[2023] FWC 367

The attached document replaces the document previously issued with the above code on 15 February 2023.

In paragraph [10], the word “not” added. In paragraph [44], spelling error corrected.

Associate to Deputy President Anderson.

Dated 16 February 2023.

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jarrad Langley

v

Ballestrin Construction Services Pty Ltd
(U2022/9377)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 15 FEBRUARY 2023

Application for an unfair dismissal remedy – civil construction sector – estimator – vehicle repair – alleged misconduct – procedural fairness – whether harsh – valid reason – serious breach of duty – material denial of procedural fairness – overall, dismissal not harsh, unjust or unreasonable – application dismissed

[1] On 20 September 2022 Jarrad Langley (Mr Langley or the applicant) applied under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy. He was dismissed on 5 September 2022 by Ballestrin Construction Services Pty Ltd (Ballestrin, the respondent or the employer).

[2] At the date of dismissal, Mr Langley was employed as an Estimator.

[3] Mr Langley claims the dismissal was harsh, unjust or unreasonable. He seeks compensation.

[4] Ballestrin oppose the application. It contends that the dismissal was not unfair and no issue of remedy arises.

[5] Conciliation was conducted on 3 November 2022. The application did not resolve.

[6] Directions were issued on 24 November and 22 December 2022.

[7] In advance of the hearing, I received materials from Mr Langley and the employer.

[8] On 6 January 2023, I granted permission for Ballestrin to be legally represented notwithstanding Mr Langley's objection.[1]

[9] I dealt further with interlocutory matters on 23 January 2023, including an order for production at Mr Langley's request.

[10] I heard the matter (merits and remedy) by video on 24 and 25 January 2023. Mr Langley was self-represented. I provided a measure of assistance to Mr Langley, consistent with my

independent statutory function, to ensure that his case was fully presented and that of the respondent tested. This included asking additional questions of employer witnesses than might have not otherwise been required.

Evidence

[11] Mr Langley gave oral evidence on a statement and related documents filed in his name.[2]

[12] Six witnesses were called by the employer:

- Andrew Worbey, Manager Stores and Purchasing (McMahons);[3]
- Clifford Oliver Byrne, Construction Manager (Ballestrin);[4]
- Tania Trepa, Human Resources Support Manager (McMahons);[5]
- Peter William Height, Estimating and Contracts Manager (Ballestrin);[6]
- Andrew Taylor McClymont, Operations Manager (Ballestrin);[7] and
- Michael Brian Hyde, Executive General Manager (McMahons) formerly General Manager (Ballestrin).[8]

[13] Although aspects of the evidence concerned matters across Mr Langley's three years of service, the evidence was primarily focused on events concerning the repair and service of a company motor vehicle in the four weeks prior to dismissal.

[14] A somewhat unusual aspect of this application is that whilst it concerns allegations of misconduct, the central elements of the alleged conduct are not in dispute. Whilst there are some disputed facts, they are limited. Primarily, this matter concerns whether the non-disputed conduct was misconduct, and whether dismissal on that account was unfair.

[15] The central facts being agreed makes fact-finding easier.

[16] However, some issues of credit arise, at least on the disputed facts. It is appropriate in that context to make some general observations on the evidence.

[17] Mr Langley gave evidence conscientiously. His evidence was presented in a straightforward manner with only limited gloss. However, he maintained, until deep into cross examination, that his conduct was not misconduct. Once confronted with certain facts, he made concessions about policy breaches and errors on his part. In belatedly doing so, I do not consider that Mr Langley had been evasive; rather, for reasons developed in this decision, he demonstrated a lack of insight into his employment obligations. Whilst exercising some caution, I generally accept Mr Langley's narrative, though treat his characterisation of his conduct as no more than subjective opinion.

[18] For different reasons, I apply certain caution in assessing the employer's evidence whilst accepting large components of it as accurate and credible, especially where corroborated by the documentary record.

[19] The documentary material appended to the evidence of employer witnesses is helpful both in its own right and also in filling gaps in the oral evidence. In particular, contemporaneous handwritten notes by Ms Trepa, Mr Byrne and Mr Height of meetings with Mr Langley on 30 August, 31 August and 5 September 2022 have considerable probative value.

[20] That said, there are somewhat concerning gaps in the employer's evidence and the recall of some witnesses.

[21] Mr Hyde could not recall the date he was briefed on the investigation results and tasked to make a decision. Nor could he recall the date he made a decision to dismiss or advised his managers of that decision. Further, the state of the evidence as to what Mr Hyde had before him when he made his decision is unsatisfactory. Moreover, Mr Hyde's affidavit devotes only two brief paragraphs to matters concerning the central issues in this case – the investigation, the alleged misconduct and his decision to dismiss.

[22] Ms Trepa was conscientious but measured. She could not recall when she and the investigation team asked Mr Hyde to make a decision, nor when she was advised of the decision. Her evidence that she had no view once the investigation was complete on whether Mr Langley should or should not be dismissed lacked plausibility, as did her initial evidence that she had no view on the merit of Mr Hyde's decision. Only after further questioning did she indicate that she "was comfortable with" the decision and that it "it seemed like an appropriate course of action".[9] The impression I gathered was that Ms Trepa wanted to distance herself from any suggestion of judgement or pre-judgement.

[23] Mr Byrne was attentive but had poor recall. Although being the lead investigator, he was vague and uncertain on critical issues. The documentary material appended to his written statement did, however, help fill some (but not all) of these gaps. Aspects of his evidence lacked plausibility although his evidence as to the early view he formed on Mr Langley's conduct and that dismissal was the appropriate consequence was not resiled from. This notwithstanding, the opinions Mr Byrne formed are opinions, not fact.

[24] Mr Height, although part of the investigation team, had more limited involvement. His evidence was clear and largely consistent with the documentary record. His evidence was that he did not recall opening an email dated 25 August sent by Mr Byrne. His recall on that point is to be treated with some caution.

[25] The evidence of Mr McClymont and Mr Worbey was limited to specific issues. None were part of the investigation team nor directly involved in the dismissal. Each gave evidence conscientiously. Mr McClymont, in particular, willingly clarified or corrected his evidence under cross examination.

[26] I take into account that some evidence (oral and written) includes hearsay. I give limited weight to hearsay where it concerns disputed facts unless otherwise corroborated by direct evidence on which findings can be made to the requisite standard of proof.

Facts

[27] I make the following findings.

Ballestrin

[28] Ballestrin is a multi-faceted civil construction company. It is part of a parent group McMahon Services Australia Pty Ltd (McMahons).

[29] Ballestrin's South Australian operations are based at Dry Creek in suburban Adelaide where employees and managers of both Ballestrin and McMahons are employed.

[30] At the time Mr Langley was dismissed, Mr Hyde was Ballestrin's General Manager (he was subsequently appointed Executive General Manager, McMahons). Ballestrin obtains human resources support from McMahons.

[31] Amongst the information systems operated by McMahons and Ballestrin are:

- SkyTrust – an electronic document management system providing employees on-line access to company policies and procedures;
- SitePass – a system through which employees undertake on-line training and re-training modules, as relevant to their position; and
- Pronto – a software system used to assist with accounting, operations and cost management. Through Pronto a person with authority to purchase goods or services acquires a purchase order number. Pronto also records plant numbers for company property and assets.

Mr Langley's employment

[32] Having earlier worked with the air force and in construction, Mr Langley commenced full-time employment with Ballestrin as an Estimator on 3 June 2019 (contract 19 May 2019)[10]. His contract was twice renewed (22 February 2021 and 25 July 2022). He holds a certificate IV in Building and Construction (Estimating).

[33] The work of an Estimator includes preparing assessments of product needs and costs for the purpose of tendering for civil construction projects.

[34] At the time of dismissal Mr Langley reported to Mr Height. Mr Height had only been in that role for four weeks. Mr Langley had previously reported to Mr Byrne, who had familiarity with Mr Langley's work and had conducted performance reviews in February and July 2022.[11] Mr Langley had, earlier in his tenure, reported directly to Mr Hyde, with whom he had had near daily contact.

Performance

[35] There is some dispute about whether Mr Langley's performance had been called into question.

[36] The finding I make is that Mr Langley had generally performed his estimating work to a good standard[12] and had been rewarded with wage increases (including a substantial increase one month prior to dismissal)[13] but had earlier been informally counselled by Mr Hyde and Mr Byrne about his application to certain tasks, punctuality and attendance,[14] though no formal written warning had been given.

[37] However, in February 2022, prior to a performance review, Ballestrin prepared a show cause letter concerning punctuality and attendance.[15] Somewhat unusually, Mr Byrne, upon taking supervision of Mr Langley from Mr Hyde, read the letter to Mr Langley but at Mr Langley's suggestion decided not to issue the warning as he considered it potentially demotivating to his management of Mr Langley and was satisfied with Mr Langley's then undertakings to rectify those concerns.[16]

Provision of vehicle to Mr Langley

[38] Initially, Mr Langley's contract of employment provided base remuneration plus a vehicle allowance.

[39] When his contract was re-negotiated following a performance review in February 2021, and at Mr Langley's suggestion, he was provided a company maintained vehicle in lieu of a vehicle allowance.

[40] The vehicle provided to Mr Langley was a dual cab Nissan Nivara which had been used by a former employee. At the time of handover it had been driven between 230,000 and 250,000 kilometres. Mr Langley's revised employment contract stated:[17]

> "6.2 Motor Vehicle
>
> 6.2.1 You will be provided with a fully maintained Company vehicle for use in undertaking your employment duties. You will be required to sign a declaration each year in relation to the personal use of this vehicle to ensure compliance with Fringe Benefits Tax requirements. The value of this benefit is $18,000 per annum."

[41] No formal handover or instruction was provided to Mr Langley when taking possession of the vehicle. No logbooks recording past maintenance were provided with the vehicle on handover. Mr Langley was not expressly advised of Ballestrin's policies or procedures for vehicle maintenance or repair or of the manufacturer's recommended servicing schedule. Mr Langley did not ask about such matters.

[42] However, Mr Langley's July 2022 contract required him to refresh his training in company policies:

> " 8. Policies and Procedures

> It is a requirement of your employment that the company policies and procedures as varied from time to time are appropriately adhered to. You must familiarise yourself with these policies during the first four (4) weeks of your employment and otherwise as varied from time to time. The company policies and procedures do not form part of your contract of employment…"

[43] Mr Langley commenced online re-training of the Operations Induction (including Code of Conduct) on 7 July 2022 but had not completed doing so at the time of dismissal.

[44] In the eighteen months Mr Langley had possession of the vehicle he did not have it serviced. However on three occasions he took it to a mechanic to have its oil and tyres checked. He did so in conjunction with taking in his private vehicle for similar maintenance.

[45] Approximately three weeks before the events of August 2022 (around mid-July), the need to service the vehicle crossed Mr Langley's mind. This occurred during an informal discussion at work whereby Mr Byrne asked Mr Langley whether his car was due for a service. During this conversation, Mr McClymont, who was seated nearby, stated that as the user of the vehicle, Mr Langley would need organise the servicing of the vehicle himself.[18]

[46] Mr Langley took no steps to consult company policy or procedures for vehicle servicing or repair, or to book the vehicle in for servicing. Those policies existed and were accessible on SkyTrust. They included:

- The Code of Conduct;
- Form F019 – Company Driving Rules;
- SWI034 Vehicle Maintenance Repair Request Process (Passenger/Truck);
- SWI200 Company Driving Rules;
- Safe Driving at Work Facilitator's Guide;
- F496 Service Request form (Adelaide Workshop); and
- Form F107-1 Plant Fault & Repair Report.

Repair and service of vehicle

[47] On Friday 5 August 2022, whilst driving the vehicle home, Mr Langley experienced mechanical problems.

[48] He limped the car into his street and driveway.

[49] Over the weekend, Mr Langley examined the vehicle in an endeavour to self-diagnose the problem. It remained unroadworthy.

[50] On 9 August 2022 Mr Langley went to Rightway Automotive Services (Rightway), who he knew repaired out of warranty vehicles for Ballestrin. He explained that his company car was unroadworthy and needed repair. Rightway (via a person known as 'Roc') informed Mr Langley that:

- A tow truck was immediately available to bring the vehicle to Rightway; and
- Mr Langley needed to provide Rightway a purchase order number from Ballestrin to authorise the towing and repair costs.

[51] Mr Langley considered the matter urgent and approved the tow. The car was towed to Rightway.

[52] Mr Langley then accessed the company software system (Pluto) and extracted a plant number for a different vehicle. Mr Langley provided the plant number to Rightway by email 9 August 2022 at 2.27pm:

> "Good afternoon,
>
> Thankyou for booking in our Nissan Navara.
>
> As Requested. (sic) Please see the purchase order number that is allocated to this vehicle for Repair and Maintenance.
>
> PO: 5400611
> REGO: [redacted]
>
> Please calk (sic) me on [redacted] if you need any more information".

[53] A Ballestrin plant number is not a purchase order. A plant number identifies an asset. It does not authorise expenditure on an asset or vehicle.

[54] Only certain Ballestrin or McMahons employees have authority to issue purchase orders. Mr Langley had no such authority.

[55] On Tuesday 9 August 2022 Rightway inspected the car. That afternoon, Rightway telephoned Mr Langley. They advised that the compression system was not the problem but that it might be a solenoid, and advised they had ordered a solenoid valve to put in on the next Thursday.

[56] That evening (9 August) Mr Langley texted Mr McClymont asking Mr McClymont to pick him up on his way to work the next day. Mr McClymont agreed.

[57] On 10 August 2022, upon collecting Mr Langley from his home, a brief exchange occurred between Mr McClymont and Mr Langley:[19]

> MR MCCLYMONT: "Where's your car?"

MR LANGLEY: "It's in for repair. Might be a timing belt issue."

MR MCCLYMONT: "Why haven't you been given a temporary car?"

MR LANGLEY: "I'm picking it up on Friday."

[58] Mr McClymont again collected Mr Langley from his home on Thursday 11 August 2022, at Mr Langley's request.

[59] On 11 August 2022 Rightway again telephoned Mr Langley. They advised that the new solenoid valve had not fixed the problem. They advised words to the effect 'bad news, the timing chain has slipped, a common fault with Navaras of this age and kilometres'. Rightway advised Mr Langley of two options: a full engine rebuild (about $6,000) or a replacement engine (about $5,000). Rightway recommended the $5,000 option and advised that a new engine could be sourced the following day and fitted the following week.

[60] Mr Langley said words to the effect, 'okay, go ahead with the new engine, it's the better of the two options'. Mr Langley also agreed to a general service being performed. Although Mr Langley's evidence about agreeing to a service was vague, I make this finding. The written notes by Mr Byrne and Mr Height made on 31 August 2022 record Mr Langley as indicating that he had agreed to Rightway servicing the vehicle.[20]

[61] Mr Langley did not advise a manager of the 'bad news' or the discussion he had had with Rightway.

[62] Mr Langley was provided a loan car by Rightway on 11 August 2022.

[63] A week later, 18 August 2022, Rightway again telephoned Mr Langley. Rightway advised that the car was ready for collection.

[64] That day, Mr Langley travelled to Rightway to collect the car. Upon collection, Rightway advised that the new engine had been fitted and the car serviced. Rightway advised that upon servicing the car it had identified additional problems requiring a new clutch, new radiator, new coolant, new brakes and a new battery. Mr Langley was surprised by this additional work and stated that he had thought the clutch was fine, that the radiator had always held coolant, and that the battery had seemed fine. Rightway advised that the clutch had too much play, that the radiator was showing signs of wear and the battery was below voltage thresholds.

[65] Mr Langley attended work the next day (19 August) but did not advise a manager of the works or the additional works that had been performed on the car.

Invoicing

[66] On Friday 19 August 2022 Rightway sent an invoice marked as an "Estimate" to Ballestrin.

[67] The invoice was sent under cover of an email to Mr Worbey, who was the group manager ordinarily responsible for authorising out of warranty vehicle repairs and authorising payment for works performed by Rightway. The invoice and covering email was copied to Mr Langley by Rightway.

[68] The invoice was for $12,805.10.

[69] The covering email read:

> "Good afternoon, Andrew
>
> Please find attached Estimate for vehicle [redacted]
>
> Vehicle was towed in from Lewiston
>
> Replaced;
> radiator
> Clutch kit with fly wheel
> Front brake pads and rotors x2
> Rear brake linings
> Rear wheel cylinders x2
> Brake fluid
> Coolant
> Engine – S/H 145 000KMS (PREMIUM WARRANTY) – **NEW ENGINE NUMBER** [redacted]
> Re-gas air con system
> Battery MF95D31R (36 MONTHS WARRANTY)
>
> Service was also caried (sic) out with replaced
> Oil
> Oil filter
> Air filter
> Cabin filter
> And wiper blades
>
> **The PO provided is 5400611**, please advise if okay to close
>
> Kind regards,
>
> Tasha Asanopoulos
> Administration
> Rightway Automotive Services" (emphasis in original)

[70] Mr Langley did not read the email or open the attachment. His evidence was that he did not see it on the Friday, but only noticed it over the weekend.

[71] On the morning of Monday 22 August 2022 Mr Worbey contacted Mr McClymont for explanation of the invoice, as he (Mr Worbey) had not authorised the works. Mr Worbey

checked the Pluto software system and noted that the plant number on the invoice appeared to be wrong. Mr Worbey asked Mr McClymont why the company had installed a new engine in an old vehicle. Mr McClymont did not know what was being spoken about. Mr Worbey forwarded Mr McClymont the email and invoice.

[72] Mr McClymont read the email and invoice. He downloaded a hard copy and walked over to Mr Langley who was seated at his desk. A brief exchange ensued:[21]

MR MCLYMONT: "What is this all about?"

MR LANGLEY: "I got my car fixed."

[73] In exasperation, Mr McClymont walked away.

[74] Mr McClymont referred the issue to Mr Byrne as he considered that Mr Langley had self-approved costly repairs to an old vehicle contrary to policy and that the matter needed to be taken up with Mr Langley by his managers.

Investigation stage 1

[75] Mr Byrne examined the invoice and considered the matter required investigation. He checked the Pluto software system and identified that the plant number quoted on the invoice was not a purchase order nor did it relate to Mr Langley's vehicle. He spoke to Mr Langley's immediate manager Mr Height. He spoke to Ms Trepa. He also spoke to Mr Hyde who agreed that an investigation was required. Mr Hyde's evidence was that Mr Byrne appeared "pretty upset".[22]

[76] Mr Byrne, Ms Trepa and Mr Height formed the investigation team, led by Mr Byrne. The investigation commenced.

[77] Mr Height independently checked the Pluto system and confirmed the discrepancy with the plant number.

[78] On 23 August Mr Byrne emailed Ms Trepa (copied to Mr Hyde) with the investigation findings to date.[23] Mr Byrne also spoke to Mr Worbey.

[79] Mr Byrne considered that serious breaches of policy appeared to have occurred and suggested a show cause letter be prepared by Ms Trepa.[24]

[80] On 25 August Mr Byrne telephoned Rightway and spoke to 'Roc'. Roc of Rightway was not called to give evidence. Mr Byrne's evidence[25] of what he was told by Roc about the content of Roc's discussions with Mr Langley is hearsay. I do not make findings about those conversations based on this part of Mr Byrne's evidence.

[81] In the course of his investigation Mr Byrne obtained a copy of the email which Mr Langley had written to Rightway on 9 August 2022.

[82] On 25 August 2022 Mr Byrne provided an email update on the investigation following his discussion with Rightway. His email read:[26]

"Hi Guys

Updates as follows.

I spoke with Rocco (Wrightway Service Manager)

Jarrad organised the tow.	Unauthorised	Did not advise management
Jarrad provided a wrong Plant number against which to undertake the repairs	Obtained a plant number from a different BCS vehicle wand provided it to Wrightway	The Navara does not have a plant number as it is owned by BCS
Jarrad received a call from Rocco about the cost of the engine	Jarrad Authorised replacement	
Rocco advised the vehicle had not been serviced, that the oil was like mud	Jarrad alleged there was no service record and that he had just received the vehicle from QLD	Incorrect. Jarrad received the vehicle 80,000 kms ago
Jarrad received another call	He instructed Rocco to undertake a full inspection and repair outstandings	unauthorised

I'll come see you to discuss his immediate termination.

Thanks.

Regards,
Clifford Byrne"

[83] After receiving this email, Ms Trepa informed Mr Byrne that notwithstanding his stated view that dismissal was the appropriate consequence, the company would provide Mr Langley an opportunity to consider the allegations of misconduct, provide a response and only then would a decision be made on the matter.

[84] On 30 August 2022 Mr Langley was asked to attend a show cause meeting.

Show cause meeting 30 August

[85] The show cause meeting was attended by Mr Byrne, Ms Trepa and Mr Height.

[86] Ms Trepa took contemporaneous handwritten notes which are in evidence.

[87] Mr Langley declined a support person.

[88] Mr Langley was advised that he was suspended with pay pending an investigation into his conduct. He was required to hand-in his company supplied phone and laptop.

[89] The show cause letter was read to Mr Langley by Mr Byrne. He was given a copy of the letter. The allegations of misconduct were:[27]

> "…The allegations are that you:
>
> - Failed to maintain the Company vehicle as required by the Company
> - Did not notify management that the vehicle was not operational and required repairs
> - Did not complete the NHV Fault Report F107 and coordinate with branch service department in relation the repair of the vehicle, including organising the vehicle to be towed
> - Authorise repair and payment of the vehicle for $12,805.10 without management knowledge or approval, which included not following appropriate expense approval protocols
> - Provided an incorrect Plant Number, in the guise of a Purchase Order Number by email on the 9th August 2022 to Wrightway to conduct the repairs
>
> This type of conduct is in breach of the Company's Code of Conduct and associated policies, including the Company Driving Rules F 019
>
> If these allegations are substantiated, this may lead to disciplinary action being taken against you, up to and including the possible termination of your employment..."

[90] Mr Langley was told that he did not need to respond then and there, and that a meeting to receive his response would be held on 2 September.

[91] Mr Langley however indicated that he preferred to meet the following day, 31 August.

Response meeting 31 August

[92] The meeting to hear Mr Langley's response was held on 31 August 2022. It was again attended by Mr Byrne, Ms Trepa and Mr Height.

[93] Mr Byrne, Ms Trepa and Mr Height took contemporaneous handwritten notes which are in evidence.

[94] Mr Langley again declined a support person.

[95] The explanations Mr Langley gave in response were:

- He was not given a handover or instruction on procedures for repair at the time of taking possession of the vehicle;
- Whilst not having serviced the car, he did change the oil and tyres in the previous eighteen months;
- He had asked and had been told to take the car in himself to a mechanic when servicing was required;
- He agreed that in general terms he had authorised some of the repairs including the replacement engine but not the additional works;
- He had told Mr McClymont that his car was in for repair;
- He asked Rightway to service the car because he just wanted to get it fixed, serviced and roadworthy but did not ask for the extra works; and
- He said he took responsibility for authorising some of the repair costs ($5,000 for the replacement engine) but not $12,805.10.

[96] Mr Langley made these explanations in part of his own motion and in part in response to questions from Mr Byrne and Ms Trepa.

[97] The meeting concluded on the basis that the investigation team would investigate the matter further in light of what had been said and the company would advise of its response in due course.

Investigation stage 2

[98] Shortly after hearing from Mr Langley, the investigators decided that they needed to speak to Mr McClymont in light of the assertion by Mr Langley that Mr McClymont had been advised of the repair.

[99] Mr Byrne, Mr Height and Ms Trepa spoke to Mr McClymont later that day.

[100] Mr McClymont stated that he had simply been told that the car was being serviced, that he had not been told that the car required major repair, had not been told that the car was not operational or had been towed, and that these understandings had been reinforced by Mr Langley telling him that he (Mr Langley) did not need a loan vehicle because he was collecting the car a day or so later.

[101] Soon after speaking to Mr McClymont, the investigation team concluded the investigation.

[102] It was agreed they would report their findings to Mr Hyde.

Decision to dismiss

[103] Mr Hyde was orally spoken to by the investigation team. No employer witness could clearly recall when this occurred.

[104] Mr Hyde had already been copied into certain documents (such as Mr Byrne's various updates) and had also been given a copy of Mr Langley's email to Rightway of 9 August and Rightway's invoice and covering email of 19 August 2022.

[105] No written report other than this assortment of documents was provided to Mr Hyde.

[106] Mr Hyde was told that the investigation team had spoken to Mr Langley as part of their investigation.

[107] The investigation team left.

[108] Mr Hyde considered the matter. The state of the evidence as to how long he took to make a decision is unclear. Mr Hyde was unsure. Under questioning he thought he would "sleep on it" and took "up to 48 hours" as he "didn't take the investigation lightly".[28] Mr Height, on the other hand, recalled that the decision was not taken "there and then" but was made "within a relatively short period of time".[29]

[109] Mr Hyde decided that Mr Langley's employment should be terminated for misconduct resulting in a loss of trust and confidence. Mr Hyde believed there to have been "deceit" and a "cover-up".[30]

[110] Mr Hyde reported his decision to Ms Trepa. Whether he also did so directly to Mr Byrne and Mr Height is unclear. His evidence as to when and how he did so was vague.

[111] Ms Trepa drafted a termination letter. The termination was to be on notice with payment of three weeks in lieu. When and who made the decision to terminate on notice rather than summarily is unclear on the evidence.

[112] Ms Trepa arranged for the letter to be signed by Mr Hyde.

Dismissal

[113] On Friday 2 September 2022 Mr Langley received an email stating that the investigation was complete, that a decision had been made and that he must attend a meeting the following Monday 5 September 2022 to be informed of the outcome.

[114] Mr Langley attended a meeting on 5 September 2022.

[115] The meeting was attended by Mr Byrne, Ms Trepa and Mr Height. Mr Hyde was not present.

[116] Mr Byrne took the lead. He read the termination letter verbatim:[31]

> "Dear Jarrad,

Outcome of Investigation

I refer to the show cause letter dated 30 August 2022 and out meeting with you on 31 August 2022 with Cliff Byrne – Construction Manager, Peter Height – Estimating and Contracts Manager and Tania Trepa – HR Support Manager.

It is noted that you were offered a support person and provided with 24 hours' notice to attend the meeting, however you opted to not have a support person present and requested to have the meeting held earlier.

We have considered the responses given by you in the meeting and all of the circumstances, which includes the details you provided in response of the allegations, along with any supporting material. Further, relevant parties have been interviewed in relation to this matter.

It has been determined that there are serious breaches of policies and practices, and it is appropriate for disciplinary action to be taken against you. The disciplinary action we consider to appropriate in the circumstances is the termination of your employment.

We therefore notify you that your employment is terminated. We will not require you to work out the period of notice and in accordance with the terms of your employment, Ballestrin will make payment to you in lieu of your notice period as per your Letter of Offer. As such, your last day of employment with Ballestrin will be today, 5 September 2022 **(Termination Date)**.

Your termination pay will also include any unpaid salary owed to you, plus all eligible accrued and untaken leave entitlements. You will be required to return any and all company property immediately including, but not limited to; Ballestrin uniform and PPE, access cards / keys and vehicle.

I take this opportunity to remind you of your continuing confidentiality obligations after the termination of your employment.

I also remind you that the employee assistance program is available to you which is a free and confidential counselling service. The employee assistance program can be contact on [redacted].

If you have any questions in relation to any of the above matter, please contact me.

Yours sincerely,

Michael Hyde | Executive General Manager

Ballestrin" (emphasis in original)

[117] Little was said by Mr Langley. He stated that the decision was "disappointing" and "super harsh" and that he would "leave it to fair work to sort out".

[118] Mr Langley left the workplace and subsequently returned the company vehicle. He was paid statutory entitlements plus three weeks in lieu of notice.

Post dismissal

[119] Considering his dismissal to have been harsh, Mr Langley further researched his rights in the days following. He prepared an unfair dismissal claim under his hand. He filed that claim online on 20 September 2022.

[120] Following dismissal, Mr Langley actively searched for comparable work.

[121] After being unemployed for thirteen weeks (nine weeks without income taking into account the three weeks paid in lieu) Mr Langley secured full time work as an estimator. He commenced on 12 December 2022.

[122] He was paid $10,000 per year less than when employed at Ballestrin.

Submissions

Mr Langley

[123] Mr Langley advances his case on two primary grounds.

[124] Firstly, Mr Langley submits that, even if he breached policy or failed in his duty, his dismissal was unfair because dismissal over this incident was harsh having regard to mitigating factors.

[125] Secondly, Mr Langley submits that in any event he was denied procedural fairness and that his dismissal was unfair on that ground.

[126] Mr Langley submits that each of these factors, considered individually or collectively, render his dismissal unfair.

[127] On harshness, Mr Langley advances the following six issues in mitigation:

1. He was unaware of what was required concerning repair and servicing of vehicles because he was not provided a vehicle handover;

2. Ballestrin's requirements for vehicle repair and servicing were unclear;

3. He informed a manager that his vehicle was being repaired;

4. He authorised only some but not all of the works performed and to only about half the value of what was invoiced;

5. He acted in good faith and in the company's interests in having its vehicle repaired and made roadworthy and he secured no private benefit in doing so; and

6. This was an isolated event in the context of having an otherwise unblemished record of service.

[128] On procedural fairness, Mr Langley submits that he was denied procedural fairness in multiple ways:

1. Prejudgement. The dismissal was infected by prejudgement in that:

    - the conclusion that he had engaged in misconduct was made before the investigation was complete; and

    - the conclusion that he should be dismissed was made before the investigation was complete.

2. Not listened to. His explanations and issues raised in mitigation were not genuinely considered.

3. Denied a full opportunity to respond in that:

    - he was not given an opportunity to respond to the findings of the investigation; and

    - he was not given an opportunity to express a view whether, in light of the findings, what the consequence should be.

[129] Mr Langley also points to a number of other procedural failings which he says were unfair to him:

- he was not made aware of the investigation into his conduct until 30 August. By then, the investigation had been underway for over a week (since 22 August);

- despite having an established working relationship with Mr Hyde, the decision-maker did not speak to Mr Langley. He instead relied on third hand communication about Mr Langley's explanations; and

- he was promised on 31 August that he would be provided a record of the meeting. None was provided.

[130] Mr Langley seeks compensation that takes into account the nine weeks he spent between jobs without income, and the fact that his new employment provides a lower remuneration.

Ballestrin

[131] Ballestrin submit that the dismissal was not harsh, unjust or unreasonable and no issue of remedy arises.

[132] Ballestrin submit that a valid reason for dismissal existed having regard to Mr Langley's conduct.

[133] Ballestrin submit that the conduct was misconduct and not a single incident of misconduct but multiple forms of misconduct by act and omission across an extended period of days. The conduct included misconduct at the serious end of the scale and at the moderate end of the scale.

[134] The misconduct was said to be of three categories:

1. Breaches of policies and procedures in that Mr Langley:

    - failed to maintain the company vehicle in accordance with his obligations;
    - failed to report that the vehicle was unroadworthy;
    - failed to comply with delegated authority procedures; and
    - failed to comply with purchase order procedures.

2. Wilful dishonesty in that Mr Langley:

    - misrepresented to Rightway that he had authority for the repairs and service including by providing an incorrect plant number knowing that it was not for his vehicle and was not a purchase order number; and
    - covered-up his lack of authorisation by devising a work-around to give the impression of authorisation.

3. Misleading the investigators in that Mr Langley:

    - gave the impression that Mr McClymont had known of or authorised the repairs when he had not done so;
    - gave the impression that the repair was urgent to justify his non-compliance with procedure when in fact there was no urgency; and
    - suggested that no-one was around on 8 or 9 August with authority to issue a purchase order when in fact that was not the case.

[135] Ballestrin submit that the wilful dishonesty, in its own right, is a valid reason for dismissal. Ballestrin submit that the non-compliance with policies and procedures, in combination, is a valid reason for dismissal in its own right. Ballestrin makes these submissions having regard to the fact that the conduct concerned expenditure of company money and breaches of fiduciary obligations.

[136] In any event, Ballestrin submit that the combination of the misconduct presented an overwhelming basis for the employer to reasonably conclude that it no longer had trust and

confidence in Mr Langley. Loss of trust and confidence, reasonably grounded, is a valid reason for dismissal.

[137] Ballestrin submit that none of the six considerations advanced in mitigation, considered individually or collectively, render the dismissal harsh. Ballestrin submit that these are excuses and not reasons and in some cases are wrong or half-truths. Dismissal was not a disproportionate response.

[138] Whilst noting that immediate and genuine remorse may be relevant to mitigation, Ballestrin point to the fact that Mr Langley displayed no remorse or acknowledgement of wrongdoing and took no responsibility for incurring unauthorised and uneconomic expenditure.

[139] Ballestrin submit that procedural fairness was provided because Mr Langley was provided an opportunity to explain his conduct after having the allegations put clearly and in writing to him, and that this occurred before the decision to dismiss was made.

[140] Ballestrin submit that the decision-maker considered the matter carefully and without prejudgement.

[141] Ballestrin submit that to the extent that there may have been some shortcomings in procedure, in an overall sense the process adopted was fair and, in any event, any gaps in procedural fairness do not trump the fact that a valid reason for dismissal for multiple forms of misconduct exists.

[142] Further, Ballestrin submit that even if Mr Langley had been provided an opportunity to put a view on the investigation findings or on potential consequences prior to a decision to dismiss, it would have made no difference to the final decision as nothing new existed or would have been proffered.

[143] In the alternative, and in the event that a finding of unfairness is made, Ballestrin submit that re-employment is neither sought nor appropriate, and that any compensation order should be nil having regard to the three weeks paid in lieu of notice, and having regard to the substantial contribution Mr Langley made to the dismissal on account of his misconduct.

Consideration

[144] The issue for determination is simply put; was Mr Langley's dismissal "harsh, unjust or unreasonable" and, if so, is it appropriate to order a remedy by way of reinstatement or compensation?

[145] I take account all of the evidence and submissions before me. Some evidence is not referenced, not because I have not considered it, but because I do not need to make specific reference to it. Similarly, I have dealt with each primary submission but not every angle of each submission, not because they have not been considered but because doing so would add excessive length to these reasons.

[146] No jurisdictional issues arise. Mr Langley was protected from unfair dismissal within the meaning of s 382 of the FW Act. He served the statutorily required minimum employment

period (s 382(2)(a)). His annual rate of earnings did not exceed the high income threshold (s 382(2)(b)(iii)). His employer was a "national system employer" within the meaning of s 14 of the FW Act. His application was filed within the statutorily required 21 days after dismissal took effect.

[147] Section 387 of the FW Act provides:

> **"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."

[148] I now consider the factors in s 387.

Valid Reason (s 387(a))

[149] An employer must have a valid reason for the dismissal of an employee. It is the Commission's task to determine if a valid reason exists. The reason(s) should be "sound, defensible and well founded" and should not be "capricious, fanciful, spiteful or prejudiced".[32]

[150] In a conduct-based dismissal[33] the test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct. The Commission must itself make findings as to whether the conduct occurred based on the evidence before it.[34]

[151] Whilst Mr Langley carries the burden of establishing that the dismissal was unfair in the relevant sense, where an employee is dismissed for misconduct, as with certain allegations in this case, an evidentiary onus rests on an employer to establish that on the balance of probabilities the misconduct occurred.[35]

[152] A valid reason is not assessed simply by reference to a legal right to terminate a contract of employment.[36]

[153] Multiple forms of breach are alleged by Ballestrin. All are matters of significance though some more serious than others. Some are couched as breach of policies, others as misconduct. Some are said to be acts of commission, some of omission.

[154] I now consider whether, on the evidence before me, the alleged breaches occurred to the standard of proof required and, if so, whether they collectively or individually constituted a valid reason for dismissal.

Breach of policies and procedures

[155] This allegation is multi-faceted. I deal with each of the elements alleged.

Failure to service and maintain the vehicle

[156] Ballestrin policy required an employee provided a vehicle to service and maintain that vehicle at least in accordance with manufacturer's recommendations.[37]

[157] On the evidence before me Mr Langley had possession of the vehicle for approximately eighteen months. Over this period, it appears to have been driven substantial distances (up to 80,000 kilometres).

[158] Mr Langley did not have the vehicle serviced prior to it breaking down in August 2022 notwithstanding its age and distances travelled. Whilst he did have its oil changed three times and tyres replaced, that was not a service as recommended by the manufacturer. In the month prior to the vehicle breaking down, the need for a service was raised with Mr Langley but he had not yet booked it in.

[159] Whilst it is possible that the failure to adequately maintain the vehicle contributed to the mechanical problems that manifest in August 2022, I do not have sufficient evidence before me to make such a finding. However, the evidence clearly establishes that when being serviced by Rightway, underlying problems were identified that required additional work.

[160] I find that Mr Langley failed to adequately maintain the vehicle in accordance with his obligations.

[161] This breach, whilst material, was at the lower end of the scale. In its own right it did not warrant dismissal.

Failure to report that the vehicle was unroadworthy and requiring major repair

[162] Ballestrin policy required an employee to report the inoperability or damage to plant and equipment under their control. This included vehicles that become unroadworthy.[38]

[163] Mr Langley did not report to any Ballestrin or McMahons manager that his car had become unroadworthy or needed major repair. Mr Langley had multiple opportunities to do so but failed to do so. Three particular moments ought to have reasonably prompted Mr Langley to do so: firstly, on 9 August when he required the vehicle to be towed. That fact alone self-evidently meant that the vehicle was unroadworthy; secondly, on 11 August when Rightway advised Mr Langley of the "bad news" that a new engine was required. Self-evidently this meant that repair was major; and thirdly, on 19 August when Mr Langley collected the car and was told that additional works of significance had been performed on the clutch, battery, brakes and radiator.

[164] In answer to questions from myself, Mr Langley was at a loss to explain why he did not report these issues to his managers.[39] There was no explanation.

[165] I do not find that Mr Langley adequately met his obligation when he told Mr McClymont on 10 August that his car was at the mechanics. This was a brief and informal conversation when Mr Langley was being picked-up in which he (Mr Langley) made no more than a casual reference to a possible timing belt issue. Whilst this put the Operations Manager on notice that the car was off-road for two days for repair, it did not reasonably raise red flags. Mr McClymont had not been told that the vehicle had been towed. In any event, this conversation occurred before Mr Langley was told of the need for a replacement engine. His obligation to report was a continuing one. Being subsequently advised that the vehicle required a new engine was a materially new development, quite different from a possible timing belt issue taking the car off-road for two days.

[166] I find that Mr Langley breached his obligations in failing to report the unroadworthy nature of the vehicle, the subsequent serious diagnosis that it required a new engine and the magnitude of the additional works once he collected the car.

[167] This breach was of significance. It was the first of a series of poor judgements by Mr Langley that led to dismissal. Had a modicum of better judgement been applied, dismissal would have been far less likely.

[168] Being significant, in its own right it warranted disciplinary sanction, though not necessarily dismissal.

Failure to obtain authority for expenditure

[169] Ballestrin's policy (drawn from McMahons policy) required that only certain persons in the company had authority to authorise expenditure. Those were persons, usually managers, who had authority to issue purchase orders.

[170] Controls on the authority to incur expenditure is so self-evident that it barely requires an underpinning policy. No employee could reasonably expect that they have authority to spend

company money without being authorised to do so. An employment relationship, of itself, confers no such authority.

[171] Mr Langley had no such authority and knew that he had no such authority.

[172] I take into account Mr Langley's submission that with respect to routine vehicle servicing, the custom and practice (and what he had informally been told to do) was that an employee in possession of a company car had authority to take the car to the service provider for a routine service and make payment on their credit card, and seek reimbursement. I accept Mr Langley's submission that his employer's policy, when set against custom and practice on routine car servicing, is unclear. It does not provide clarity on whether an employee who needs to take their car in for routine servicing but who is not a person authorised to expend funds requires pre-authorisation.

[173] This consideration does not however address the facts in this matter. On 9 August 2022 Mr Langley was not taking the car in for routine servicing. He was doing so because it was unroadworthy and needed a tow. Nor was authorising a replacement engine in the days following routine servicing. The servicing request was tacked onto Mr Langley's decision to approve a new engine.

[174] I do not accept Mr Langley's submission that managers with authority were not available to provide authority at the times he was required to obtain authority. This submission is related to Mr Langley's further submission that the situation was accompanied by urgency such that he had to find workarounds to the purchase order obligations.

[175] I reject both submissions.

[176] Repair of the unroadworthy car, if it was to be repaired, was urgent only to the extent that Mr Langley had the right to a roadworthy car as part of his contractual entitlements. However, neither the unroadworthy car, nor Mr Langley, were put in an unsafe situation when it broke down that might have justified a workaround such as an urgent unauthorised tow. In any event, I accept Ballestrin's evidence that there were managers present on 8 and 9 August and in the week thereafter who could have decided upon and authorised a tow or other expenditure.

[177] Moreover, and even more relevantly, Mr Langley's failure to report that the car had been towed and that it required a new engine denied Ballestrin its right to make an informed decision about whether repair should be undertaken. Clearly relevant was the fact that Mr Langley was entitled to use a company vehicle of comparable dollar value to that stated in his employment contract, but Mr Langley's conduct in acting without authority denied his employer the right to make a decision as to whether it was appropriate to replace the engine and fund other significant works on an aged vehicle. The evidence suggests that this would not have been considered by Ballestrin to make economic sense by a considerable margin. I need not decide that point because the issue is not the state of the economics but Mr Langley's conduct which denied his employer the right to make a decision about that matter including the economics.

[178] This breach was of significance. It concerned authority over fiduciary matters. At least with respect to Mr Langley authorising the new engine, the sum of expenditure authorised without authority was substantial. More than one opportunity existed for authority to be obtained, but similar to the non-reporting breach, Mr Langley missed those opportunities. Being significant, in its own right, it warranted disciplinary sanction including dismissal.

Failure to obtain a purchase order

[179] A closely related breach by Mr Langley was not only that authority was needed to authorise expenditure but that he was required to obtain a purchase order number once (and if) given authority.

[180] The purpose of a purchase order is also self-evident. The external service provider (in this case a vehicle repairer) needs confidence that the services they are being asked to perform by an officer of a company have been authorised such that they will be paid by the company for the work undertaken.

[181] Mr Langley knew of the requirement for obtaining purchase order numbers and the process for doing so. The evidence establishes that he had previously done so compliant with policy.

[182] Further, the evidence establishes that Mr Langley was at a briefing provided to employees on 8 July 2022 (mere weeks prior to this episode) where Mr Hyde had advised staff that unauthorised expenditure had been a problem and in an effort to control costs and maintain integrity of process the company would be strictly applying its policies and procedures requiring purchase orders to be obtained before incurring expenditure.

[183] In August 2022 Mr Langley did not obtain a purchase order number. He had an obligation to do so and failed to do so. He did not need to be reminded of his obligation to do so but in any event was reminded by Rightway on 9 August 2022 when he authorised the tow.

[184] I deal below as to whether this conduct and related representations by Mr Langley were dishonest or misleading.

[185] This breach was of significance. It concerned fiduciary matters. Although technically separate from the obligation to seek authorisation, it was an obligation that arose if and when authorisation was granted. As such, it forms part of the same sequence of conduct as the breach of the obligation to seek authorisation. For the same reasons it warranted disciplinary sanction including dismissal.

Wilful dishonesty

[186] The allegation is that Mr Langley dishonestly obtained and used a plant number and then made false representations to Rightway that the plant number was a purchase order so as to cover-up the absence of authority.

[187] The evidence clearly establishes, and Mr Langley does not dispute, that he obtained a plant number attributable to a different company asset (not his car) and that in any event a plant number is not a purchase order, and that he knew that.

[188] The evidence also clearly establishes that Mr Langley represented to Rightway that the number he supplied was a purchase order number when in fact that was false. This is apparent on the face of Mr Langley's email to Rightway of 9 August 2022.

[189] I find that Mr Langley knowingly made false representations to a service provider that gave the impression that his employer had authorised repair of the company vehicle when it had not done so. Further, Mr Langley took no steps in the days following to correct that misrepresentation despite having multiple opportunities to do so.

[190] The false representation was a misrepresentation.

[191] In cross examination Mr Langley belatedly accepted that such conduct was dishonest.[40]

[192] I find that this conduct, and in particular the email of 9 August 2022, was indeed dishonest but make that finding in a particular context.

[193] It was dishonest because it was false, knowingly false, and was intended to cover-up the fact that Mr Langley knew that he needed authority to expend company funds but had not obtained such authority.

[194] It was not dishonest in the sense that a private benefit was secretly sought to be obtained. Towing and repair of an unroadworthy company motor vehicle was not necessarily contrary to the company's best interests (though may have been if the economics did not warrant such a course) nor was Mr Langley trying to derive some private benefit at the company's expense beyond what he was entitled under his contract of employment (which was use of a roadworthy company car of that value).

[195] Nonetheless, the false representation made by Mr Langley in his email of 9 August 2022 was a serious breach of duty that struck at his fiduciary duties.

[196] It was a valid reason for dismissal in its own right.

Misleading the investigation

[197] This allegation is that during the investigation Mr Langley:

- gave the impression that Mr McClymont had known of or authorised the repairs when he had not done so;
- gave the impression that the repair was urgent to justify his non-compliance with procedure when in fact there was no urgency; and
- suggested that no-one was around on 8 or 9 August with authority to issue a purchase order when in fact that was not the case.

[198] Whilst it is understandable that an employee, facing misconduct allegations, may seek to portray their conduct in as benign a light as possible, there is a difference between doing so whilst raising issues in mitigation, and making false or misleading claims about the conduct itself.

[199] I do not find that Mr Langley crossed the line of providing false information to the investigators. The handwritten notes of Mr Byrne, Ms Tepa and Mr Height all indicate that Mr Langley acknowledged that he did not have authority to incur the level of expenditure he was then willing to take responsibility for (the engine replacement). Due to a lack of thought and insight into his obligations Mr Langley did not see this as wrongdoing, but nonetheless made the acknowledgement that he had acted without authority.

[200] Whilst it was reasonable for Mr Langley to also make reference to the fact that he had told Mr McClymont that his car was in for repair, this was somewhat of a half-truth because it conveyed the impression that Mr McClymont had authorised or at least been advised of the magnitude of the repair, when in fact Mr McClymont had not done so and had no reason to believe that the repair was unauthorised or large scale.

[201] The views Mr Langley conveyed to the investigators about urgency were genuinely held, even though I have found that objectively considered there was no urgency such to warrant a breach of established policy requiring reporting and pre-authorisation.

[202] The views Mr Langley expressed to the investigators about no persons being available to authorise the works was a reckless attempt to deflect responsibility and whilst incorrect, I do not find that Mr Langley knew it to be false.

[203] Overall, I find that Mr Langley largely put genuinely held opinions to the investigators and only in limited ways did he provide inaccurate information.

[204] I do not find that Mr Langley's conduct during the investigation was a basis for disciplinary action or dismissal.

Conclusion on valid reason

[205] I have found that Mr Langley's failure to obtain prior authorisation and a purchase order for the expenditure on towing and repairing the vehicle, and in particular commissioning a new engine, was a serious breach of company policy and his duty as an employee.

[206] I have found that the misrepresentation made by Mr Langley in his email to Rightway of 9 August 2022 that the number he provided was evidence of company authorisation for towing and repair services was false and a serious breach of duty.

[207] Each of these breaches of duty struck at Mr Langley's fiduciary responsibilities and each in their own right was a valid reason for dismissal.

[208] Other beaches of policy by Mr Langley concerning the failure to adequately maintain the vehicle and failure to report its unroadworthy condition were not valid reasons for dismissal in their own right but add weight to a finding of valid reason.

[209] The two findings of serious breach giving rise to a valid reason weigh strongly against a finding of unfair dismissal.

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

[210] Mr Langley was notified of the reason for dismissal at the meeting on 5 September 2022. This was confirmed in writing when given the letter of termination.

[211] In these circumstances, Mr Langley knew why he had been dismissed.

[212] This is a neutral conclusion.

Opportunity to respond (s 387(c))

[213] An employee protected from unfair dismissal should be provided an opportunity to respond to a reason for dismissal relating to their conduct or capacity. An opportunity to respond should be provided before a decision is taken to terminate an employee's employment.[41]

[214] The opportunity to respond is an element of procedural fairness but does not require formality. This consideration is to be applied in a common-sense way to ensure the employee is treated fairly.[42] Where an employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, that is enough to satisfy this consideration.[43]

[215] The evidence before me is that Mr Langley was provided an opportunity to respond to the allegations against him.

[216] However, two significant qualifications need to be placed on this opportunity.

[217] Firstly, the opportunity to respond was to the investigators, not the decision-maker. Whilst it is not unusual that a corporate decision-maker may be independent of the fact-finding conducted by investigators, in this matter I am not able to find that Mr Hyde was given an accurate brief of what Mr Langley had to say. There was no written report provided by the investigators on their findings, let alone on Mr Langley's explanations. The evidence is that, at least with respect to Mr Langley's explanations, Mr Hyde was entirely dependent on an oral report, details of which are not mentioned in his evidence in chief and which he could not recall in the witness box. I am unable to find that Mr Langley's views were genuinely considered as I am unable to find which, if any, of his views were known to Mr Hyde. For example, Mr Hyde had no insight, even in the witness box, that Mr Langley had claimed that he had not authorised the full $12,805.10 of expenses and that he had, upon collection, been taken by surprise at the additional works beyond the new engine.

[218] Secondly, at least the lead investigator (Mr Byrne) to whom Mr Langley responded had prejudged not just his wrongdoing but also that he should be immediately dismissed for the wrongdoing. This much is readily apparent from Mr Byrne's email of 25 August 2022.

[219] Indeed, I find that by keeping Mr Byrne in the investigation and by allowing him to continue to lead the investigation no less (as well as communicate the dismissal) Ballestrin allowed the investigation process and the dismissal to be infected with his prejudgement. Whilst I take into account that Mr Hyde did not prejudge his decision, he was privy to Mr Byrne's opinion (he was copied in on the 25 August email) and his consideration of the facts was only as good as what he was told by the investigators including Mr Byrne.

[220] Although he was given an opportunity to respond and did so, these were material denials of procedural fairness to Mr Langley.

[221] Procedural fairness does not require in all cases that an employee be given an opportunity to respond to findings of a misconduct investigation particularly if they have been given an opportunity to answer allegations during the investigation. Often that would create an unproductive and circular process. However, in this instance where the investigation was infected by prejudgement the failure to do so was unfair to Mr Langley.

[222] Nor does procedural fairness require in all cases that an employee be given an opportunity to express a view on sanction in light of the findings of a misconduct investigation. However, in this instance where the investigation was infected by prejudgement not just on misconduct but also on sanction, the failure to do so was unfair to Mr Langley.

[223] These too were material denials of procedural fairness.

[224] The material denials of procedural fairness were significant, particularly that the investigation was infected by prejudgement by the lead investigator as to conduct and consequence from an early stage.

[225] This weighs strongly in favour of a finding of unfairness.

Opportunity for support person (s 387(d))

[226] Where an employee protected from unfair dismissal has requested a support person to assist in discussions relating to dismissal, an employer should not unreasonably refuse that person being present.

[227] Mr Langley did not request a support person. The employer did not unreasonably refuse a support person.

[228] This is a neutral consideration.

Warnings concerning performance (s 387(e))

[229] I have found that Mr Langley had generally performed his estimating work to a good standard and had been rewarded with wage increases (including a substantial increase one

month prior to dismissal) but had been informally counselled by Mr Hyde and Mr Byrne about his application to certain tasks, punctuality and attendance though no formal written warning had been given (although one had been prepared and discussed in early 2022 but not formally issued).

[230] In the circumstances, this is a neutral consideration.

Size of enterprise and human resource capability (ss 387 (f) and (g))

[231] The employer is a sizeable business with a dedicated human resource capacity through its parent company McMahons. It is not a small business within the meaning of the FW Act.

[232] There is no sense in which the size of the employer or its internal human resources capacity mitigate any shortcomings in managing workplace or disciplinary matters.

[233] This is a neutral consideration.

Other matters (s 387(h))

[234] I now deal with the factors in mitigation raised by Mr Langley. Mr Langley submits that these factors collectively render the dismissal harsh.

He was unaware of what was required concerning repair and servicing of vehicles because he was not provided a vehicle handover

[235] Whilst there was no handover in which Mr Langley was provided a briefing on servicing and repair procedure, he knowingly took possession of the car, knowingly negotiated a contractual entitlement to a car, knew the general policy and procedure on authorisation of expenditure and purchase orders and had full access to the SkyTrust system that contained all policies and procedures including those concerning company vehicles.

[236] Further, Mr Langley had a contractual obligation to familiarise himself with these policies and procedures. He also had, as recently as June 2022, a contractual obligation to re-train in those policies and had commenced doing so with respect to the Code of Conduct.

[237] It was Mr Langley's task to inform himself of company requirements relevant to his work and his employment rights and obligations, including his obligation to service the vehicle, maintain the vehicle, obtain authorisation for expenditures on the vehicle and report any major issues with the vehicle. This he did not do other than casually and as and when it suited him.

[238] Mr Langley's misconduct is not mitigated on this account.

Ballestrin's requirements for vehicle repair and servicing were unclear

[239] I have found that the employer's policy when set against custom and practice on routine car servicing was unclear. It did not provide clarity on whether an employee who needs to take their car in for routine servicing but who is not a person authorised to expend funds required pre-authorisation.

[240] However, I have also found that this consideration does not address the breaches of duty in this matter. Mr Langley was not taking the car in for routine servicing. He was doing so because it was unroadworthy and needed a tow. Authorising a replacement engine was not routine servicing.

[241] Significant expenditure of the type Mr Langley authorised without authority required a purchase order number issued by an officer of the company with authority to do so. Mr Langley knew or ought to have known that fact. The policy in that regard was clear.

[242] Mr Langley's misconduct is not mitigated on this account.

He informed a manager that his vehicle was being repaired

[243] I have found that whilst Mr Langley told Mr McClymont on 10 August that his car was at the repairers, this was a brief and informal conversation in which Mr Langley made no more than a casual reference to a possible timing belt issue.

[244] This put the Operations Manager on notice that the car was off-road for two days for repair but did not reasonably raise red flags. In any event, this conversation occurred before Mr Langley was told of the need for a replacement engine. His obligation to report was a continuing one and Mr McClymont never had insight into the fact that a possible timing belt repair had morphed into a new engine being required.

[245] Mr Langley's misconduct is not mitigated on this account.

He authorised only some but not all of the works performed and to only about half the value of what was invoiced

[246] This was an issue in mitigation on which Mr Langley placed significant weight during the investigation and at the hearing.

[247] Objectively considered, it does not mitigate the serious breaches of duty.

[248] Firstly, even at its highest Mr Langley's submission is that he only approved $5,000 of the $12,805.10 invoice (the engine replacement). Breaches of fiduciary duty involving any sum of money, and most certainly $5,000, are material and significant. It is the conduct in breach that gives rise to a reasonably grounded loss of trust and confidence, not the quantum of the monies involved *per se*. Even on Mr Langley's best case the sums are not so small as to be unable to ground a reasonably held loss of trust and confidence or render the dismissal unfair.

[249] Secondly, as Mr Langley conceded in his closing submission, he expressly approved not just the $5,000 for the new engine but also the cost of the tow and the cost of a routine service. These three components, on Mr Langley's case amount to between $5,500 and $6,000.

[250] Thirdly, it is more than tolerably arguable that approving a vehicle repairer to perform a service carries an inference that approval is given for expenditure of costs related to and incidental to the service. If the additional works on the clutch, brakes, battery and radiator fell

into that category (a matter on which I need not make a decision), all of the works were approved by Mr Langley without authorisation expressly and by inference.

[251] Mr Langley's misconduct is not mitigated on this account.

He acted in good faith and in the company's interests in having its vehicle repaired and made roadworthy and he secured no private benefit in doing so

[252] I have found that whilst towing and repair of an unroadworthy company motor vehicle was not necessarily contrary to the company's best interests, this was not automatically so. The economics of repair of an aged vehicle required assessment. Mr Langley's conduct in not obtaining prior authority and a purchase order denied Ballestrin that opportunity and was a serious breach of duty.

[253] I have also found that whilst Mr Langley was not trying to derive some private benefit at the company's expense beyond what he was entitled under his contract of employment, his conduct in making a false representation to Rightway that the number he provided was evidence of company authorisation for towing and repair services was false and a serious breach of duty.

[254] Whatever Mr Langley's intentions were in devising this "workaround", his misconduct is not mitigated on this account.

This was an isolated event in the context of having an otherwise unblemished record of service

[255] The issue of the towing and repair of the vehicle was a singular subject matter that gave rise to dismissal but the misconduct by Mr Langley was not isolated to one breach of conduct or on one day.

[256] I have found multiple breaches of duty, some by commission and some by omission, across multiple days with opportunities in this period for Mr Langley to have corrected or remediated the breaches.

[257] This was not an isolated instance of error in the heat of the moment.

[258] Relevant to mitigation is also the fact that Mr Langley at no time prior to dismissal acknowledged wrongdoing even when accepting that he did not have authority to approve a new engine replacement. Mr Langley also held out that he was not in breach of duty on the face of his application, in his evidence in chief and until deep into cross examination.

[259] The assertion of this being an isolated incident is not factual. In any event an isolated incident giving rise to a serious breach of fiduciary duty generally will not mitigate the misconduct. This is particularly so, as in this matter, where the breach included false and misleading conduct.

[260] For similar reasons I do not consider Mr Langley's employment record to mitigate the breaches of duty. Even accepting Mr Langley's submission at its highest (that his record was unblemished, which does not entirely accord with my finding), a good record prior to a serious breach of fiduciary duty will not generally mitigate that breach.

[261] For these reasons, Mr Langley's misconduct is not mitigated on these accounts.

Conclusion

[262] Unfair dismissal matters are multifactorial.[44]

[263] In considering whether Mr Langley's dismissal was "harsh, unjust or unreasonable" the Commission is required to consider each of the matters in s 387 of the FW Act to the extent relevant.[45] Those matters must be considered as part of an overall assessment. Each assessment must be made on its merits. That assessment is to be based on the ordinary meaning of the words, in their statutory context. Context includes the object stated in s 381(2) of the FW Act that:

> "…the manner of deciding on and working out such remedies are intended to ensure that a "fair go all round" is accorded to both the employer and the employee concerned."

[264] In arriving at an overall assessment, the statutory considerations must be applied in a practical, common sense way to ensure that the employer and employee are each treated fairly.[46]

[265] I have found valid reasons for dismissal based on serious breaches of fiduciary duty that gave rise to a reasonably founded loss of trust and confidence and which point strongly against a finding of unfairness.

[266] I have not found any factors in mitigation to objectively mitigate the seriousness of the breaches.

[267] However, I have found significant and material denials of procedural fairness, particularly that the investigation was infected by prejudgement by the lead investigator as to conduct and consequence from an early stage. I have found that this weighs strongly in favour of a finding of unfairness.

[268] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the employer's position.[47] My role is not to review whether the employer had a reasonable basis for its decision or ought to have made a different decision, but to consider whether, on the evidence before me, the dismissal of Mr Langley was harsh, unjust or unreasonable.

[269] The ambit of the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* [48] as follows:

> "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."

[270] In reaching my conclusion, I adopt the approach set out by a Full Bench of this Commission in *B, C and D v Australian Postal Corporation T/A Australia Post:*[49]

> **"[58]** Reaching an overall determination of whether a given dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh:
>
> (i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable;
>
> against
>
> (ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct.
>
> **[59]** It is in that weighing that the Commission gives effect to a 'fair go all round'."

[271] In weighing these factors, I take into account the observations of a Full Bench of the Commission in *Parmalat Food Products Pty Ltd v Wililo*:[50]

> "The existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair. The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open."

[272] I also take into account the approach set out by a full bench of this Commission in *Federation Training v Sheehan*:[51]

> "It is trite to observe that any issue/s of procedural unfairness may not be of such significance as to outweigh the substantive reason/s for an employee's dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity as to outweigh any other considerations in respect to 'harshness', such as age, length of service, employment record, contrition or personal and family circumstances."

[273] Conducting this weighing exercise and considering the matter overall, I conclude that the dismissal was not harsh, unjust or unreasonable.

[274] Whilst the significant and material denials of procedural fairness and, in particular, a dismissal being infected by prejudgement, may in other instances render a dismissal harsh, the

nature of the breaches of duty by Mr Langley are such that the dismissal is not re-characterised as harsh on that account.

[275] I take all matters into account but three considerations in particular.

[276] Firstly, the breaches were not only serious but directly concerned fiduciary duties. Those breaches were multiple and occurred across different days. Misrepresenting authority to incur costs that are to be borne by the employer whilst knowing that authority is required and does not exist, and then doing nothing to obtain that authority or disclose the non-authorised approvals, was a breach at the higher end of the scale.

[277] Secondly, it is not likely that had Mr Langley been afforded the full measure of procedural fairness both as to conduct and consequence that the findings of the investigation would have differed or that a lesser sanction would have applied. My findings as to misconduct largely mirror views formed by Mr Hyde. It is unlikely that a plea by Mr Langley for a lesser sanction in the face of a finding of serious breach involving fiduciary responsibilities would have altered Mr Hyde's decision. Given that I have found that dismissal was not a disproportionate response to the multiple breaches of duty, that plea does not alter my decision.

[278] Thirdly, the predicament Mr Langley found himself in was almost entirely of his making and he could provide no explanation as to why he did not take the opportunities that presented to engage with his mangers about what was happening with the vehicle and what he had authorised once he had received news that the car engine needed replacement. Instead Mr Langley lacked insight into his obligations and was recklessly indifferent to the fact that he was approving expenditure of company funds on services he had no authority to approve.

[279] The dismissal was not harsh, unjust or unreasonable.

[280] I make one concluding observation. That Mr Langley was materially denied procedural fairness explains, in part, why he feels a strong sense of injustice about what transpired. That sense of injustice manifest in an unfair dismissal application and the employer being required to expend time and money defending a claim. Whilst Mr Langley's sense of injustice was also driven by a subjective view that his dismissal was "super harsh" because of mitigation factors (a submission I have not accepted), the findings I have made about procedural fairness ought to be a salutary message to employers seeking to minimise exposure to unfair dismissal claims. If an employer's serious misconduct investigation prejudges conduct or sanction or if an employee under investigation is not genuinely listened to when responding then an employer runs a real risk of facing unfair dismissal claims with all the attendant risks. Despite the lack of insight into his conduct, Mr Langley had reason for bringing this claim in those circumstances. It was genuinely advanced and from the outset he told his employer that he thought it best that "fair work sort it out". That I have done.

Conclusion

[281] As the dismissal was not unfair, no issue of remedy arises.

[282] For these reasons and in conjunction with the publication of this decision I issue an order[52] that application U2022/9377 be dismissed.

DEPUTY PRESIDENT

Appearances:

Mr J Langley, *on his own behalf*

Mr T Earls, *with permission*, with Ms K Fidos and Ms A Tyson, *on behalf of* Ballestrin Construction Services Pty Ltd

Hearing details:

2023
Adelaide (by video)
24, 25 January

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[1] Decision via email 'Chambers - Anderson DP' 6 January 2023 1.25pm

[2] A1; A2; A3

[3] R1

[4] R2

[5] R3

[6] R4

[7] R5

[8] R6

[9] Recording of Hearing, 24 January 2023, 6:00:37 - 6:00:59

[10] A4

[11] A8

[12] Mr Hyde R6 paragraph 8

[13] R6 MBH3 Email Mr Byrne to Mr Hyde 4 July 2022

[14] Mr Hyde R6 paragraphs 8 to 12; MH2

[15] R3 T11

[16] Mr Byrne R2 paragraphs 12 to 18

[17] A4 Letter of Offer 25 July 2022

[18] Recording of Hearing, 24 January 2023, at 3:03:50 - 3:04:46

[19] This exchange combines the evidence in chief of Mr McClymont (R5 paragraph 7) with additional content agreed in cross examination (Recording of Hearing, 24 January 2023 at 7:30:20 - 7:30:26; 7:30:37 - 7:30:54, 7:31:10)

[20] R2 COB6 page 4 and R4 PWH2 page 2

[21] R5 paragraph 11

[22] Recording of Hearing, 24 January 2023, 8:04:05 - 8:04:18

[23] R2 COB4

[24] This request was made prior to Mr Byrne speaking to Rightway on 25 August; Recording of Hearing, 24 January 2023 4:38:19 - 4:38:46

[25] R2 paragraphs 26 and 27

[26] R2 COB5

[27] R3 TT12

[28] Recording of Hearing, 24 January 2023, 8:13:51 - 8:13:59; 8:15:02 - 8:15:50

[29] Recording of Hearing, 24 January 2023, 6:57:08 onwards

[30] Recording of Hearing, 24 January 2023, 8:19:29 - 8:19:33

[31] R3 TT15

[32] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373

[33] except where the Small Business Fair Dismissal Code applies

[34] *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213 [24]

[35] *Edwards v Guidice* (1999) 94 FCR 561 [6]-[7]

[36] *Sydney Trains v Hilder* [2020] FWCFB 1373 at [26] principle (6)

[37] F019 Company Driving Rules

[38] F019 Company Driving Rules

[39] Recording of Hearing, 24 January 2023, 3:01:24 - 3:02:06

[40] Recording of Hearing, 24 January 2023, 2:28:30 - 2:28:57

[41] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 at [75]

[42] *RMIT v Asher* (2010) 194 IR 1 at 14-15

[43] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7

[44] *Jones v Brite Services* [2013] FWC 4280 at [24]

[45] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR 915674 at [69] (AIRC, 21 March 2002)

[46] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 as cited in *Potter v WorkCover Corporation* (2004) 133 IR 458 per Ross VP, Williams SDP, Foggo C and endorsed by the Full Bench in *Industrial Automation Group Pty Ltd T/A Industrial Automation* [2010] FWAFB 8868, 2 December 2010 per Kaufman SDP, Richards SDP and Hampton C at [36]

[47] *Miller v University of New South Wales* [2003] FCAFC 180 at 64. See also *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[48] [1995] HCA 24; (1995) 185 CLR 410 at 465 per McHugh and Gummow JJ

[49] [2013] FWCFB 6191

[50] [2011] FWAFB 7498 at 20

[51] [2018] FWCFB 1679 at 55

[52] PR750607