[2023] FWC 3084[Note: An appeal pursuant to s.604 (C2023/7994) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Brock Austin
v
Sandgate Taphouse Pty Ltd
(U2023/6319)

COMMISSIONER SIMPSON BRISBANE, 23 NOVEMBER 2023

Application for an unfair dismissal remedy – Performance issues – Dismissal not unfair – Application dismissed.

[1] On 12 July 2023, Mr Brock Austin (**the Applicant**) applied to the Fair Work Commission (**the Commission**) under section 394 of the *Fair Work Act 2009* (**the Act**) for an unfair dismissal remedy, alleging he was unfairly dismissed from his employment with Sandgate Taphouse Pty Ltd (**the Respondent**).

[2] I listed the matter for an initial directions hearing by telephone on 13 September 2023. The matter was listed for hearing of the merits of the application by video using Microsoft Teams on 25 October 2023.

[3] At the hearing, the Applicant was represented by Mr Thomas Allan, solicitor of Allan Bullock Solicitors & Advocates. The Respondent was represented by Ms Bianca Mendelson of counsel, instructed by Mr Hamish Procter, solicitor of Aitken Legal.

[4] The Applicant filed written submissions and a witness statement on 28 September 2023. On 12 October 2023, the Respondent filed written submissions and a witness statement of Mr Ian Van Der Woude, a former director of the Respondent. The Applicant then filed further submission in reply on 18 October 2023, and a second witness statement on 19 October 2023.

[5] The Applicant was dismissed from his employment on the Respondent's initiative on 29 June 2023. The application was filed on 12 July 2023, within 21 days of the dismissal. The Applicant commenced employment with the Respondent on 21 October 2022 as venue manager on a full-time basis and completed a period of employment in excess of the minimum employment period.

Relevant Legislation

[6] Section 385 of the Act states that a person has been unfairly dismissed if:

(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.

[7] The question for determination is whether the Applicant's dismissal was harsh, unjust or unreasonable pursuant to s.387 of the Act, which states:

> **"387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
> (b) whether the person was notified of that reason; and
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the 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."

SUBMISSIONS AND EVIDENCE

Background

[8] The Applicant was engaged by the Respondent as the venue manage of the Sandgate Post Office Hotel (**the Hotel**) since October 2022. He was responsible for the day-to-day operations of the Hotel, and his duties included completing stocktakes, weekly rostering and cash control. The Applicant was also subject to financial benchmarks regarding revenue, sales and wage costs.

[9] The Respondent contended that the Applicant was dismissed due to poor performance due to not keeping up with his duties to an adequate standard. The Applicant vehemently denied these allegations.

Performance Concerns – December 2022 – May 2023

[10] Mr Van Der Woude submitted that as early into the Applicant's employment as 6 December 2022, he met with the Applicant and discussed the expectations of the venue manager role and provided some guidance on key tasks to focus on and followed up via email. The Applicant disagreed that Mr Van Der Woude worked closely with him or provided guidance at the start of his employment and submitted that the email provided after that meeting, and the meeting itself were about the priorities of the business, not performance concerns raised against him.

[11] Mr Van Der Woude submitted that in around February 2023, he started to become concerned that the Applicant was not achieving the required results and was not actively embracing feedback on his performance and was dismissive of Mr Van Der Woude's suggestions to improve. Mr Van Der Woude submitted that he had regular one-on-one discussions with the Applicant regarding his underperformance and tried to counsel him on how he could improve.

[12] Mr Van Der Woude submitted that by April 2023, he was concerned that stocktakes at the end of each month were not under control and that the system had not been properly updated or maintained. Mr Van Der Woude submitted that in May 2023, he had a discussion with the Applicant about the poor result for the May stocktake. The Applicant's evidence was that the system had not been set up correctly, and he had raised the issue with the Respondent with no response. He submitted that this was the reason for the significant variances in stocktake per month, and not through his own poor performance.

[13] The Applicant disagreed that any of the alleged performance concerns raised by Mr Van Der Woude in his evidence were reliable indicators of early poor performance on his behalf due to the realities of the role including scheduling changes, software difficulties and other employees' responsibilities overlapping.

[14] In mid-May 2023, the Applicant approached Mr Van Der Woude about his difficulties keeping up with his study while working for the Respondent. The Applicant submitted that he mentioned he may need to resign if he was not able to be approved for leave to devote time to his studies. The Applicant submitted that in response, Mr Van Der Woude stated that he wanted the Applicant to remain employed and offered for him to take 2 weeks leave. The Applicant submitted that Ms Michelle Christoe, co-director then joined them in the smokers section and Mr Van Der Woude verbally confirmed the leave approval.

[15] Mr Van Der Woude submitted that he understood that the Applicant had given his notice that day but did not want to have to hire a new venue manager so instead it was resolved that the Applicant would have some time off, including time to think about his performance issues.

[16] Mr Van Der Woude submitted that on 22 May 2023, the Respondent's Financial Controller identified a deficit in the petty cash balances without explanation. The Applicant was contacted regarding this, however Mr Van Der Woude submitted that his response was that the information was all in his spreadsheets and if there was something missing it was because Mr Van Der Woude or Ms Christoe had taken it.

[17] Mr Van Der Woude submitted that it was the Applicant's responsibility to induct all new staff members on the policies and procedures of the Hotel, including WHS procedures,

which he allegedly failed to do. Ms Christoe emailed the Applicant on 5 June 2023 reminding him of this responsibility, and Mr Van Der Woude noted that by 8 June 2023 the outstanding inductions were still not complete despite being 8 months overdue.

[18] The Applicant rejected this assessment of his performance of his duties, stating that he continually requested fire training be booked for the staff. He submitted that it could not be booked due to an unpaid outstanding invoice of the Respondent, and that he provided the remainder of the training and sign offs.

[19] The Applicant's evidence did not canvas a detailed response to any of the above alleged conversations about his performance other than as outlined. He instead provided a blanket non acceptance of the 'statements of opinion' made by Mr Van Der Woude in his witness statement.

No defined role description / changing KPIs

[20] The Applicant submitted that he was not provided a specific role description and through working in the role, came to understand that the position included responsibilities which were not typical within the industry. Mr Van Der Woude's evidence was that at the interview, he had explained the role and duties as:

- Managing and overseeing key functions such as planning and procedures
- Recruiting and induction of new staff
- Setting systems and processes
- Ordering stock and stocktakes
- Undertaking rostering
- Attending to cash control.

[21] The Applicant's Letter of Offer set out the following, but did not contain a position description or duties list:

> "…In addition to your base Salary you will be entitled to an annual 10% Bonus (paid 5% 6 monthly) on successful attainment on our key company KPI's, being;
>
> Annual Turnover: $3,300,000
> Bar Margin > 71%
> Bar Labour < 21%
> Kitchen Margin > 69%
> Kitchen Labour < 28%"

[22] The Applicant submitted that the KPIs he was expected to meet were constantly altered and enlarged to meet weekly fluctuations. He considered that the Respondent must not have placed much stock in these changes as they were never provided in a written form relevant to each individual management level KPI targets. The Applicant submitted that to the extent that targets were purportedly varied in these meetings, he understood the true position to be that these altered targets were of no direct effect on his KPIs because his contract of employment had not been varied, and he worked to meet his contractual targets.

[23] Under cross examination, it became clear that the business benchmarks and KPIs were different to the Applicant's individual KPIs, however the business KPIs did not change as frequently as the Applicant had suggested, for example the labour budget KPI was sitting consistently at 33%. In response, the Applicant submitted that as it was a percentage of sales the business made, it did in fact fluctuate and was only partially under his control due to fixed labour costs of employees such as bookkeepers or other non-casual staff who had set hours. He did not appear to take any responsibility for his role in contributing to the higher than benchmarked labour costs, giving reasons such as needing to provide minimum hours and shift lengths to employees to keep them. He agreed that Mr Van Der Woude was aware of this, but not that it had been raised with him directly as a personal performance issue.

[24] With regard to stocktake and stock levels, and the fairly significant discrepancies, the Applicant's evidence was that the software had not been properly set up for this specific business, and therefore provided incorrect quantities and discrepancy figures at stocktake time. The Applicant also blamed the discrepancies on invoices not being input (a part of his role but a part he claimed not the have had the time to complete), and Mr Van Der Woude purchasing stock from another of his businesses which had folded, for a cheaper price, with no invoice or reference to price per item, but only a total cost. The Applicant submitted that circumstances such as this led to the discrepancies and not meeting the target of less than $200 a month discrepancy in stocktake rather than a deficit in his performance.

[25] The evidence disclosed that the stock take errors were not minor in nature. The Applicant was required to keep stock take variances under $200 each month. The variance in April was about $6,000 and, concerningly, the variance in May was $26,419.

[26] With regard to petty cash and cash box discrepancies, the Applicant submitted that he had balanced that to the best of his ability, however Mr Van Der Woude would also take money from the till and not inform the Applicant, so it could be balanced properly.

[27] He submitted that at six months of employment, he had met the metrics set out in the letter of offer, and knew this by reason of attendance at the management meetings and viewing the financial data he was privy to.

Show Cause and Termination

'Performance Management' Process

Prior to Leave

[28] The Applicant prepared a handover for the period of his leave, commencing on 12 June 2023. However, on that date, the Applicant was contacted by a staff member calling in sick. As he could not arrange to cover the shift, he came in, informing Mr Van Der Woude 30 minutes prior to his arrival. The Applicant worked 3 hours of that shift before another staff member arrived to relieve him. Before leaving, the Applicant submitted that he went to collect his belongings from the office and speak to Mr Van Der Woude and confirm that there was nothing additional required of him before he left to commence his leave.

[29] During the conversation on 12 June 2023, which the Applicant submitted he had intended to be fleeting, Mr Van Der Woude asked him how he thought he was doing in his role. The Applicant responded in general terms that he thought he was doing his job. The Applicant was then asked to rate himself across the different areas of his performance, for which he gave an 8 or 9 out of 10 to each area. Mr Van Der Woude did not provide his own rating for comparison. Mr Van Der Woude also asked the Applicant to prepare a plan to discuss with him on his return. The substance and expression of the plan to be prepared was in dispute.

The 'plan'

[30] The Applicant referred to the 'plan' Mr Van Der Woude had raised with him to consider during his leave, as a "strategy/action plan" which he referred to as being "for the venue" as it was not meeting its expected benchmarks overall. The Applicant did not place very much weight on this, as he had been assigned it and then commenced on approved leave during which time Mr Van Der Woude was aware that the Applicant would be studying rather than working. The Applicant did not see it as a concern that he had not put a lot of thought into it on his return. The Applicant also submitted that setting goals was one thing, but without supported action items to achieve such goals, there wasn't much to be done.

[31] Mr Van Der Woude, in contrast, referred to it as a plan to address the key areas of concern in the Applicant's performance in not meeting his personal benchmarks, and how the Applicant planned to improve in that. He referred to specific areas of concern as controlling labour costs, team leadership and operational issues (stock and cash control). Mr Van Der Woude's evidence was that he put a lot of stock into this plan to be able to demonstrate the Applicant's understanding of the issues and his commitment to continued employment.

[32] There appears to be differing recollections of the plan's importance and expression between the parties which led to the termination. The Applicant did not present the plan in his evidence as anything more than being 'for the venue' and apparently unrelated to his personal performance. There is also no evidence that Mr Van Der Woude informed the Applicant of his heavy reliance on this plan prior to his leave or in the performance discussions leading to termination.

[33] Having made that observation, it also appears to be the case however, that the Applicant was either wilfully blind to or unaware of his role in the business' overall success, and how his personal KPIs affected such success. His cross examination demonstrated a lack of ability to take responsibility for the areas he was in charge of as venue manager, consistently clarifying exactly where his duties ended and another's began or providing excuses for why his areas of control were not up to standard. Despite this he was strong in his belief that his performance was not an issue.

[34] In the 12 June 2023 interaction, Mr Van Der Woude also raised that the Applicant has not attended a complete week at work for the last few weeks. The Applicant disagreed and clarified that he had completed his hours, just on fewer days due to approved sick leave. The Applicant then understood that Mr Van Der Woude made a comment implying that he was not a "good" venue manager. The Applicant submitted that he rejected the assertion that he was not a good venue manager and attempted to clarify matters before forming the view that Mr Van Der Woude was not engaged, and the conversation had little continued utility. The Applicant

in his evidence submitted that this was a very round about conversation, and he did not understand it to be specific to his performance, despite the request for him to rate his performance or Mr Van Der Woude's implication that he was not a good venue manager.

Returning from Leave 26 June 2023

[35] The Applicant then proceeded on 2 weeks leave for his studies. On 26 June 2023 he returned to work and presented at the venue to find he had been rostered on a bar shift. The Applicant submitted that he went to the managers office to greet Mr Van Der Woude and Ms Christoe and asked if there were any tasks or issues requiring his immediate attention. He submitted that they were unwelcoming and dismissive and confirmed there were no tasks for him. The Applicant then commenced his shift at the bar.

[36] Approximately 5-6 hours into the shift, the Applicant submitted that he was called over to the smoking section by Mr Van Der Woude and made aware of non-specific poor performance concerns. Mr Van Der Woude stated that he was not "happy" with the Applicant's performance and impliedly suggested that the Applicant should resign in light of this. The Applicant alleged that he had seen Mr Van Der Woude pressure another employee similarly to resign. The Applicant submitted that he had no idea this would be a performance meeting otherwise he would have recorded it or brought a support person as a witness. The Applicant submitted that he rejected Mr Van Der Woude's assertions of unsatisfactory performance and agreed that he would consider them as requested. The Applicant then completed the remainder of his shift at the bar.

[37] Mr Van Der Woude's evidence was that he did not recall having any significant discussion with the Applicant about his performance on his return to work on 26 June 2023, other than an in passing informal discussion.

[38] On 27 and 28 June 2023, the Applicant was supposed to be on his regular RDOs. However, a management meeting, which were usually scheduled on Thursdays, was scheduled on Tuesday 27 June 2023. The Applicant attended the meeting. During the meeting, Ms Christoe informed the Applicant that he did not have to come in for the meeting, but he confirmed it was a part of his role so had attended.

Termination of employment 29 June 2023

[39] The parties evidence differed on how the final meeting took place. On 29 June 2023, during a rostered shift, without prior warning the Applicant was asked to meet with Mr Van Der Woude in the public bar section of the Hotel.

[40] The Applicant's evidence was that at the start of the meeting, Mr Van Der Woude asked him if he had given any thought to the informal meeting on 26 June 2023 where his unsatisfactory performance had been raised. The Applicant responded that whilst he had given it some thought, ultimately, he did not agree with the assertions and referred to his consistent meeting of the KPI targets in rebuttal. The Applicant submitted that Mr Van Der Woude again implied that he should resign. The Applicant stated that he clearly and unequivocally stated that he would not be resigning from his position and asked Mr Van Der Woude what he would like

to do. The Applicant submitted that Mr Van Der Woude then proceeded to verbally terminate his employment effective immediately.

[41] Mr Van Der Woude's evidence was that he 'formally' met with the Applicant to discuss where he was at and to discuss the plan he had been asked to develop. He submitted that the Applicant responded by asking him what he wanted to do. Mr Van Der Woude stated that he was seeking to hear a plan to demonstrate that the Applicant could address the key issues in his performance that had been spoken about (cash control, roster management and stock control) plus other leadership issues. Mr Van Der Woude submitted that the Applicant responded that he thought he was performing well in the role and disagreed with the assessment. In response, Mr Van Der Woude submitted that he advised that the response did not give him any confidence in the Applicant's ability to run the venue or improve his performance and accordingly he was left with no choice but to let the Applicant go.

CONSIDERATION

(a) Whether there was a valid reason for dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees);

[42] A valid reason was described in *Selvachandran v Petron Plastics Pty Ltd*[1] as one which is "…sound defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based on the operational requirements of the employer's business." The onus rests with the Respondent in cases such as this to establish that it had a valid reason for dismissal.

[43] The Respondent submitted that the reason for the Applicant's dismissal was related to the Applicant's capacity (or lack thereof) to satisfactorily perform his role of Venue Manager.

[44] In *Crozier v Australian Industrial Relations Commission*, it was found that "a reason will be "related to the capacity" of the employee where the reason is associated or connected with the ability of the employee to do his or her job."[2]

[45] The Respondent submitted that the Applicant was aware that he failed to meet the wage benchmarks as he regularly attended the weekly management meetings (the only exception being when he was on leave). The benchmarks and the venue's performance against those benchmarks were discussed every week and recorded in the meeting minutes, copies of which were emailed to the Applicant immediately after the meeting. The Respondent submitted that the benchmarks and performance documented in the minutes plainly and objectively show that the Applicant was not meeting the benchmarks nor his contractual KPI targets. Therefore, the Applicant's assertion simply cannot be true, and if his assertion represents the Applicant's genuine belief, it shows a significant lack of insight into, and understanding of, his underperformance.

[46] The Respondent submitted that it is apparent that the Applicant has conflated his individual contractual KPIs, which are used to determine whether he is entitled to a bonus, with the Respondent's clear financial expectations and the benchmarks that applied to the business as a whole.

[47] In the case of *Cai v Serco Citizen Services Pty Ltd*,[3] Commissioner Wilson noted in relation to the Applicant's lack of understanding of his poor performance:

> "[96] I am satisfied from the evidence that it was appropriate to counsel Mr Cai about his work performance, with it being evident to Serco by late 2021 that there was a problem when his performance was considered against its KPI expectations. There then ensued a very extended performance management process which did not appreciably move Mr Cai's performance, and certainly did not move it to acceptable levels. His explanations as to why that may be the case were largely general, evasive and blame shifting –evasive in that he never provided cogent medical evidence of his situation and blame shifting inasmuch as he tried to say that the failure to submit a Stay at Work medical consent form was a failing on the part of his Team Leader and not an omission by him…"
>
> (emphasis added)

[48] The Full Bench upheld the original finding that the Applicant did not provide sufficient evidence to support his submission that his performance was not at issue. [4] Similarly to the matter before me, the Applicant was said to be evasive and shifted blame when explaining his poor performance and was unable to provide compelling evidence or explanations to justify his claims that he was not responsible. Conversely in this case, there was no formal performance management process notified to the Applicant that he was under scrutiny to improve. However, as mentioned earlier, the difficulties of the business were linked to the Applicant's failure to meet his personal management KPIs, and he appeared wilfully or otherwise, blind to that.

[49] In *Ash v Chabad Institutions of Victoria Limited*,[5] a Full Bench made comment about an Applicant's failure to understand the significance of their conduct despite performance management action being taken, upholding the original decision that the dismissal was not harsh, unjust or unfair:

> "[37] We consider that the brevity of this response, and the obvious lack of effort which went into it, wholly justifies the Deputy President's description of it as "casual". Rabbi Ash made no acknowledgment of the importance of his duty of care to supervise students by attending classes in accordance with the roster, nor did he communicate a proper acceptance of his responsibility for the incident. His "explanation" did not address why he had not familiarised himself with the current roster. The response gives every indication that Rabbi Ash regarded this as a matter of no importance, notwithstanding the warning he had been given arising from the Fourth Incident. In that sense, the apology might also reasonably be characterised as "insincere"…"
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> "[45] We do not accept that there was any error in the Deputy President's conclusion that the Fourth and Fifth Incidents were the same in nature in that they both involved a failure by Rabbi Ash to attend to his fundamental obligation to attend and supervise students as required. The circumstances by which the failure in each case arose were different, but they both involved Rabbi Ash not undertaking a basic duty of care obligation - in the first case, by wilfully misunderstanding what Rabbi Morozow had told him he was required to do and, in the second case, by failing to take the basic step

> of informing himself of his class attendance requirements on the SEQTA system. The fourth contention of error is therefore rejected."
>
> (emphasis added)

[50] The Respondent through regular management meetings, made it clear to the Applicant that the business was not performing to standard, especially in areas the Applicant was involved in, like labour planning. His fundamental duties as the Venue Manager included keeping costs down and at an appropriate ratio to the incoming funds. The Applicant in his evidence demonstrated, similar to *Ash*, an almost wilful misunderstanding of this connection, and failed to take the basic mental step of linking the business' poor performance with his failure to meet performance indicators. In his evidence, despite being taken to and it being demonstrated plainly his responsibility for and input into key financial matters, not once did he take responsibility for his actions forming part of the issues the business was facing.

[51] The Applicant's argument of the business' failure having no nexus to his performance would hold more water if the Respondent was alleging poor performance due to low sales, which is not within the Applicant's role description or responsibilities. However, the areas at issue were directly within his control, labour rostering where the sales were not supporting the need for the boots on the ground, stock to meet the demand being unclear and poor cash control.

[52] Further, the Respondent submitted that errors by an employee that detrimentally affect an employer's interest are a valid reason for termination.[6] The Respondent submitted that these errors and the consistent overspending had a significant detrimental effect on the Respondent's financial interests (including profitability) and overall business justifying the termination of the Applicant's employment.

[53] In all of the circumstances I accept the Respondent's submission that the errors being made were not being corrected despite being raised multiple times with the Applicant. The consistent failure of the Applicant to recognise the ongoing performance management and adjust accordingly provide a valid reason for termination of the Applicant's employment due to this conduct. I do not consider that the Applicant's arguments of lack of role clarity, consistently shifting KPIs or ineffective software has been made out to an extent great enough to dislodge this finding, and instead consider it more indicative of further blame shifting by the Applicant.

(b) Whether the person was notified of the reason

[54] The Respondent submitted that the Applicant had been on notice of his unsatisfactory performance for several months before his eventual dismissal, and he had been specifically advised of the various performance shortfalls and was counselled to assist him to improve his performance. The Applicant argued that he was not properly notified of the reason for his dismissal. It is my view Mr Van Der Woude was a credible witness. I found he answered questions directly and candidly and I am inclined to prefer his evidence over that of the Applicant's where there is a conflict between them concerning the extent of discussions that occurred regarding the Respondent's concerns with the Applicant's performance. I am satisfied that the Applicant had notice of the issues that led to his termination.

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

[55] 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.[7]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.[8]

[56] The Respondent submitted that in addition to the various notifications of the performance issues, the Applicant was provided with ample opportunity and time to respond to his underperformance, and well before the Respondent made the decision to terminate his employment. The Applicant states that he got the impression from a discussion that Mr Van Der Woude was implying that he was not a 'good' Venue Manager. While the Respondent submits that it put the Applicant on notice of his performance issues many times before this meeting, the Applicant admits that he was aware, at least as of late May 2023, that the Respondent considered his performance to be poor.

[57] The Respondent submitted that the Applicant was given the opportunity to respond to the performance issues raised by Mr Van Der Woude, and he, in fact, took up that opportunity. In his evidence, the Applicant states that he told Mr Van Der Woude that he disagreed that the three areas of concern he raised did not have "any nexus to [his] work performance".

[58] I do not accept the Applicant's submission and the evidence does not support a finding that prior to the communication on 26 June 2023 of 'broad allegations absent evidence of unsatisfactory performance,' he was entirely unaware of any dissatisfaction felt on behalf of the Respondent regarding his job performance. Under cross examination, the Applicant accepted that he had received the emails regarding refocussing on the 'targets' of the business, had been emailed the meeting minutes which demonstrated the consistent failure to meet the 33% labour cost KPI, and that he had multiple in person ad hoc meetings with Mr Van Der Woude about stocktake issues and labour costs.

[59] I accept that it could be considered that notification of the Respondent's concerns was given on 12 June 2023, and that the Applicant did provide a general response to the specific areas raised by Mr Van Der Woude. The Applicant was then also provided an opportunity to address the areas of concern by the creation of the 'plan.' I would accept that clarity of the communication of the content of the plan may have been unclear, and it was inappropriate for Mr Van Der Woude to require the Applicant to perform work related tasks while on a period of approved leave, particularly where Mr Van Der Woude had been specifically informed that the Applicant would be studying during that period. If the 12 June 2023 interaction is considered the commencement of the show cause process, then there were only 4 working days of the Applicant not being on leave for him to create the 'plan' to address the issues with his performance. I consider that this is not indicative of an "ample" opportunity, as set out in the Respondent's submission, but coupled with the Applicant's account of the 26 June 2023 'meeting' I consider it sufficient to have constituted two opportunities for the Applicant to realise he was being performance managed and demonstrate an understanding of the Respondent's requirement for improvement.

(d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist in any discussions relating to dismissal

[60] The Respondent did not refuse to allow the Applicant to have a support person. This is a neutral consideration.

(e) Was the Applicant warned about unsatisfactory performance before dismissal

[61] With respect to warnings, the AIRC noted that "a mere exhortation for the employee to improve his or her performance would not be sufficient."[9] The Respondent submitted that what the Respondent did to impress upon the Applicant the seriousness of his underperformance and the need for him to improve went far beyond "mere exhortation" for him to improve.

[62] The case of *Bartlett v Ingleburn Bus Services Pty Ltd T/A Interline Bus Services*[10] discussed how repeated conduct (or in this case, repeated failure to improve) affects the balancing of section 387 factors:

> "[41]…If Mr Bartlett had been dismissed for a single instance of misconduct, this might be sufficient to "tip the balance" in favour of a finding that the dismissal was unfair. Regrettably, however, he engaged in a course of unacceptable conduct over a long period of time, and his incapacity to accept responsibility for that behaviour and rectify his conduct in the face of numerous warnings from his employer inevitably led to his continued employment becoming untenable. In this respect, we emphasise the following findings made by the Deputy President, with which we agree:
>
> > [27] The Applicant's evidence that during his employment he was not subject to any "major" poor performance issues is untenable. In my view, on the evidence, it is unquestionable that the Applicant wilfully engaged in the conduct …. The fact that the Applicant seeks to explain away, or otherwise downplay, the significance of these incidents (to the Respondent, and in these proceedings) cannot alter the fact that this conduct occurred. Nor can it alter the fact that such conduct, in my view, amounts to repeated instances of misconduct to which the Applicant received written warnings …"
>
> (emphasis added)

[63] In *Bowen v Cape York Grassroots Aboriginal Corporation*[11] the requirement to consider warnings, regardless of whether they were mentioned as part of the show cause or termination correspondence was summarised as follows:

> "[98] In *Newton v Toll Transport* it was established that "the Commission is required to conduct an objective analysis of all relevant facts in determining – on the basis of the evidence in the proceedings before it –whether there was a valid reason to dismiss…."
>
> [99] Further, in *Virgin Australia Airlines Pty Ltd v Blackburn* it was summarised that prior warnings form part of the factual matrix that existed at the time of dismissal and the Commission must consider them when determining whether a valid reason existed for the termination. This is so even if those facts do not appear explicitly in the Show

> Cause notice. It becomes relevant to the overall weighing exercise performed with the section 387 factors in determining whether the decision was harsh unjust or unreasonable."

[64] In this case, there was no formal process at all, and no formal warnings. Although, several emails of the Respondent to the Applicant regarding clarifying expectations or the management meetings where the specific failure of the Applicant to meet labour targets was discussed could be considered as the Applicant being on notice. The poor performance being noted by the Respondent as early as December 2022 must be considered as part of the full factual matrix.

[65] In considering a performance record which does not have formal warnings noted, but prior issues are known to the parties and raised in an unfair dismissal matter, Commissioner Cirkovic noted in *Maxitanis v Department of Justice and Community Safety*[12]*:*

> "[82] I do not make any findings in relation to the conduct relating to each of the matters in the Applicant's performance history, however, on the basis of the material before me, though there is no formal written warning or disciplinary action recorded against the Applicant, I cannot be satisfied that the Applicant's performance history is "exemplary" as described by the Applicant"

[66] On appeal, the decision was quashed and the Full Bench stated:

> "[72]…However there was no finding on either of these earlier occasions that Mr Maxitanis had used unreasonable, unnecessary or excessive force, and on the evidence that appears to have led Mr Maxitanis to consider that his conduct in these earlier incidents was compliant with DCI 1.13. Absent evidence that Mr Maxitanis had in clear terms been warned that he had engaged in conduct which was improper and not to be repeated, this must be treated as a matter with neutral weight."[13]
> (emphasis added)

[67] Therefore, absent specific evidence that the Applicant was specifically warned, I cannot consider any of the above mentioned actions of the Respondent as warnings, and therefore there were no warnings related to the conduct the Applicant was dismissed for. This factor weighs in favour of the Applicant.

(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

[68] The Form F3 response to the application filed by the Respondent said it had 28 employees.

(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

[69] The Respondent has no dedicated human resources staff. In *Gates v Jordan Transport Pty Ltd*,[14] Commissioner Richards found that the very limited human resource management

resources at the disposal of the respondent provided an explanation in part for the perfunctory manner in which the respondent terminated the applicant's employment. This is a neutral consideration.

(h) Any other matters that the FWC considers relevant

[70] It is necessary to address the performance management process the Respondent claims to have undertaken with the Applicant. Despite there being a significant element of what appears to be wilful blindness of the Applicant to the issues with his performance, I also consider that there was some deficiency in Respondent's process.

[71] The Respondent submitted that while the process was not perfect, it in substance provided the Applicant with procedural fairness because he was well aware of the performance issues, and he had sufficient time and opportunity to respond to those concerns. The Respondent submitted that the Applicant ought to have been aware of the issues as early as December 2022, or if the Applicant's submission was the be accepted, as late as 12 June 2023, just prior to the Applicant's leave.

[72] Given the evidence tends to support the conclusion that the Applicant's entire nine-month employment with the Respondent was marked by poor performance, and the Applicant showed - and continued to show in his witness statement - a lack of insight into this under performance, it is very unlikely the Applicant's performance would have improved to a standard satisfactory to the Respondent. As such, the Applicant's employment would have likely ended due to poor performance regardless of any failings in procedures adopted by the Respondent.

CONCLUSION

[73] I have weighed each of the considerations under section 387 of the Act. I have concluded that the Respondent had a valid reason for the termination of the Applicant's employment, and despite there being some issues concerning the procedures adopted by the Respondent in terminating the Applicant's employment, I have determined in weighing each of the matters that I am required to consider under section 387 that the termination of the Applicant's employment was not harsh, unjust or unreasonable in all of the circumstances. On that basis the application for unfair dismissal remedy is dismissed. An order to this effect will be issued separately and concurrently with this decision.

COMMISSIONER

Appearances:

Mr T Allan on behalf of the Applicant.

Ms B Mendelson of counsel instructed by Mr H Procter on behalf of the Respondent.

Hearing details:

2023
Brisbane (via Microsoft Teams)
25 October.

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[1] (1995) 62 IR 371 at 373.

[2] *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14].

[3] [2023] FWC 1391.

[4] [2023] FWCFB 144.

[5] [2020] FWCFB 4448.

[6] *Quattrocchi v Monsanto Australia Ltd* [2009] FWA 882.

[7] *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200 at [26].

[8] Ibid.

[9] *Fastidia Pty Ltd v Goodwin*, Print S9280 (AIRCFB, Ross VP, Williams SDP, Blair C, 21 August 2000 at [44].

[10] [2020] FWCFB 6429.

[11] [2023] FWC 1198.

[12] [2020] FWC 2019.

[13] *Maxitanis v Department of Justice and Community Safety* [2020] FWCFB 4529.

[14] [2003] AIRC 1011 at [92].