

⁷⁶ Transcript PN951.

⁷⁷ Respondent's Outline of Closing Submissions at [43].

⁷⁸ Transcript PN2297-2298.

⁷⁹ Transcript PN76.

⁸⁰ Transcript PN91-98.

⁸¹ Transcript PN100.

⁸² Applicant's Outline of Submissions at [45].

⁸³ Transcript PN102.

⁸⁴ Applicant's Submissions in Reply at [5].

⁸⁵ Applicant's Outline of Submissions at [32].

⁸⁶ Applicant's Outline of Submissions at [40]-[42].

⁸⁷ Applicant's Submissions in Reply at [8]-[9].

⁸⁸ Applicant's Outline of Submissions at [38]-[42].

⁸⁹ DHB p129, Transcript PN1284.

⁹⁰ [1998] AIRC 1592 (**Rose v Telstra**).

⁹¹ Witness Statement of Rodney Hickey at [18], Respondent's Outline of Closing Submissions at [13].

⁹² DHB p9, p31, Transcript PN946.

- ⁹³ Transcript PN963, PN1519.
- ⁹⁴ Transcript PN1520.
- ⁹⁵ Ibid.
- ⁹⁶ Witness Statement of Rodney Hickey at [17].
- ⁹⁷ Transcript PN114, PN1752.
- ⁹⁸ Transcript PN1299, PN2021.
- ⁹⁹ Transcript PN613, PN1766.
- ¹⁰⁰ Transcript PN1567, Witness Statement of Rodney Hickey at [18].
- ¹⁰¹ Witness Statement of Rodney Hickey at [18].
- ¹⁰² Witness Statement of Rodney Hickey at [8].
- ¹⁰³ Transcript PN1594.
- ¹⁰⁴ Transcript PN422.
- ¹⁰⁵ Transcript PN426.
- ¹⁰⁶ Transcript PN887.
- ¹⁰⁷ Transcript PN1981.
- ¹⁰⁸ DHB p9, p31, Transcript PN946.
- ¹⁰⁹ DHB p101.
- ¹¹⁰ Transcript PN944-948.
- ¹¹¹ Transcript PN722-723.
- ¹¹² Transcript PN887.
- ¹¹³ DHB p198.
- ¹¹⁴ DHB p204.
- ¹¹⁵ DHB p203.
- ¹¹⁶ Transcript PN1965.
- ¹¹⁷ DHB p105.
- ¹¹⁸ DHB p109.
- ¹¹⁹ DHB p113.
- ¹²⁰ DHB p115.
- ¹²¹ Transcript PN885, PN952, PN2447.
- ¹²² DHB p113.
- ¹²³ Transcript PN1937.
- ¹²⁴ Transcript PN102.
- ¹²⁵ Witness Statement of Lachlan Maltby at [25], Transcript PN1704, PN1765.
- ¹²⁶ Transcript PN102.
- ¹²⁷ [1998] AIRC 1592.
- ¹²⁸ *Fair Work Act 2009* (Cth) s. 387(b).
- ¹²⁹ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151; *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [\[2012\] FWA 10626](#).
- ¹³⁰ *Previsic v Australian Quarantine Inspection Services* (unreported, AIRC, Holmes C, 6 October 1998) Print Q3730.
- ¹³¹ Applicant's Outline of Submissions at [54], Transcript PN2059.
- ¹³² *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRC FB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- ¹³³ *RMIT v Asher* (2010) 194 IR 1, 14-15.
- ¹³⁴ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- ¹³⁵ [1996] IRCA 568; cited in *Dover-Ray v Real Insurance Pty Ltd* [\[2010\] FWA 8544](#).

¹³⁶ Transcript PN90-98.

¹³⁷ DHB p11.

¹³⁸ Applicant's Outline of Submissions at [57].

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Respondent's Outline of Submissions at [36].

¹⁴⁷ Respondent's Outline of Submissions at [37].

¹⁴⁸ Ibid.

¹⁴⁹ Transcript PN1280-1282.

¹⁵⁰ Transcript PN1324.

¹⁵¹ DHB p91, Transcript PN1218.

¹⁵² Transcript PN435, PN1732.

¹⁵³ DHB p11.

¹⁵⁴ Applicant's Outline of Submissions at [60].

¹⁵⁵ Respondent's Outline of Submissions at [40].

¹⁵⁶ Applicant's Outline of Submissions at [62].

¹⁵⁷ Respondent's Outline of Submissions at [42].

¹⁵⁸ Respondent's Outline of Submissions at [43].

¹⁵⁹ *B, C and D v Australian Postal Corporation T/A Australia Post* [\[2013\] FWCFB 6191](#) at [41].

¹⁶⁰ Ibid.

¹⁶¹ Applicant's Outline of Submissions at [66].

¹⁶² Applicant's Outline of Submissions at [67].

¹⁶³ Applicant's Outline of Submissions at [68].

¹⁶⁴ Applicant's Outline of Submissions at [71].

¹⁶⁵ Applicant's Outline of Submissions at [72].

¹⁶⁶ Applicant's Outline of Submissions at [73].

¹⁶⁷ Applicant's Outline of Submissions at [57].

¹⁶⁸ Respondent's Outline of Submissions at [45].

¹⁶⁹ Respondent's Outline of Closing Submissions at [59].

¹⁷⁰ Ibid.

¹⁷¹ Respondent's Outline of Closing Submissions at [60].

¹⁷² Transcript PN2500-2501.

¹⁷³ Statement of Rodney Hickey at [53], DHB p117.