



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Diandong Ren

v

**The Commonwealth of Australia as represented by the Bureau of
Meteorology T/A Bureau of Meteorology**
(U2023/5946)

COMMISSIONER CONNOLLY

MELBOURNE, 29 DECEMBER 2023

Application for an unfair dismissal remedy – dismissal not found to be harsh, unjust or unreasonable - application dismissed.

[1] On 3 July 2023, Mr Diandong Ren (the Applicant) made an application to the Commission for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act). Mr Ren alleges his dismissal from the Commonwealth of Australia as represented by the Bureau of Meteorology trading as the Bureau of Meteorology (the Respondent) was harsh, unjust or unreasonable. The Respondent denies these allegations.

[2] I have found that the termination of Mr Ren’s employment was not harsh, unjust or unreasonable within the meaning of s.387 of the Act. By reason of s.385(b), Mr Ren was not unfairly dismissed. The reasons for this decision follow.

Initial Matters

[3] Consideration as to whether Mr Ren’s dismissal was harsh, unjust, or unreasonable cannot occur unless the Commission is first satisfied that the provisions of s.396 of the Act have been met. In the present case, this was uncontested, and I am satisfied that Mr Ren’s application was made within the 21-day required timeframe by s.394(2), and, as an employee of the Commonwealth of Australia, Mr Ren is protected from unfair dismissal within the meaning of s.382. A question of whether Mr Ren’s dismissal was a case of genuine redundancy did not arise and the Respondent was not a small business employer within the meaning of s.23 of the Act. Accordingly, the question of compliance with the *Small Business Fair Dismissal Code* did not arise. Therefore, I am satisfied that all the requirements of s.396 of the Act have been met and the Commission can proceed to determining the merits of Mr Ren’s application.

Background

[4] Mr Ren commenced employment with the Bureau of Meteorology on 25 September 2018. He was engaged as a non-ongoing Australian Public Service (APS) employee under s.22(2)(b) of the *Public Service Act 1999* (Cth) [the PS Act] as a Research Scientist with the

classification of Executive Level 1 – BOM Broadband 3 in the Satellite Data Assimilation team in the Respondent’s Melbourne office.¹ He was initially employed as a non-ongoing APS employee up to 12 August 2020. His contract was subsequently extended for a further period from 13 August 2020 and was due to end on 11 August 2023.²

[5] As an APS employee, Mr Ren was subject to all relevant policies, procedures and codes as determined by the Respondent and governing legislation, including:

- (a) The APS Code of Conduct, in s.13 of the PS Act, and the APS Values in s.10;
- (b) The Acceptable use of Information Systems Policy;
- (c) The Secure Mobile Computing Procedure;
- (d) The Working from Home Procedure; and
- (e) The *Bureau of Meteorology Enterprise Agreement 2018*.

[6] At the induction of his employment, the Applicant was made aware of these policies, their requirements and obligations on him. He was further made aware of his obligation to ensure he was familiar with the policies, comply with them, and this was reinforced by the requirement to complete refresher training on an annual basis.³

[7] The Applicant commenced a period of approved recreational leave on 23 August 2022 to 16 September 2022.⁴ However, on 28 September 2022 the Applicant’s Supervisor made a complaint to the Respondent that the Applicant had not returned to work onsite at the Melbourne office, that he was still overseas but representing himself to be working in Australia and was unresponsive during work hours. Subsequently, on 29 September 2022 the Respondent issued the Applicant with a request for information regarding concerns Mr Ren had accessed his work IT account from overseas and that he had misinformed his manager as to his movements. The request sought the Applicant provide evidence of his return to Australia.⁵

[8] On 20 October 2022, the Applicant was further issued a written direction to provide, by 24 October 2022, evidence of his travel dates to the United States by means including requesting his travel records from the Department of Home Affairs. The Respondent claims the Applicant chose to not comply with its lawful and reasonable direction by not providing the required evidence or at least demonstrating steps taken to obtain such information.⁶ Accordingly, on 25 October 2022, the Respondent issued the Applicant with a Notice of Suspected Breach of the APS Code of Conduct and commenced a process of formal investigation and reporting pursuant to the APS policies and procedures. The Applicant was invited to respond by 4 November 2022.

[9] The allegations under investigation are summarised as follows:⁷

- Using a personal device on Bureau networks without first obtaining permission;
- Failure to comply with the conditions of Working From Home (WFH) arrangements by choosing to work from overseas;
- Making a false statement to a manager regarding his whereabouts; and
- Failing to comply with a lawful and reasonable direction.

[10] On 21 December 2022, a draft report on the investigation was provided to the Applicant for him to comment on and provide any substantiating evidence which will be considered before the report is submitted.⁸ The Applicant responded that he “truly did not recall” his travel details and “you have ways to dig them out”.⁹ In response, the Applicant was informed a decision would be made on the information available to them and the Respondent does not have the mechanism to obtain the overseas travel information meaning the Applicant was responsible for providing his travel details to substantiate his rebuttal of the allegations. The Applicant provided the following “*Except for working from home (in the USA) using the machine with software installed by BoM IT staff, I have not logged on to the Bureau. I hope you take away the unfounded charges relating to unauthorized log-ins. All are legal logons.*”¹⁰

[11] Following submission of the investigation report, the Respondent informed the Applicant on 17 January 2023 its preliminary view is to accept the report’s findings, provided the Applicant a copy of the report and invited the Applicant to formally respond.¹¹

[12] The Applicant responded on 19 January 2023 including:¹²

“As it started from a scheduled PCL travel, and I did not bring any BoM device with me. How can I misused the BoM property?”

Also I traveled according to a schedule discussed with my Manager, I am still unaware what is wrong. You may cast this spell on my head but I wish to know why?”

[13] On 14 February 2023, a proposed Notice of Suspected Breach of the APS Code of Conduct was issued, it noted that in considering the evidence and absence of detailed response from the Applicant, on the balance of probabilities, they are satisfied the Code of Conduct was breached. Accordingly, the Applicant was given the opportunity to comment and provide any new information for consideration.¹³ On the same day, the Applicant was suspended in accordance with s.28 of the PS Act and Regulation 3.10 of the Public Service Regulations.

[14] At the conclusion of the investigation process, the Respondent determined the Applicant had breached the APS Code of Conduct and advised the Applicant of this in a Breach Decision Letter dated 30 March 2023. He was advised that the appropriate sanction would be considered by a Sanction Delegate in accordance with the APS Code of Conduct and s.15(1) of the PS Act.

[15] On 17 April 2023, the Applicant wrote to the Respondent advising he took leave in accordance with his leave request and that any delay in his return was caused by an interruption to his return flight and the contraction of Covid-like symptoms.¹⁴

[16] On 11 May 2023, the Respondent advised the Applicant the preliminary view of the Sanction Delegate in relation to an appropriate sanction was termination of employment. The Applicant was invited to comment by 18 May 2023.¹⁵

[17] On 24 May 2023, with the assistance and advice of his union, the Community and Public Sector Union (CPSU), the Applicant appealed to the Respondent to not terminate his employment, writing:¹⁶

“I acknowledge there are serious risks associated with accessing work systems through a personal device without adequate clearance. I now understand that although Bureau IT staff installed for me the work related apps for remote access, they did not grant me clearance to access the Bureau systems remotely even if it was for genuine work related purposes. As I have previously indicated to you, and believe, my actions demonstrate, I am a committed employee who deeply values my position and the opportunity to do significant and meaningful work.”

[18] On 22 June 2023, the Respondent issued the Applicant its Final Sanction Decision and notice of termination affirming its finding the appropriate sanction to impose in the circumstances is termination of employment.¹⁷

Legislation

[19] Section 385 of the Act outlines the meaning of unfair dismissal

“385 What is an unfair dismissal

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

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

Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388.”

[20] The legislative provisions relevant to this matter are set out in s.387 of the Act, which is as follows:

“387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

Materials Before the Commission

[21] Directions were issued to both parties on 29 August 2023. The Applicant was directed to file his materials on 11 September 2023 and 2 October 2023, in reply. The Respondent was directed to file their submissions on the 25 September 2023.

[22] Both the Applicant and Respondent sought orders from the Commission for the production of various documents in support of their respective positions that were considered and either accommodated through discussion, produced or not produced. To the extent it is relevant to the parties’ submissions they are included in their materials provided.

[23] The Respondent prepared a digital court book which was provided to the Commission and the Applicant at the commencement of proceedings on the morning of the Hearing. The Respondent clarified several of the Respondent’s policies were not replicated in their entirety at each reference point, but that a complete copy was included in the materials. The Applicant raised no objection and sought the inclusion of an email provided to my Chambers on 8 October 2023. There being no objection to the admission of these materials, I accepted the entirety of the court book as evidence in these proceedings.

Preliminary Matters

[24] Pursuant to s.397 of the Act, the Commission must conduct a conference or hearing to determine matters involving contested facts.

[25] The Respondent sought leave to be represented by Ms Rebecca Preston (of Counsel) and Ms Alison Spivey (Special Council). Having regard to the requirements of s.596 of the Act and circumstances of the matter, including that there were no objections, I granted the Respondent permission to be represented by a lawyer.

[26] Likewise, considering the circumstances of the Applicant, I determined it appropriate to proceed with a determinative conference as the most effective and efficient way to resolve the matter per s.399 of the Act.

[27] Accordingly, the matter proceeded by way of determinative conference on 9 October 2023 at the Fair Work Commission in Melbourne. The Applicant represented himself with the aid of a Commission allocated Mandarin interpreter for the purposes of the proceedings.

Witnesses and Observations on the Oral Evidence

[28] The differences between the Applicant and Respondent as to the evidence in this case are stark. Not only does this extend to the subjective evidence presented in the form of submissions or testimony, but also to copies of emails and records produced. It is the Applicant's contention that many of these materials are either fabrications or have been manipulated to discredit his case. Apart from his assertions, the Applicant has provided no relevant material evidence to support the Commission making this conclusion.

[29] The Respondent presented its materials in a manner that was both relevant with contemporary evidence and in support of the Commission making its conclusions.

[30] I assessed the merits of the evidence, testimony, submissions and materials before me, on the balance of probabilities as to the accuracy or otherwise. To the extent necessary, I will refer to these determinations in this decision.

[31] In addition to its materials, the Respondent provided 6 separate witnesses in support of its position. In proceedings, Ms Goodwin, Mr Lynch, Mr Su, Ms Smith and Ms Baker all provided sworn oral evidence to the Commission in support of their written witness statements. The Applicant has called no additional witness to support his application, but where relevant took the opportunity to question the witnesses.

[32] As a determinate conference, the parties were aware that I would be asking questions the Act requires me to as well as guiding the proceedings to the extent necessary and appropriate in the circumstances.

[33] The Applicant gave sworn evidence on his own behalf, and Mrs Preston led evidence on behalf of the Respondent. In regard to the Respondent's witnesses, I found they endeavoured to be of assistance to the Commission and provided their evidence in good faith.

[34] Whilst acknowledging Mr Ren was in a difficult position as both the Applicant and advocate in these proceedings, I did not find him to be of the same assistance. I observed that his perception of injustice and unfairness in what he perceived to have occurred influenced his evidence. Nonetheless, I accept that Mr Ren's evidence is his experience and perception of the circumstances. However, I am unable to favour his evidence to that of the Respondent because the objective facts support their version of events. As will become clear in the reasoning below, this is significant in my determination and consideration of all the circumstances of this case and materials before the Commission that the Applicant's dismissal was not harsh, unjust or unreasonable within the meaning of s.387 of the Act.

Consideration

Was the dismissal harsh, unjust or unreasonable?

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

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

[36] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter¹⁸ and now turn to each of these criteria below.

s.387(a) Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)

[37] In order to be a valid reason, the reason for the dismissal should be “sound, defensible, or well founded”¹⁹ and should not be “capricious, fanciful, spiteful or prejudiced.”²⁰ However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.²¹

[38] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.²² The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which result in termination.²³

[39] Vice President Ashbury (then Deputy President) summarised the relevant principles in relation to an employer’s onus of establishing that there was a valid reason for a dismissal on the balance of probabilities as follows in *Gary Mellios v Qantas Airways Limited* which was confirmed on appeal by the Full Bench.²⁴

“[17] In considering whether there is a valid reason for the Applicant’s dismissal, I am required to be satisfied on the balance of probabilities that he engaged in the alleged misconduct or in misconduct to which dismissal was a valid, sound and defensible response. I must be conscious of the gravity of the allegations and the ramifications for the Applicant if they are made out. However, the standard of proof does not change and the issues in dispute must be determined on the balance of probabilities. Put another way, it must be more probable than not that the Applicant engaged in the relevant misconduct.”

[40] I have applied these principles to the matter before me.

The Respondent's Position and Evidence

[41] The position of the Respondent is that APS employees hold a unique position in their employment and are required to uphold appropriate standards of conduct consistent with those reflected in the APS Code of Conduct. Their evidence is that on multiple occasions, the Applicant failed to conduct himself consistent with these obligations and knowingly or negligently engaged in multiple breaches of the APS Code of Conduct. They allege that the Applicant acted without honesty and integrity and demonstrated a distinct lack of regard to the policies and procedures applying to his employment. This resulted in a breakdown of the trust and confidence that was necessary for the Applicant's employment relationship with the Respondent to continue and provided a **valid reason** for the termination of his employment.

[42] The Respondent also submits, that the Applicant engaging in conduct the same or similar to the conduct that led to the dismissal, at the same time he was under investigation for this conduct, that were set out in its Further Allegations of Misconduct provide a **further valid reason** for the termination of his employment. They submit that this only serves to reinforce the seriousness of the Applicant's conduct and the likelihood that he would continue to act in the same or a substantially similar way should the Respondent make decisions relating to his employment, in particular his leave, that were not convenient to him, or he did not agree with.

[43] Summarising its position, the Respondent submits that it could not have confidence the Applicant would not continue to engage in misconduct in the future and that it was justified in terminating the Applicant's employment due to the nature and extent of the breaches of the APS Code of Conduct and the Respondent's policies and procedures. This was reinforced by the further allegations of misconduct and the approach the Applicant took to his employment obligations and the investigations into his misconduct.

[44] The evidence of the Respondent is that it followed a lengthy, fair and objective investigation process in accordance with the APS code and standards prior to its determination that the Applicant had engaged in the misconduct. This process provided the Applicant with every opportunity to present his case and repudiate the allegations against him and included:

- On 25 October 2022, notifying the Applicant in writing that it was investigating the Applicant for a breach of the APS Code, the details of the Allegations and providing the Applicant with an opportunity to respond;
- On 21 December 2022, providing the Applicant with a Draft Investigation Report containing findings of substantiated misconduct against the Applicant and providing him with a further opportunity to respond;
- On 17 January 2023, providing the Applicant with a Notice of Suspected Breach and finalised investigation report informing him that the Respondent proposed to accept the conclusions of the Investigation Report of substantiated misconduct and inviting him to provide a response;

- On 13 February 2023, informing the Applicant it was considering suspending him without remuneration and inviting him to provide a response;
- On 14 February 2023, providing the Applicant with an amended Notice of Suspected Breach clarifying the alleged breach of the APS Code and providing him with another opportunity to respond along with a Notice of Suspension;
- On 17 February 2023, providing the Applicant with details of further allegations of misconduct and breaches of the APS Code of Conduct being made against him and the commencement of a further investigation;
- On 30 March 2023, informing the Applicant of the final decision that he had breached the APS Code of Conduct and had engaged in conduct that was serious misconduct and that he would be subject to disciplinary action; and
- On 11 May 2023, informing the Applicant that the Respondent had formed a preliminary view that the appropriate disciplinary action was the termination of his employment and inviting him to provide reasons why this should not be the case.

[45] On 22 June 2023, the Respondent advised the Applicant of its final decision to terminate his employment with notice on grounds that it was found to be substantiated that he had engaged in serious misconduct in breach of the APS Code of Conduct and its expectations of employees, including that:

“1. Over the period 30 August to 28 September 2022, you used a personal device to access Bureau networks without first seeking the approval of the Chief Information Security Office (CISO).

2. Over the period 20 September 2022 to 28 September 2022 you were not present within Australian to undertake your duties, without first obtaining permission to work overseas.

3. On 29 September 2022, you knowingly made a false statement when you notified your manager, Chun Hsu Su, that you returned to Australia on or around 19 September 2022.

4. On 24 October 2022 you choose not to comply with a lawful and reasonable direction when you failed to act in accordance with the direction you were issued..... to supply evidence of the date of your return to Australia, on or around 19 September 2022.”

[46] The further allegations of misconduct that the Applicant is alleged to have engaged in and that the Respondent also relies upon as a **further valid reason** for the termination of the Applicant’s employment, included:

(a) that the Applicant failed to:

- i. Perform and deliver on agreed outcomes while working from home;
- ii. Maintain contact with the Applicant’s supervisor and team;

- iii. Ensure suitable communication methods were available to be contactable at home during agreed work hour;
 - iv. Advise his immediate supervisor and home base work delegate of any changes to, or affecting, the home base work site and arrangements.
- (b) That from the 6 February 2023, the Applicant failed to comply with the lawful and reasonable direction to undertake his work duties from his workstation in the Melbourne Office;
- (c) That on the 8 February 2023, the Applicant failed to Act with honesty and integrity when he told Dr Smith that he could not access Bureau IT systems because the password had expired, when it had not;
- (d) That on 8 February 2023, the Applicant failed to comply with a lawful and reasonable direction to provide medical evidence of his absence on personal leave;
- (e) That between 17 January and 8 February 2023, the Applicant provided false and misleading information that he was working from home in Melbourne when he was not;
- (f) That on 14 February 2023, the Applicant provided false and misleading information to the Sanction Delegate to indicate he was working from home in Melbourne when he was not;
- (g) From 1 February 2023, the Applicant again failed to comply with the Bureau's acceptable use of Information Systems Policy and Secure Mobile Computing Procedure and failed to use Commonwealth Resources in a proper manner by accessing the Respondents IT network from the United States.

[47] It is the Respondent's evidence, and it was not disputed, that the Applicant was aware of the standards and expectations placed on him as an APS employee as part of the APS Code of Conduct and other relevant policies and procedures. Relevantly, the APS Code of Conduct requires that:

- (a) section 13(1): An APS employee must behave honestly and with integrity in connection with APS employment;
- (b) section 13(5): An APS employee must comply with any lawful and reasonable direction given by someone in the employers Agency who has authority to give the direction;
- (c) section 13(8): An APS employee must use Commonwealth resources in a proper manner;
- (d) section 13(9): An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employees APS employment; and

- (e) section 13(11): An APS employee must at all times behave in a way that upholds APS Values (Ethical Value and Accountable Value) and APS Employment Principles, and the integrity and good reputation of the employees Agency and the APS.

[48] In relation to the Respondent's IT and cyber security policies and procedures, the Respondent's evidence, and it is not disputed, that the Applicant was made aware of these specific policies and requirements during his induction, provided ongoing access to the policies and completed annual refresher courses.²⁵

[49] The Respondent submits that between 19 November and 25 November 2021,²⁶ the Applicant was again made explicitly aware of these policies and processes, and the requirements of him to seek approval to gain access to the Respondent's IT systems from overseas. Further, the Applicant demonstrated his awareness of these requirements by making a formal application for approval to work from overseas which was considered and subsequently denied.

[50] On 25 July 2022, the Applicant made a request for 4 weeks recreation leave from 23 August to 16 September 2022, which was approved, with Mr Ren due to return to work onsite at the Melbourne Office from 19 September 2023. On 28 September 2022, the Respondent received an email from Dr Su, Mr Ren's then manager, expressing concerns about his lack of responsiveness to attempts to contact him after he was expected to return to work.

[51] It is the Respondent's evidence presented by Dr Su and Dr Smith (who was responsible for the Applicant's day to day supervision) that Mr Ren had not been seen in the Melbourne Office since 19 September 2022 and had not attended meetings, including those he was scheduled to Chair. Dr Su was concerned that Dr Ren had not returned to Australia and was attempting to work from overseas without the knowledge or approval of the Respondent.

[52] On 28 September 2022, Mr Scott Smith for the Respondent commenced preliminary enquiries in relation to Dr Su's complaint and concerns. A report of the Applicant's logins for the period 30 August – 29 September 2022 compiled for these purposes indicated Mr Ren was logging onto the Respondent's network from an IP address located in Austin, Texas during this period, up to and including on 28 September 2022.

[53] Ms Cassy Baker provided evidence for the Respondent as the Respondent's Manager, Cyber Security Operations (CSOC), that indicated a key feature of the Bureau's network is that employee logon sessions automatically time out after 10 hours, requiring the employee to log back in using Multi-Factor Authentication.

[54] Mr Smith's evidence is that based on this information, he formed a preliminary view that the Applicant may have been accessing his IT work account from overseas without authorisation and that he may have intentionally misinformed his supervisor, Dr Su, as to his whereabouts. On this basis, Mr Smith issued the Applicant a Request for Information seeking information from Mr Ren to address these concerns.

[55] In email exchanges produced as evidence for the Respondent between Mr Ren and Mr Smith between 7 October to 11 October 2022, the Applicant attributed his access to his work account from overseas to his personal computer have been "*left running python and unix*

scripts". Mr Ren also indicated that while he was on leave for this period, he had in fact been engaged in research relevant to his role and of benefit to his employer.

[56] In response, Mr Smith indicated what he was seeking from the Applicant was evidence of his travel arrangements in the form of ticket stubs, flight details or passport stamps. When the Applicant suggested other alternative forms of evidence such as his residential arrangements because he did not have access to his personal computer and travel details, Mr Smith's evidence is that he advised the Applicant how he could obtain his accurate travel records from the Department of Home Affairs.

[57] The Respondent's evidence is that Mr Ren did not make this request, nor did he provide Mr Smith with any reasons not to consider his initial concerns and preliminary views as to the Applicant's whereabouts, use of the Respondent's IT network and failure to provide his supervisor with accurate information had merit.

[58] During the life of this matter, the Respondent sought an Order from the Commission for the production of the Mr Ren's travel records from the Department of Home Affairs. This order was complied with and provided to the parties on Friday, 6 October 2023.

[59] The evidence of these Department of Home Affairs records produced for the Respondent is that Mr Ren's passport was used to:

- Depart Australia on 19 November 2021 for the United States;
- Arrive in Australia on 6 February 2022;
- Depart Australia on 3 August 2022 for the United States;
- Arrive in Australia on 6 October 2022;
- Depart Australia on 20 January 2023 for the United States;
- Arrive in Australia on 10 March 2023;

[60] Mr Smith's further evidence is that he was formally appointed by the Respondent to conduct an investigation into the Applicant's conduct under the Respondent's Suspected Breaches of the Code of Conduct Procedure. To this end, on 20 October 2022, he issued a written direction to the Applicant to provide evidence of his travel dates to the United States, by means including requesting his travel records from the Department of Home Affairs.

[61] Mr Smith provided the Applicant's reply to this request indicating that he had nothing more to provide and was engaged in work from the Respondent while he was on leave and that he did not miss any meetings.²⁷ Mr Smith indicates that he considered this response, and on the 25 October 2022 issued the Applicant with a Notice of Suspected Breach of the APS Code of Conduct which (in paragraph [9] above) set out the details of the alleged breach and provided the Applicant with an opportunity to respond by 4 November 2022.

[62] The Applicant did not reply within the nominated time period. On 7 November 2022, Mr Smith emailed the Applicant indicating his intention to prepare a final investigation report for the breach decision maker based on the evidence available and that he would be provided with an opportunity to comment on the report. Mr Smith indicates that he again received no reply from the Applicant to this email. On 21 December 2022, he provided the Applicant with a copy of the draft investigation report for the breach decision maker, advising the Applicant to respond before noon on 9 January 2023. Mr Smith and the Applicant exchanged emails about the draft report on 21 and 22 December 2022. Mr Smith's evidence is that he did not consider these emails a formal response to the report, and he did not otherwise receive a response from or on behalf of the Applicant by the nominated deadline.

[63] On 17 January 2023, Mr Smith subsequently provided a copy of the final investigation report to the breach decision maker Dr Simon Lynch for his consideration. Dr Lynch endorsed the findings in the report and formed a preliminary view on the breach providing a written invitation to the Applicant to respond to his proposed findings. Mr Ren responded to Mr Smith and Dr Lynch.

[64] The evidence of Dr Lynch, who provided a written statement and gave sworn testimony in proceedings, is that on 17 February 2023, he issued Mr Ren with an amended Preliminary view on the proposed findings of breaches of the APS Code of Conduct and providing him with a further opportunity to respond by 27 February 2023. The Applicant failed to provide him with any additional information and on 30 March 2023, Dr Lynch provided Mr Ren with his decision of findings against the Applicant of breaches of the APS Code of Conduct (**Breach Decision**) informing him that the appropriate sanction, including termination of his employment would now be considered.

[65] The Applicant's reply to Dr Lynch's findings were provided on 17 April 2023 and claimed that he took leave only in accordance with his leave request, and that the only variation to this approved leave was caused by an interruption to his return flight that occurred because of a positive PCR test in Doha on his return journey to Australia. Further, that he had "Covid-like" systems on his return into the country that required him to quarantine and work from home for 2 weeks prior to returning to the office.

[66] On 5 May 2023, Dr Lynch referred his breach decision to Ms Goodwin, a delegate of the Agency Head, who had the authority to consider and determine the appropriate sanction to apply to the findings against the Applicant in accordance with section 15(1) of the PS Act.

[67] Ms Goodwin provided a written statement and provided sworn evidence before the Commission in proceedings indicating that on 11 May 2023, she wrote to Mr Ren advising him that it was her preliminary view that termination of his employment was the appropriate sanction to impose in relation to the findings against him. On 24 May 2023, with assistance of his union, the CPSU, Mr Ren responded to the preliminary view (as indicated above at paragraph [6] of this decision). On 23 June 2023, Ms Goodwin advised the Applicant her preliminary view remained unchanged and advised him of the termination of his employment.

[68] In advising Mr Ren of this decision, Ms Goodwin indicated that she had considered his response but found that his conduct was a result of a "*deliberate refusal*" to accept the Respondent's rules with regard to working remotely and accessing its IT systems that had

potential implications for overall security and integrity of the Respondent's systems. Further, that Mr Ren's conduct had been "*deliberate evasive and untruthful*", and "*inconsistent*" with the expectations placed on him by his employer and his obligations under its Code of Conduct and procedures to the extent that the Respondent could no longer have trust and confidence he would continue to perform his duties to the standards required of an Executive Level 1 employee.

[69] Ms Goodwin also referred to the further allegations of misconduct that had been identified by the Respondent regarding the conduct of Mr Ren in January and February 2023, and while acknowledging these allegations had been neither investigated nor substantiated, reinforced her concerns that the Applicant's misconduct would continue to occur.

[70] As set out at paragraph [37] above, the Respondent's evidence to substantiate the considerations of these further allegations of misconduct was advanced by Dr Fiona Smith, who was the then responsible manager for the Applicant. Dr Smith provided a written statement and provided sworn evidence in the proceedings. Dr Smith's evidence is that in January 2023 Mr Ren had submitted a further request for extended personal/carers leave to visit the United States from 7 February 2023. Dr Smith had advised Mr Ren that this request had not been approved and was being considered in light of the yet to be completed investigation and was concerned as to the Applicant's whereabouts.

[71] Dr Smith's evidence is that from 8 February 2023, the Applicant had not been sighted in the Melbourne Office for 10 days, was largely uncontactable from the start of February, and had left his laptop in the office.²⁸ Concerned that Mr Ren may have already left Australia, Dr Smith sought a report of where Mr Ren was logging on from. These reports indicated that the Applicant was logging into the Respondent's IT systems from overseas on and from 20 January 2023.²⁹

The Applicants Position and Evidence

[72] The principle submissions in support of Mr Ren's position are twofold. Firstly, he contends that number of the allegations against him are false and not supported by the facts that he presents. Secondly, he contends the decision to determinate his employment is harsh, unjust, and unreasonable in the circumstances of the case, his recognition and acknowledgement of his mistakes and demonstrated history and dedication to his employment with the Respondent.

[73] Regarding the use of the Respondent's IT systems remotely and from overseas relevant to the allegations against him that he accessed Bureau systems without permission, Mr Ren submits that it was the Respondent that enabled and installed these programs on his devices for the purpose of facilitating his remote work and work from overseas. He maintains that he had the permission and had been given the authority from the Respondent to work remotely and access its IT's systems for this purpose by Mr John Le Marshall who was his manager prior to Mr Su. Mr Ren's evidence is also that Dr Fiona Smith provided him explicit additional permission to work remotely when advising him to contact the Respondent's IT support team for help uploading software and VPN connections on 20 July 2022.³⁰

[74] Mr Ren further submits that not only were his subsequent managers aware that this permission had been given but that they were openly aware of it being the case by participating

in meetings (including on Microsoft Teams during September 2022) where Mr Ren was also present during the course of his employment. Mr Ren also indicated that working remotely and from home was a common practice amongst other Bureau staff and accepted behaviour of its employees, including Mr Su and Dr Smith.

[75] Up until the departure of Mr Marhsall, Mr Ren indicated that he had an excellent working relationship with this employer and peers. That he was a valued employee and that his work and contributions were recognised to the extent that his initial contract was renewed to conclude in August 2023. Mr Ren asserts that this changed when Mr Su became his responsible manager in July 2021 for reasons unknown to him. His evidence in support of these submissions is his clear employment record until this time and that fact that issues with his employment were only identified by Mr Su in the first instance.

[76] Further, he submits that in February 2022 he was asked to respond to allegations of dual employment with Curtin University which were baseless and subsequently dropped because Mr Su had an issue with him. Mr Ren asserts that from this time, representatives of the Respondent were prejudiced against him and that he is faced with these further false allegations as a result.

[77] Mr Ren's evidence is that he accessed the Bureau's IT system during his September 2022 period of leave in the United States because, (1) he had authority to do so; and (2) he was a dedicated and committed employee who while he was on leave was in fact undertaking research relevant to this role in Data Assimilation to be able to better perform in his position. He submits he persisted in doing so to the detriment of his family and personal relationships.

[78] With regard to the allegations against him that he was not in Australia to undertake his duties without permission to work from overseas Mr Ren's evidence is that, as indicated above, he already had permission to work remotely and that his delay, if any, in returning to Australia was a consequence of a positive PCR Covid test while travelling that caused him to change his flight plans.

[79] His experience of Covid-like symptoms when returning into the country also caused him to delay his return to the office. Mr Ren asserts that these delays were in no way contrived or intentional by him. He rejects the Respondent's suggestions that he was intentionally lying or misleading them. His evidence is that his intention in travelling and working in September 2022 was to the benefit of his employer, that he only never intended to be absent from work for the authorised period and that the delay in him returning was caused by events beyond his control.

[80] In support of these contentions, Mr Ren sought access to his BOM email account to confirm his booking details and travel arrangements. These were unable to be provided however, which he asserts places him at a disadvantage. Mr Ren also indicates that that "there exist slight possibility of identity theft"³¹ and that his passport may have been used by someone else for travel he asserts he did not undertake.

[81] Mr Ren does not accept that he made a false statement to his manager by notifying Mr Su that he had returned to Australia on or around 19 September 2022. His evidence is that he did not send any email to Mr Su to this effect, that he has no record of such an email on his Gmail account and that the email produced by the Respondent is a fabrication.

[82] Similarly, Mr Ren does not accept that he failed to comply with a lawful and reasonable direction of Mr Smith to supply evidence of the date he returned to Australia. Mr Ren's evidence in this regard is that he attempted to reply to this request to the best of his ability in the circumstances. That he emailed both Mr Smith and Mr Su to this effect, indicating he was able to provide evidence he was lodging on in Melbourne but was unable to access his travel records as his personal computer remained overseas.

[83] Mr Ren also submitted that during the period of this part of the investigation, his AMV assimilation work for the Respondent was at a critical stage that impacted on this capacity to focus on anything else that he genuinely thought was not a high priority for the Respondent. His evidence is also that at this time, and up until the end of March 2023, he was advised by co-workers and colleagues that the investigations into this travel and leave were not really that serious and that he just needed to go through the 'process' and everything would be ok.

[84] On 30 March 2023, when he was advised that the findings of misconduct had been substantiated against him and that he was facing possible termination he first realised the matter was serious and that he needed to give it his full attention. He subsequently sought the assistance of his relevant union, the CPSU, who assisted him in providing a response on the 24 May 2023.

[85] Mr Ren's evidence is that the concessions he made in this reply were at the advice of the CPSU as an attempt to avoid the termination of his employment and that they are not an accurate reflection of his position.

[86] Regarding the allegations of further misconduct against him, Mr Ren refutes these allegations completely. His evidence is that he was in, and remained in, Australia through January 2023. Supporting this position, Mr Ren submitted an email statement from Mr John Le Marshall that indicated he had lunch with Mr Ren along with a Mr Howard and Mr Morrow in Melbourne on the 31 January 2023. Mr Marshall's email was provided as evidence during proceedings. Mr Ren further asserts that sometime between his return to Australia in October 2022 and January 2023 his Australian passport was stolen and used by someone other than him to travel. Mr Ren provided disputed flight credits dated 3 June 2023 from Malaysian Airlines for flights on 9 October 2022 and 10 May 2023 for the period to support this assertion.³²

[87] Based on the above evidence and the resulting deficiencies in the Respondent's case, Mr Ren submits that the Respondent's decision to terminate his employment was not based on a valid reason and was therefore; harsh, unreasonable and unjust considering all the circumstances of the case and his employment record with the Respondent.

Findings

[88] In determining whether, or not, the Respondent had a valid reason to terminate Mr Ren's employment in this case, a series of questions are relevant. The first of these is whether Mr Ren was aware of the APS Code of Conduct and its relevant policies and procedures for leave and remote work.

[89] Having considered all the evidence and submissions, I am satisfied that Mr Ren was made aware that as an employee of the Australian Public Service certain policies, procedures and expectations applied to his employment. These included the APS Code of Conduct, Acceptable Use of Information Systems Policy, Secure Mobile Computing Procedure, and Working from Home Procedure inclusive of requirements of him to seek authorisation for leave, remote access to the Bureau's IT network and permission to work from overseas.

[90] The evidence presented, that is not in dispute, is that Mr Ren was provided access to and made aware of these policies and their requirements of him at his induction and during the course of his employment. Further evidence, that is also not disputed, is that Mr Ren demonstrated his awareness of these requirements by completing the relevant forms and making the relevant requests for leave and remote working.

[91] In proceedings, Mr Ren was referred to a series of emails between Mr Su and himself where he made a request to work from home and overseas in November 2021 that was not approved.³³ Mr Ren denied ever seeing these emails and indicated that they must be fabrications. However, there was no evidence presented to the Commission to support this assertion. The emails clearly indicate Mr Ren formally making a request to work from home and overseas in emails sent from his BOM email account.³⁴

[92] This being the case, I am satisfied that Mr Ren was aware that a requirement of his employment with the APS was compliance with its code of conduct and procedures. That these requirements included seeking permission and authorisation for leave, and remote access to the Bureau's IT systems for work remotely from within Australia or overseas.

[93] Being satisfied that Mr Ren was aware of the requirements of the APS Code of Conduct, I now turn my consideration to each of the 4 alleged breaches of the Code and the Further Allegations of Misconduct that the Respondent submits are the valid reason for its decision to terminate his employment.

Allegation 1 – Access to Bureau networks without approval during the period 30 August – 28 September 2022

[94] It is not disputed that Mr Ren did indeed access the Bureau's networks from overseas as alleged. It is Mr Ren's position that he had prior approval provided to him by Mr Le Marshall, Dr Smith and Dr Su to work remotely and that this included working overseas. He asserts that it was his employer who facilitated the enablement of his mobile phone and computer with the necessary technology to access its systems from remote locations, including overseas. Further, he indicates that his employer was aware of his working remotely and did not object. Moreover, that other employees also worked remotely and that while on leave he was in fact performing work to the benefit of his employer.

[95] Mr Ren has provided some evidence to support this position. I accept that he had genuinely formed the impression that he had the implicit permission of his employer to work from wherever was convenient to him. Further, that he considered the formal process of requesting leave and remote working approval (from home or overseas) were not that serious and could be either arbitrarily changed or disregarded provided he performed his duties.

[96] The Respondent accepts that during the Covid period prior to November 2021 it provided some latitude to employees, including Mr Ren to work remotely, including from home and overseas. They submit however, that this was done with the explicit knowledge, permission and authority of the employer. Its evidence is that employee devices were necessarily enabled for this purpose. Employees were required to submit requests for working from home or remote locations in accordance with the required policies and procedures and that these were considered on an individual basis.

[97] It is the Respondent's position that Mr Ren was made explicitly aware of these requirements when he made a request to work from overseas in November 2021 that was refused. Mr Ren was explicitly advised at this time that he had to have permission and authority to access the Bureau's system from overseas. On 25 November 2021, the Respondent's Observations and Data Science Section Manger Mr Eric Shulz sent the following email to Mr Ren:

"...the level of supervision and interaction required to integrate you fully into the DA team and ensure project work is completed cannot be achieved with you located overseas. These particulars add to the general rule that the Science & Innovation Group is not supportive of staff working from overseas, while this can be considered at the discretion of the management, in your case this is not suitable.

You will therefore need to return to work in Australia at the end of your current leave. You may apply to extend your time overseas if you have additional leave options available to you....

All leave requests required prior endorsement by your line manager, you need to ensure that endorsement is granted before securing travel arrangements.

*If you do not return at the end of your approved leave, you will be considered to be an authorised absence. An authorised absence is a serious breach of your employment conditions and grounds to terminate employment."*³⁵

[98] I find the Respondent's evidence of this compelling. Further, while I accept Mr Ren had no malice or ill intent in accessing his employer's IT systems from overseas, I do not accept that he did so with permission and that this finding against him is not valid. While Mr Ren's intentions may have been honourable in these circumstances, it is not for him to decide when and from where he can access the employer's IT networks, without prior approval. In this case, I am satisfied and accept the submission that managing access to its IT networks is a requirement of the Australian Governments "Protective Security Policy Framework" and an important part of maintaining the integrity of its systems security.³⁶

Allegation 2 – Failure to be present in Australia to undertake duties without permission to work overseas in the period 20-28 September 2022

[99] It is not disputed that the Applicant applied for a period of leave to travel to the United States from 23 August to 16 September 2022 and was due to return to work on Monday 19 September 2022. In proceedings, Mr Ren accepted he returned to Australia on 6 October 2022.

The Applicant's travel records from the Department of Home Affairs confirm this, indicating he departed Australia on 3 August 2022 and returned on 6 October 2022.

[100] The Applicant asserts that he had permission to work from overseas and access the Bureau's networks during this period. As indicated above, I do not accept this position.

[101] In seeking to explain the reasons for the delay in his return to Australia and failure to attend his workplace when his period of approved leave ended on 19 September 2022, Mr Ren's evidence is that he had always intended to return to work on 19 September 2022. He indicated that his flight into Australia was via Doha, that he had a positive PCR test in Doha and was consequently delayed. On returning to Australia, he was suffering from Covid-like symptoms requiring him to work from home for a further 10 days.

[102] In support of this position, Mr Ren presented his Australia passport, which is not marked. He has also indicated that he has been denied access to his Bureau email account, that he did not keep separate travel receipts and made all his bookings and arrangements using his work computer and work email.

[103] The Respondent's position is that Mr Ren was scheduled to return to work on 19 September 2022 and failed to do so. That he did not have permission to work from overseas and access the Bureau's IT systems during this period but sought to. Further, that at no time did he either seek to explain his failure to attend work or seek an additional period of leave. Rather, that the Applicant was not forthcoming with his employer about his whereabouts and tried to conceal that he was overseas when he was scheduled to be at work by indicating his flight was delayed, he was subjected to a positive PCR test and was required to quarantine in Doha.

[104] In the hearing, Mr Ren accepted that he was out of the country for this period and that he used his Australian passport to travel as it was in his possession at this time. He asserts that the only reasons he did return to work as scheduled were out of his control. That he continued to perform his duties, that he had used his leave to the benefit of his employer and that he did not think returning to work a few days later than scheduled was a significant matter.

[105] Despite Mr Ren's assertions, the overwhelming evidence provided in the form of records provided by the Department of Home Affairs and Mr Ren's own concessions in proceedings are that he returned to Australia on 6 October 2022.

[106] Therefore, in the absence of any evidence to the contrary, I am satisfied that it is more probable than not that he engaged in the conduct that has been alleged by his employer. Further, if he had genuinely planned to return to work on 19 September 2022 as required and only failed to do so for reasons out of his control, I find no evidence that Mr Ren sought to explain this to his employer at the time. It was only when prompted by his employer's enquiries as to his whereabouts did Mr Ren seek to provide any explanations for his reasons include travel delays, Covid like symptoms and a positive PCR test.

Allegation 3 – Making a false statement by claiming to have returned to Australia on or around 19 September 2022

[107] Mr Ren emphatically denies that he had made a false statement to Dr Su. He claims that he has no record of the email he is alleged to have sent making this statement and that it is a fabrication designed to discredit him. He asserts that Dr Su has issues with him and that his relationship with the Respondent has only ever had issues since he began being managed by Dr Su. He further asserts that he did not realise that “a delayed return of just a couple of days was important” that would be later used as an “excuse” to dismiss him and reaffirms that the reasons of his delayed return were beyond his control as indicated above.

[108] The Respondent’s position is that Mr Ren was aware of his obligations under the code of conduct to be truthful to this employer, was provided with a clear request to explain his whereabouts and intentionally made a false statement. With regards to the Applicant’s assertion that the email provided from Dr Su is a fabrication, the Respondent affirms that is not the case and that it is not reasonably believable that this could be the case. Further, that the Applicant has provided no evidence to support this assertion and that in making it he is only trying to provide a further reason to justify his misconduct.

[109] I find the evidence of the Respondent compelling in this regard. There is no evidence to support the Applicant’s assertion and, on the balance of probabilities, I can see no reason why Dr Su or the Respondent would fabricate emails to discredit the Applicant or provide evidence against him which was fabricated.

[110] I accept Mr Ren’s relationship with Dr Su may have been strained and different in comparison to that of his previous managers, however, I do not accept, that the employer was intent on finding a reason to dismiss him.

[111] On this basis, I am satisfied that on the balance of probabilities, the Applicant engaged in the conduct as alleged.

Allegation 4 – Failing to comply with a lawful and reasonable direction to supply evidence of returning to Australia on or around 19 September 2022

[112] Mr Ren does not accept that he failed to comply with a lawful and reasonable direction of Mr Smith to supply evidence of the date he returned to Australia. Mr Ren’s evidence is that he attempted to reply to this request to the best of his ability in the circumstances and emailed both Mr Smith and Mr Su. This email indicated he was able to provide evidence that he was logging on in Melbourne but was unable to access his travel records as his personal computer remained overseas.

[113] Beyond the submissions made by the Applicant, as set out above in paragraph [83] of this decision, no further evidence was provided to support these assertions.

[114] The Respondent’s position is that the requests provided to the Applicant by Mr Smith were clear, concise and explicit in what was required of him. The Respondent also indicated that the Applicant was provided with multiple opportunities and directions to comply with this request.

[115] In cross examination, I also asked Mr Smith on the steps he took to ensure Mr Ren understood and was aware of the requests being made of him and the seriousness of the

allegations against him. Mr Smith indicated that the Respondent took multiple steps to make the Applicant aware of the seriousness of the allegations against him and their consequences. That Mr Ren was provided with multiple opportunities and extensions of time to provide his evidence and submissions and that the employer took all reasonable steps to ensure that all care and procedural fairness was provided to the Applicant in the circumstances.

[116] I have no evidence before me to support that this was not the case or to suggest that the Applicant has not failed to comply with this request by his employer. Accordingly, I am satisfied that it is more probable than not that the Applicant has engaged in the misconduct as alleged.

The Further Allegations of Misconduct

[117] The Applicant's position regarding the further allegations of misconduct are emphatic. His evidence is that he was in, and remained in, Australia through January 2023. Supporting this position, Mr Ren submitted an email statement from Mr John Le Marshall that indicated he had lunch with Mr Ren along with a Mr Howard and Mr Morrow in Melbourne on 31 January 2023. However, Mr Le Marshall did not make a formal statement or provide oral evidence at the hearing.

[118] Mr Ren further asserts that sometime between his return to Australia in October 2022 and January 2023 his Australian passport was stolen and used by someone other than him to travel. Other than disputed flight credits for Malaysian Airline flights on 9 and 10 May 2023, Mr Ren provides no further evidence, including as to the relevance of these records.

[119] The travel records provided by the Department of Home Affairs indicate that Mr Ren's passport was used to depart Australia on 20 January 2023 and return on 10 March 2023. Mr Ren's Australian passport, a copy of which was provided to these proceedings, is a Passport enabling multifactor visual identification on entering and exiting Australia. Despite Mr Ren's assertions that his passport was stolen and that he was the victim of identity theft no clear evidence has been provided to support this conclusion.

[120] Therefore, on the balance of probabilities, I am satisfied his employer was justified in considering these further allegations of misconduct in its decision to terminate his employment.

[121] For the reasons set out above, I am satisfied that there was a valid reason for the Respondent to bring Mr Ren's employment to an end.

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

[122] Proper consideration of s.387(b) requires a finding to be made as to whether the Applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).³⁷

[123] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,³⁸ and in explicit³⁹ and plain and clear terms.⁴⁰

[124] There is no question that Mr Ren was provided with clear, plain and explicit notification of the reasons for both the consideration of the decision of terminate his employment and that subsequent decision in the correspondence of 30 March 2023 and 22 June 2023, respectively. Accordingly, I am satisfied that this requirement has been met and consider this factor to be against a finding that his termination was harsh, unjust or unreasonable.

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

[125] The first time Mr Ren was made aware of the allegations of serious misconduct was on 25 October 2022. Over the course of the next 6 months, he was provided with multiple opportunities to respond to the allegations being made against him. He was subsequently provided with multiple opportunities to respond to the findings of substantiated misconduct and finally provide reasons as to why his employment should not be terminated.

[126] On this basis, I am satisfied that Mr Ren was given able opportunity to respond and provided all reasonable procedural fairness and consider this factor to be against a finding that his termination was harsh, unjust and reasonable.

s.387(d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[127] There is no dispute and I find that the Respondent did not unreasonably refuse to allow Mr Ren to have a support person present at any discussion's relating to the dismissal.

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

[128] As this dismissal did not relate to unsatisfactory work performance, this factor is not relevant to the circumstances of this case and its determination.

s.387(f) The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal and s.387(g) - Whether The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise impacted on the procedures followed

[129] Neither of these factors are relevant in the circumstances of this case and no evidence was presented to the contrary. The Bureau of Meteorology is the Respondent, and its size and Human Resource Management expertise and experience is not in contest. I am therefore satisfied that these factors are not relevant to the determination of this case.

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

[130] The Applicant has not made any additional submissions as to any other matters that are relevant to the Commissions considerations. The Respondent identified the Applicant's reference to being "defamed" by the Respondent in his materials and the significant economic consequence of its decision on the Applicant in its outline of submissions.

[131] It is self-evident that Mr Ren's reputation and standing as an employee has been negatively impacted by the Respondent's decision, however, there is no evidence before the Commission to suggest that this is a consequence of anything but his actions.

[132] I have considered the economic consequences of the Respondent's decision on the Applicant. I am satisfied that these have also been reasonably considered by the Respondent in arriving at its decision. In reaching this decision, the Respondent indicates it balanced the conduct of the Applicant and the findings against him against the importance of employees behaving with honesty and integrity and complying with its policies and procedures, the significant of the integrity of its IT network in this matter and the risk of future non-compliance.

[133] I find the reasoning of the Respondent compelling in this regard. I have also considered the serious of potential breaches to Commonwealth IT networks and systems and I am convinced that this ground alone would have warranted the Respondent to take decisive action.

[134] While the economic consequences of the loss of his employment is significant, Mr Ren has provided no submissions in this regard. I have also considered that at termination he was provided with payment of all his entitlements, full pay for the period 13 May 2023 to 23 June 2023, and an additional 4 week's pay in lieu of notice.

[135] In proceedings, Mr Ren was provided with the assistance of a Mandarin interpreter and there is no question that Mr Ren has had some challenge and difficulty in participating in these proceedings. This has been a consequence of English not being his primary language and his lack of familiarity with the legal process of natural justice and procedural fairness.

[136] Throughout the proceedings, however, I had regard to Mr Ren's circumstances and endeavoured to provide him with as much guidance as possible and taken steps to satisfy myself that he understood what was being required or put to him and its seriousness. The Commission also facilitated Mr Ren seeking independent legal advice.

[137] On this basis, I am satisfied that Mr Ren has not been disadvantaged either as an unrepresented Applicant or Mandarin speaker in these proceedings and do not consider these factors to be material to my considerations.

[138] Mr Ren has maintained that if he was able to access his Bureau email address and record's he would have been able to provide the necessary information required to clear his name. The Respondent was not able to provide Mr Ren access to the email records he sought. However, Respondent did provide the Commission with a confidential copy of Mr Ren's emails for the period of 7 July 2022 and 13 July 2022. On reviewing these documents, I am satisfied they do not provide any assistance to the Applicant.

[139] Furthermore, the compelling evidence in this case is that of the Department of Home Affairs records that indicate Mr Ren departed Australia on 19 November 2021, and arrived in Australia on 6 February 2022; departed Australia on 3 August 2022, and arrived in Australia on 6 October 2022; and departed Australia on 20 January 2023, arriving back in Australia on 10 March 2023. No evidence has been presented to lead me to reasonably doubt that the accuracy of these records or to substantiate the Applicant's claims he has been the victim of identity theft.

Conclusion

[140] I have made findings in relation to each matter specified in s.387 as relevant. I have considered and given due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.

[141] For the reasons I have set out above, I have not found that the termination of Mr Ren's employment by the Respondent was harsh, unjust or unreasonable. While I empathise with Mr Ren and what he perceives to have occurred to him, after considering all the materials and submissions presented, on the balance of probabilities, I find that Mr Ren has not been unfairly dismissed.

[142] Accordingly, Mr Ren's application for an unfair dismissal remedy is dismissed.



COMMISSIONER

Appearances:

D Ren, as the Applicant.

MS Preston and Ms Spivey (of Counsel), on behalf of the Respondent.

Hearing details:

2023.

Melbourne.

October 9.

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¹ Court book page 41.

² Court book page 44.

³ Court book page 370.

⁴ Court book page 970.

⁵ Court book page 372.

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- ⁶ Court book page 26.
- ⁷ Court book pages 46 – 51.
- ⁸ Court book page 52.
- ⁹ Court book page 58.
- ¹⁰ Court book page 56.
- ¹¹ Court book page 60.
- ¹² Court book page 79.
- ¹³ Court book pages 81 – 88.
- ¹⁴ Court book page 375.
- ¹⁵ Court book page 105.
- ¹⁶ Court book page 107.
- ¹⁷ Court book page 26.
- ¹⁸ (1995) 185 CLR 410 at [465].
- ¹⁹ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at [373].
- ²⁰ *Ibid.*
- ²¹ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
- ²² *Edwards v Justice Giudice* [1999] FCA 1836 at [7].
- ²³ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].
- ²⁴ [\[2020\] FWC FB 5885](#).
- ²⁵ Witness Statement of Cassy Baker Statement, Court book page 908.
- ²⁶ Witness Statement of Chun-Hsu Su, Court book pages 627 – 633.
- ²⁷ Witness Statement of Scott Smith at [34], Court Book page 696.
- ²⁸ Witness Statement of Fiona Smith at [31], Court Book page 651.
- ²⁹ Respondent’s outline of submissions at [52], Court Book page 378.
- ³⁰ Applicant’s outline of submissions, Court Book page 156.
- ³¹ Applicant’s outline of submissions, Court Book page 158.
- ³² Applicant’s outline of submissions, Court Book page 194.
- ³³ Witness Statement of Chun-Hsu Su, Court book pages 627 – 633.
- ³⁴ *Ibid.*
- ³⁵ *Ibid.*, Court Book pages 628 – 629.
- ³⁶ Witness Statement of Cassy Baker at 14-20, p 797-799 of Court Book
- ³⁷ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWC FB 6429](#) at [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWC FB 533](#) at [55].
- ³⁸ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151.
- ³⁹ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- ⁴⁰ *Ibid.*