DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Tomaso Edwards Moro
v
Insider Au Pty Ltd
(U2023/8953)

COMMISSIONER MCKENNA SYDNEY, 22 DECEMBER 2023

Application for an unfair dismissal remedy

[1] Tomaso Edwards Moro ("applicant") has made an application, pursuant to s.394 of the *Fair Work Act 2009* ("Act"), in which he seeks an unfair dismissal remedy in relation to his termination of employment by Insider Au Pty Ltd ("respondent" or "Insider").

Preliminary matters

[2] As to the initial matters to be considered, as set out in s.396 of the Act, there was no issue, and I otherwise find: the application was made within time; the applicant is a person who was protected from unfair dismissal; the respondent is not a small business, with the result that consideration of the *Small Business Fair Dismissal Code* does not arise; and the termination of employment was not a case of genuine redundancy.

[3] In the preliminary stages of proceedings, the applicant self-represented (together with his mother, Ms S Edwards, participating as his support person). The respondent was initially represented by a law firm, but that firm gave notice on 23 November 2023 that it had ceased to act for the respondent. The respondent's materials were filed and served by an Insider "Legal Counsel" under cover of an email advising that the submission "was carried out from the operational HQ in Turkey where our global legal team is located" (being a matter I will return to, for example, in connection with the size of the respondent's operations). In the proceedings on 29 November 2023, Ms Edwards represented the applicant and the respondent was represented by Mr Tunc Bolluk, Regional Director. Given that both parties' representatives were not lawyers or paid agents and/or did not otherwise have experience as representatives before the Commission, the proceedings on 29 November 2023 were conducted with a minimum of formality. Evidence was given by the applicant, Mr Bolluk and Trent Olsen (Digital Growth Manager of the respondent); each was cross-examined, albeit very briefly in the case of Mr Olsen. The case was heard in less than half-a-day.

Background

[4] The respondent was described in the Form F3 – *Employer response to unfair dismissal application* as being an "E-Commerce Support and Customer Service Solution Provider". The respondent has 16 employees, but the overall count is 1,015 employees when associated entities are taken into account. The applicant commenced employment with the respondent on 8 August 2022 on a full-time permanent basis, as a Digital Growth Associate. On 31 August 2023, Mr Bolluk had a telephone discussion with the applicant in which he relevantly stated to the applicant words to the effect that "It is best to part ways" and asked the applicant to write a letter of resignation indicating that his last day would be the following day, Friday, 1 September 2023. The applicant declined to resign. It at least appears, from an email the applicant sent to Mr Bolluk on 1 September 2023, that the applicant had said during the discussion on 31 August 2023 that he would "be happy to accept the termination on the basis that [his] notice period was paid in order with [his] contractual agreement". It appears the dismissal took effect on 1 September 2023 - which was when the applicant's access to the respondent's IT systems was cut off and the applicant received oral advice from Mr Bolluk and/or emailed advice from the respondent's HR section advising him that he would receive two weeks' pay in lieu of notice.

[5] For his part, the applicant contended that not only was he was a satisfactory employee, but that he was a high-performing employee – as evidenced by having received awards from the respondent for achieving the highest performance out of the respondent's Sales Development Representatives in both Quarter 1 and Quarter 2 in 2023. The applicant's case was that he had not received any prior warning/s, or similar, about any conduct or performance-related issues to the time he was dismissed; and nor was he advised of the reasons for dismissal during the discussion on 31 August 2023 – apart from a comment relating to having worked from home instead of attending the work premises on an in-office day. The applicant considered that: (a) the dismissal was substantively unfair for want of a valid reason for the dismissal; and (b) there was a denial of procedural fairness because, for example, he was not given any prior warning/counselling; he was not given any prior notice of the purpose of the discussion on 31 August 2023; and he was not given the opportunity to have a support person present during the discussion on 31 August 2023. The applicant further submitted that the respondent's failure to provide him with his proper entitlements concerning notice on termination of employment compounded matters, i.e., the respondent paid the applicant two weeks' pay in lieu of notice in circumstances where the applicant's employment contract, the evidence confirmed, otherwise identified a notice period of eight weeks or an equivalent payment in lieu thereof.

[6] For its part, the effect of the respondent's case was that concerns were held about performance-related issues, conduct-related issues and attendance-related matters. The respondent's Outline of Submissions put matters as follows:

> "On August 30th, 2023; the employee was absent from work without prior notice, citing a tradesperson's visit. Attempts to address this issue were met with a dismissive response. Consulting with HR revealed numerous issues including frequent unexplained absences, poor collaboration, challenging behavior, and dishonesty. This led to termination discussions, where it became evident that the employee's commitment to the role had diminished. The employee was given the option to resign, considering their earlier expressed desire to do so. Clarification on the notice period was provided, and

> HR guidance was offered for further steps. Notably, the employee did not request a support person during subsequent meetings."

[7] The evidence of Mr Bolluk and Mr Olsen outlined certain matters in such respects. In particular, the respondent required employees' attendance at the office, rather than work-from-home, on Mondays and Wednesdays. However, the applicant had failed to attend the work premises on a number of these mandatory in-office attendance days, and the applicant had advised, as to the non-attendance, that, for example, he was not well enough to attend the office but instead would work-from-home. Mr Bolluk, in cross-examination evidence, said that had twice discussed the in-office attendance days with the applicant: (a) first, over coffee at a local coffee shop, around January or February 2023; and (b) second, again over a coffee at the coffee shop, around May 2023. Despite having canvassed matters concerning the in-office attendance days, there were further instances where the applicant did not attend the work premises on those in-office days – most relevantly, it appears, on a date proximate to the dismissal.

Statutory considerations

[8] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account certain cumulative matters specified in s.387(a)-(h) of the Act. I now turn to those matters.

(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)

[9] I am not satisfied that there was a valid reason for the respondent to dismiss the applicant related to his capacity or conduct (including its effect on the safety and welfare of other employees). Nothing arising from the evidence leads me to conclude that there was any capacity-related reason that would ground a valid reason for dismissal. The evidence of the applicant's achievement awards for Quarters 1 and 2 of 2023 speaks to his capacity to undertake his role of Digital Growth Associate rather than suggesting any lack of capacity such as to support a valid reason for dismissal. In so concluding, I have considered the matters to which reference was made in the submissions and in the statements of evidence of Mr Bolluk and Mr Olsen – which I will return to later in the decision.

[10] As to the applicant's conduct in working from home on some of the in-office attendance days on Mondays and Wednesdays, there is nothing to indicate that the applicant's non-attendance was for reasons other than those he described. As to that, the applicant's evidence was that, "plain and simple", he did not want to work at the office on some of the days in question. His reasons in such respects were outlined in the contemporaneous communications – such as through the medium of WhatsApp messages, which were put into evidence by the respondent on the day of the hearing. An examination of the WhatsApp messages indicates that on the dates of 17 January and 2-3 February 2023, the applicant did not work at all, as he was off work entirely on sick leave – with the result that the in-office attendance issue does not relevantly arise as to those dates. I otherwise accept that the evidence indicates that the applicant advised, for a range of reasons, he was working from home on a number of in-office attendance days.

[11] I have also considered the evidence that the applicant worked from home on Wednesday, 30 August 2023. The applicant updated the work calendar to inform everyone that he was working from home that day, but did not communicate that by the more usual means of WhatsApp; and it was Mr Bolluk who otherwise initiated contact with the applicant about the non-attendance for that in-office attendance day. Relevantly, Mr Bolluk messaged the applicant to ask where he was. The applicant sent a message to Mr Bolluk which read: "Hi Tunc, I'm here with I have a tradesperson here fixing my dishwasher. I updated the calendar this morning." Mr Bolluk then sent a message to the applicant which read: "Sorry Tom, I'm calling BS on this. This is not good enough - you are supposed to give us a heads up WAY in advance as opposed to having me chase you are, like this." Shortly thereafter Mr Bolluk sent a further message to the applicant which read: "Will setup a time to speak with you."

[12] The office non-attendance/work-from-home on 30 August 2023 was referenced in the applicant's evidence concerning the discussion with Mr Bolluk on 31 August 2023 – and appears to have been the only matter to which reference was made in the discussion that day. That is, the applicant's evidence read:

> "12. On 30 August 2023, I did not go into the Sydney Office but worked from home instead as I had a tradesperson coming to my home and the tradesperson had only confirmed that they would be coming the evening before. In accordance with the process, I updated the team calendar to inform everyone that I was working from home.
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> 13. <u>On 31 August 2023, [Mr Bolluk] called me on the phone and said words to the effect of "you clearly don't want to come into the office. It is best to part ways" and informed me that my final day working for the Respondent would be on 1 September 2023.</u> [Mr Bolluk] then asked me to write a notice of resignation and, in that notice, state that my final day of work would be 1 September 2023.
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> 14. During the 31 August 2023 discussion I said words to the effect of "Oh you want to get it done that quickly?" I asked if Insider would pay my notice period. [Mr Bolluk] said "Yeah I don't think that's going to happen." I said "contractually you are obligated to pay my notice period." He said "alright, I'll speak to HR and get back to you tomorrow."
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> 15. During my entire time working for the Respondent, I was never given any warning about my performance at work, conduct or any other relevant issues. <u>The discussion with [Mr Bolluk] on 31 August 2023 came as a surprise and [he] did not provide any specific reason for the dismissal other than not coming into the office on 30 August 2023.</u> I was not at any point consulted, warned or given an opportunity to respond to the Respondent's decision to terminate my employment.
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> 16. On 1 September 2023, I received an email from the Respondent's HR Representative that said the Respondent would only pay me 2 weeks of notice rather than the 8 weeks of notice indicated on my contract of employment. …
>
> 17. On 1 September 2023, my access to the Respondent's work systems was terminated."
>
> (My underline)

[13] For his part, Mr Bolluk's evidence was that he outlined "several critical points" to the applicant in the telephone discussion on 31 August 2023. However, I prefer and accept the applicant's evidence that the only matter to which reference was made was the work-from-home on the in-office attendance day of 30 August 2023. Mr Bolluk did not, I find, give any reason to the applicant for seeking a resignation other than the applicant not coming into the office and working from home on Wednesday, 30 August 2023 (due to a tradesperson giving late advice to the applicant about attendance at his residence). I am not satisfied that the applicant's conduct in not attending the office and, instead, working from home on 30 August 2023 constituted a valid reason for dismissal. This is so even considering that it is a matter of common ground that in-office attendance days had been broached by Mr Bolluk in January or February 2023 over coffee with the applicant as part of a broader, informal work-related conversation. In circumstances where a second coffee shop discussion about in-office attendance around May 2023 was not referred to in either the respondent's Outline of Submissions or Mr Bolluk's evidence-in-chief, I find it did not occur, more particularly given the otherwise sometimes extravagantly-asserted allegations of supposedly repeated instances of firm warnings supposedly given to the award-winning employee about all manner of things over several months. That is, reference was made in the respondent's materials only to advice about the in-office days during the initial on-boarding and in early-2023.

(b) Whether the person was notified of that reason

[14] I am not satisfied, for the purposes of the s.387(b) of the Act, that the applicant was notified of the reason for his dismissal in the sense considered in *Crozier v Pallazzo Corporation Pty Ltd* (200) 98 IR 137, as affirmed in cases including *Mark Bartlett v Ingleburn Bus Services Pty Ltd t/a Interline Bus Services* [2020] FWCFB 6429, or that he was otherwise notified. The evidence around the first coffee shop conversation between the applicant and Mr Bolluk in January or February 2023 about in-office days just does not rise to describing the type of notification ordinarily understood, on the authorities, to be of the type contemplated by s.387(b) of the Act. I am not satisfied that the applicant was given any notification that he may be dismissed on account of in-office attendance or any other matter.

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

[15] Mr Bolluk's evidence was that, after the applicant worked from home on 30 August 2023, the following relevantly occurred: "After consulting with our HR team, we reached a mutual understanding that the Applicant's commitment to their role was lacking, leading to the decision to proceed with termination." The applicant was not given an opportunity to respond to any reason related to his capacity or conduct. That is, matters were identified perfunctorily to the applicant on 31 August 2023 on the basis of advice that it was "best to part ways" coupled with Mr Bolluk seeking a written resignation from the applicant to be effective the following day, 1 September 2023 (which the applicant declined to accede to). The dismissal was then effected by the respondent on 1 September 2023 in connection with the advice to the applicant about his payment in lieu of notice coupled with the removal of the applicant's access to the respondent's IT systems. The matter of the termination of the employment as the (only) outcome had been pre-determined as between the respondent's HR team and Mr Bolluk apparently on the basis of their "mutual understanding" that the applicant's commitment to his role was (allegedly) lacking.

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

[16] There does not appear to be any dispute that, in the telephone discussion on 31 August 2023, Mr Bolluk relevantly advised the applicant that it was best to part ways and sought from him a written resignation to take effect the following day, Friday, 1 September 2023. This was the only discussion relating to the dismissal of the applicant and, because of the way matters unfolded, constituted, reasonably self-evidently I would think, an unreasonable refusal by the respondent to allow the applicant to have a support person present to assist at any discussions relating to dismissal. Indeed, on the evidence it appears there were no discussions about a dismissal, as such. Rather, it is perhaps more accurate to say that the discussion on 31 August 2023 turned on Mr Bolluk seeking a resignation from the applicant.

[17] I should also note that the respondent's outline of submissions asserted, in part, as follows:

> "… The employee was given the option to resign [in the discussion on 31 August 2023], considering their earlier expressed desire to do so. Clarification on the notice period was provided [on 1 and 2 September 2023], and HR guidance was offered for further steps. <u>Notably, the employee did not request a support person during subsequent meetings</u>." (My underline)

[18] Despite what was written in the respondent's submissions, there was no evidence in either party's case of any (relevant) meeting/discussion other than the "best to part ways" discussion on 31 August 2023. What next transpired after that discussion was the cessation of the applicant's access to the respondent's IT systems, a telephone conversation with Mr Bolluk advising the applicant that the human resources section had determined to provide two weeks' pay in lieu of notice and emailed communications between the applicant and Insider's People and Culture Manager about matters concerning payment in lieu of notice. Thus, there was no evidence about any subsequent meeting or meetings as adverted to in the respondent's submissions, albeit there is a suggestion that there was a conversation between the applicant and Mr Bolluk at some point before 1.02pm on 1 September 2023 in which Mr Bolluk informed the applicant that the respondent's HR personnel were prepared to provide two weeks' pay in lieu of notice.

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

[19] The dismissal was not, I find, identified as being related to unsatisfactory performance in Mr Bolluk's telephone call to the applicant on 31 August 2023. The respondent did not issue any termination letter advising of any reason or reasons for the dismissal related to unsatisfactory performance (or any other reason). Although the initial Form F3 Employer Response, as well as the respondent's evidence and submissions in the proceedings, sought to raise unsatisfactory performance-type issues, I note the following (uncontested) matters as set out in the applicant's submissions:

> "12. … I had been recognised by the Respondent for my exemplary performance, including:
>
> a. Being awarded for achieving the highest performance out of the Sales Development Representatives of the entire global Insider team for Q1 2023;
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> b. Achieving the Highest SAO Quota Attainment out of the global team for the period of Q1 2023;
>
> c. Achieving the Highest meeting to SAO ratio out of the global team for the period of Q1 2023.
>
> d. Achieving the biggest pipleline [sic] created out of the entire global team for Q1 2023.
>
> e. Being awarded for achieving the highest performance out of the Sales Development Representatives at of the entire global Insider team for Q2 2023;
>
> f. Being paid bonuses for high performance for the period(s) of Q1 2023 & Q2 2023, with $7,523.88 & $15,706.25 respectively for each period.
>
> 13. In any event, I had never been warned about any unsatisfactory performance before the dismissal."

[20] The respondent's "Outline of Submissions" identified at paragraph 3c that the reason for the applicant's dismissal was "Poor work performance". If the dismissal arose against the background of unsatisfactory performance-type considerations, as the respondent now seems to contend, the applicant appears to have been a notably high-achieving employee not only locally but in the context of Insider operations globally. Moreover, as to the applicant's oral advice on 9 August 2023 to Mr Bolluk that he was planning to travel and would resign from his position with four weeks' notice (which, I note, was short of the contracted eight weeks' notice) the applicant's evidence was:

> "10. … The Respondent sought to extend my notice period for resignation to the end of September as I was only one of three Digital Growth Associates and they needed staff.
>
> 11. On the next day on 10 August 2023, I messaged [Mr Bolluk] by Slack and told him that I was no longer resigning because my travel plans were uncertain. [Mr Bolluk's] message was to the effect of "so you are not leaving this year, great to hear it". I replied to the effect of "No. I'm committed to driving results for the business." [Mr Bolluk] did not message anything about my performance or him having concerns about my performance or my attendance in the office." (My underline)

[21] The full text of the applicant's 10 August 2023 resignation retraction was in evidence, reading:

> "Hey Tunc, just wanted to follow up on our chat yesterday and I'd like to put that on ice. Plans are still up in the air and travel dates haven't been confirmed. In the meantime I'm still very much committed to being part of the team and driving results."

[22] To the extent the respondent now appears to rely on unsatisfactory performance-type reasons for dismissal, the evidence does not lead me to a conclusion that the applicant was unsatisfactory in his work performance. More specifically, for the purposes of s.387(e) of the Act, I find that no one within the respondent's/Insider's ranks had warned the applicant about any form of (allegedly) unsatisfactory performance before the dismissal. I make this finding notwithstanding the repeated submissions and the content of the respondent's statements of evidence addressing the provision of repeated warnings to the applicant in response to several months of allegedly unsatisfactory performance. That is, Mr Bolluk's evidence in cross-examination confirmed that he did not warn the applicant about any unsatisfactory performance and the applicant's evidence was that his own supervisor/line manager (Daniel Keegan – who did not give evidence) did not give him any warnings. As to Mr Olsen and the applicant, it is common ground that although they initially had a good working relationship that relationship deteriorated. I do not read the exchanges between them as amounting to warning the applicant. Rather, the exchanges between them show that each sent the other at least some objectively regrettably-worded communications - and, in any event and as shown in clause 2.a. of the employment contract, the applicant reported to Mr Keegan, not Mr Olsen. There is nothing arising from the evidence that it was within the scope of the reporting lines for Mr Olsen to give any warning/s to the applicant on behalf of the respondent; they were more akin to co-workers, albeit Mr Olsen appears clearly to have been, in the scheme of things, the more senior of the two employees. Last, there was no evidence that anyone from the People and Culture/HR section warned the applicant about any matter.

(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*

[23] The somewhat overlapping considerations in s.387(f) and s.387(g) of the Act require elaboration in this matter. The Form F3 Employer Response and the respondent's Outline of Submissions identified that the respondent had 16 employees, but the overall count was 1,015 employees when associated entities were taken into account.

[24] On and around 1 September 2023, there were exchanges of emailed correspondence between the applicant and a person whose signature block identified a title of "People and Culture Manager - Global Teams" about matters related to the dismissal as they concerned payment in lieu of notice periods. The People and Culture Manager referred to "our legal team" in the correspondence.

[25] One of the annexures to the applicant's statement of evidence was a chain of messages between the applicant and Mr Olsen. A footer on the chain of messages at least suggests that Insider has operations in about 30 different international locations, with the (non-alphabetical) list of cities or countries commencing with London and ending with Santiago. In the initial pre-hearing proceeding before me, Insider's instructing officer for the respondent's then-solicitors was identified as being "Legal Counsel"; she participated by telephone from Istanbul. In Insider

correspondence received by chambers shortly before the hearing, which addressed certain procedural matters, another person was also identified as being "Legal Counsel"; this differently-named person appears to have been based in Singapore. Thus, the respondent's local operations appear small, with only 16 employees; but the Insider group (however described) operates internationally and has in-house personnel with titles such as "People and Culture Manager – Global Teams" and "Legal Counsel".

[26] Given the size of the operations and the availability of access to people and culture/legal advice in effecting the dismissal, it is somewhat surprising that the dismissal was effected in the way it was. I infer that this may be attributable to a lack of understanding by overseas-based personnel of Australian employment-related principles/laws, or a failure to properly research such principles/laws. For example, on 1 September 2023, the People and Culture Manager – Global Teams sent emailed correspondence to the applicant which read (as written):

> "Hi Tom
>
> Thank you for your email.
>
> Actually I want to thank you for bringing this issue since we are looking into all contracts and Australian Employment Law yesterday as well.
>
> The situation is as follows, yes including your contract, we have some other contracts that have the wrong notice period written and our legal team is currently working on them to fix it. However, if you also look into Employment Law in Australia, the notice periods in local law is as follows:
>
> Therefore, you can clearly see that your notice period by law is 2 weeks. And to correct this, we have the exact clause written in ALL Australia contracts starting from 2023. You will see that the MAXIMUM notice period provided for an employee by law is 5 weeks and 8 weeks written in your contract is a typo and does not make sense in Australia local law anyway.
>
> We are obliged by law to pay the provided 2 weeks of notice to you as the law requires. If you have any questions about it, please do not hesitate to contact me.
>
> [Table identifying/paraphrasing minimum notice periods set out as part of the National Employment Standards in s.117(3)(a) of the Act.]
>
> Thank you,
>
> [Name block/contact details for the People and Culture Manager – Global Teams]".

[27] Certain matters set out in the preceding correspondence from the People and Culture Manager - Global Teams to the applicant are plainly untenable. The National Employment Standards identify *minima* and, of course, it is open to parties to agree to longer periods of notice - as was the case between the applicant and the respondent in the contract of employment that was co-signed in July 2022. That is, clause 9 of the employment agreement read as follows:

> "9. TERMINATION AND NOTICE PERIOD
>
> Each party shall be entitled to terminate this Agreement at any time by giving to the other Party an eight (8) weeks' notice in writing or by providing the payment in lieu of notice. …".

[28] Thus, the respondent was plainly bound by the employment contract to provide to the applicant eight weeks' pay in lieu of notice in connection with the dismissal (because the applicant's probationary period had long since passed, which provided for a shorter notice period at clause 4), rather than the two weeks' payment in lieu of notice that was provided - notwithstanding the People and Culture Manager's mixed and incorrect assertions about the operation of Australian employment laws and, on the other hand, alleged typographical error in the employment contract. There are aspects of the contract of employment which would be in disconformity with the ordinary operation of Australian employment laws (e.g., ss.324-326 of the Act as to matters including unlawful deductions). While it is unnecessary for the purposes of this decision to fully catalogue the matters, Insider/the respondent would be well-advised to have its template contract/s reviewed by a person or organisation familiar with Australian statutory and common law precepts, as well as Australian employment contract law, so as not to fall into avoidable error.

(h) Any other matters that the Commission considers relevant

[29] Because the applicant was represented in the hearing by his mother and the respondent was represented by Mr Bolluk - neither of whom has had any experience in the conduct of proceedings before the Commission - matters such as witness cross-examination were not approached in a way that might be expected with, for example, experienced industrial advocates. As such, there are certain matters of contest in the cases that the parties advanced which are, in effect, unresolvable in the usual way given, for example, that propositions/challenges were not put to the witnesses in cross-examination in relation to at least certain key matters. But what I can comfortably conclude, and find, is that there were elements of, put at its lowest, embroidery in the assertions now advanced in the respondent's case about what an unsatisfactory employee the applicant was considered to have been. I just do not accept that there was the litany of performance-related and conduct-related concerns of the type now forcefully advanced in the respondent's case. The applicant was a high-achieving employee as evidenced by his awards and bonuses. Moreover, it is entirely counterintuitive that Mr Bolluk would have so readily accepted the applicant's 10 August 2023 withdrawal of his resignation if there were such concerns, noting that this occurred just a matter of weeks before the dismissal was effected. I similarly do not accept the proposition that any or all of these purported concerns now advanced in the respondent's case were ever put to the applicant – save to say that:

- in one coffee shop conversation in early-2023, Mr Bolluk informally broached with the applicant the topic of the in-office attendance days and conveyed the company's expectations; and

- there were some fairly terse exchanges of electronic communications towards the end of the employment relationship as between Mr Olsen and the applicant (but, as noted earlier, the applicant reported to Mr Keegan not Mr Olsen). Moreover, it cannot go

unremarked that the tenor of some of Mr Olsen's own written communications to the applicant was unprofessional and unedifying.

[30] I consider that the applicant's earlier advice that he was intending to resign to travel (albeit the swift withdrawal of the resignation was equally swiftly accepted by Mr Bolluk on behalf of the respondent - and in circumstances where, of course, an employer is not bound to accept a purported retraction by an employee of a resignation) and/or intending to leave the employment as he was planning to travel at some point probably, for the respondent, cast a pall over the relationship as to what might have been considered as the applicant's longer-term commitment to the business. I also consider that the irritant of the applicant's unilateral advice that he would again be working from home on 30 August 2023, being an in-office day, was the trigger for the dismissal against the backdrop of the previous exchanges about resignation and/or Mr Bolluk's understanding that the employment relationship was, in any event, going to conclude by resignation at some point into the future. Among other matters, Mr Bolluk's evidence was that he "conveyed to the Applicant that it was clear they were no longer invested in their position here and that parting ways seemed the best course of action." The respondent's Outline of Submissions included text to similar effect which read that "… the Applicant's verbal resignation also shows that the employee had lost his sense of loyalty to the Respondent." It is apposite to note that, in the hearing, the matters addressed in Mr Bolluk's cross-examination about his employment-related concerns had as their focus the in-office attendance days and the applicant's non-attendance – rather than having any particular focus on performance or conduct issues. Mr Bolluk conceded in cross-examination that he had not given any warning to the applicant.

[31] I have considered the evidence that the relationship between the applicant and Mr Olsen, which initially was professional and cordial, deteriorated towards the end of the employment relationship; and the applicant conveyed concerns to Mr Bolluk about his interactions with Mr Olsen. The applicant submitted that he had been dismissed after making a complaint to Mr Bolluk on 7 August 2023 about Mr Olsen's "bullying style of management" and that dismissal was the "easiest way" for the respondent to deal with that issue. However, I have not been satisfied that the dismissal was effected for this reason or reasons. As outlined earlier, the dismissal appears to have been more directly related to: the earlier resignation; concerns held by the respondent or Mr Bolluk, or both, about the applicant's longer term commitment to the business where he had uncrystallised travel plans; and the applicant's failure to attend the in-office day on 30 August 2023 (coupled with the applicant's explanation about a tradesperson's attendance – which Mr Bolluk characterised as "BS").

Conclusion - Merits

[32] Absent a valid reason for the dismissal and given that the dismissal was bereft of procedural fairness, I am satisfied, on a weighing of all matters, that the dismissal was harsh, unjust and unreasonable – and that the applicant was, thereby, unfairly dismissed. I am also satisfied that the applicant should have an unfair dismissal remedy in his favour. In lieu of reinstatement (which was not sought by the applicant), an order for compensation is appropriate.

Compensation

[33] The applicant sought three months/12 weeks' pay as a remedy (he also sought the six weeks' underpaid notice period, but an order in such respects would be beyond jurisdiction). In determining an amount of compensation, the Commission must take into account all the circumstances of the case including the following cumulative matters identified in s.392 of the Act. I now turn to those matters.

(a) The effect of the order on the viability of the employer's enterprise

[34] While the respondent submitted that the application should be dismissed in its entirety, no evidence or submission was advanced that an order for compensation would have any effect on the viability of the respondent's enterprise. The respondent's Outline of Submissions was silent in relation to that matter. The respondent is part of the global Insider group of companies, which appears to have personnel such as an in-house legal team and the like. The oral submissions for the applicant also referred to matters concerning the sizeable financial turnover of the respondent and Insider more broadly. On what was before me, I am satisfied that an order for compensation would not affect the viability of the respondent's enterprise.

(b) The length of the person's service with the employer

[35] The applicant was employed by the respondent in the period 8 August 2022 to the date the dismissal took effect on 1 September 2023. The length of service was just over one year. It seems to me that this length of service does not support either reducing or increasing the amount of compensation to be ordered.

(c) The remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed

[36] But for the dismissal, the applicant would have received at least his base wage or salary of $68,400 a year (as of 1 May 2023), plus superannuation. The applicant would have been likely to receive additional payments under the respondent's Digital Growth Associate Bonus Plan or similar. As noted earlier, the applicant was paid performance-related bonuses of $7,523.88 (Quarter 1 of 2023) and $15,706.25 (Quarter 2 of 2023). It is likely that the applicant would have continued to receive bonus-type payments in addition to his base wage or salary if he had not been dismissed. It is not possible to determine with specificity what the additional payments would have been. However, over the course of the proceedings, the applicant advanced an indicative figure of $2,208.00 as being a typical week's wage. It seems to me to be appropriate to use this figure as the remuneration that the applicant would have received, or would have been likely to receive, considered on an averaged-type weekly basis, if he had not been dismissed. This is so notwithstanding the matters outlined in the respondent's Outline of Submissions referring to matters including a base weekly salary of $1,425 plus a "smart work model" of an additional $88.83 a month, and the respondent's submission that "… although the quarter ended with a calculated bonus of 0 AUD due to his termination before the [Quarter 3] completion, considering the underperformance due to missing this deal closure, it is assessed that he would not be eligible for a bonus."

[37] I consider that the employment would not have come to an end until at least after the end of 2023. That is, the evidence indicated that after the applicant retracted his 9 August 2023 resignation advice, Mr Bolluk sent the applicant a message to the effect of "so you are not leaving this year, great to hear it" and the applicant replied "… I'm still very much committed to being part of the team and driving results." Thus, it may be drawn from this exchange that, on or around 10 August 2023, the parties expected that the employment would have been likely to continue at least for the rest of 2023 – with the possibility of a termination of employment by resignation (rather than dismissal) in 2024, or potentially beyond 2024, if and when the applicant shored-up his tentative travel arrangements.

(d) The efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal

[38] The applicant has made attempts to find alternative employment since the dismissal - described as involving "multiple" applications through Seek and LinkedIn. Therefore, the applicant has made efforts to mitigate the loss suffered by him because of the dismissal. At the time of the hearing, and despite the attempts to find another job, the applicant's endeavours had been unsuccessful; he explained that he has a specialised skill-set and that it had taken him some time to, for example, obtain his position with the respondent in the first place. I am satisfied that the applicant has taken reasonable steps to mitigate his loss in applying for jobs, albeit he had not yet found a job at the time of the hearing.

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

[39] The applicant remained unemployed at the time of the hearing, and hence had not received any remuneration from employment or other work since the dismissal; and there was nothing before me upon which I could determine any remuneration from employment or other work to the making of the order for compensation considered in the context of s.392(2)(e) and s.392(2)(f) of the Act.

(g) Any other matter that the Commission considers relevant

[40] There is an indication in an email that the respondent tendered on the day of the hearing that the applicant would not have, in effect, cavilled with the dismissal provided the respondent paid him in lieu of his contractual notice period. While this may be the case, the respondent did not make the proper payment in lieu of notice (it was six weeks' pay short) and, in one consequence, the applicant made an application for an unfair dismissal remedy and otherwise advanced a persuasive case that he was unfairly dismissed considering the substantive merits of the case and the procedural aspects of the dismissal that ensued after he declined to effect a resignation. This was not so much a case with the not-unfamiliar ultimatum of "resign or be dismissed", because this ultimatum was not given by Mr Bolluk. Rather, after the applicant declined to resign, he next found the following day that he did not have access to the respondent's IT systems and he otherwise received advice about a unilateral decision by the respondent to reduce the payment in lieu of notice from eight weeks' pay to two weeks' pay.

[41] As to other matters addressed in the Act:

- I have not been satisfied that misconduct by the applicant, including what is now alleged to have been "dishonesty", contributed to the respondent's decision to dismiss him. As such, there is no basis to reduce the amount of compensation on account of any misconduct (s.392(3)).

- The amount that the respondent will be ordered to pay to the applicant does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused by the manner of the dismissal (s.392(4)); and it does not exceed the compensation cap (s.392(5)-(6)).

[42] Last, to avoid doubt, the amount of compensation as an unfair dismissal remedy in this matter does not seek in any way to address the underpayment of six weeks' pay in lieu of notice (and could not properly do so, in any event). However, I comment that the respondent should promptly correct the underpayment without the need for the applicant to have to separately commence recovery action in circumstances where the respondent is plainly in breach of its obligations under the contract of employment concerning the payment in lieu of notice.

Conclusion

[43] Considering all matters (including consideration, for myself, of the application of the Sprigg formula – albeit not addressed in this decision because neither party actually advanced any submissions around this matter), it is appropriate to make an order that the respondent pay to the applicant the claimed amount of 12 weeks' pay calculated at a weekly amount of $2,208.00 gross, subject to such tax as may be appropriate, by no later than 14 days after the date of this decision. An order in such respects will issue in conjunction with these reasons.

[44] The proceedings are concluded.

<u>COMMISSIONER</u>

Appearances:

S Edwards for the applicant
T Bolluk for the respondent

Hearing details:

2023.
Sydney:
29 November.

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