

[2023] FWC 585 [Note: An appeal pursuant to s.604 (C2023/5118) was lodged against this decision - refer to Full Bench decision dated 4 October 2023 [\[2023\] FWC FB 182](#) for result of appeal]



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Max Vincent

v

Roof Safe Pty Ltd

(U2022/10389)

DEPUTY PRESIDENT BINET

PERTH, 7 AUGUST 2023

Application for an unfair dismissal remedy

[1] Mr Max Vincent (**Mr Vincent**) has filed an application (**Application**) pursuant to section 394 of *Fair Work Act 2009* (Cth) (**FW Act**) with the Fair Work Commission (**FWC**) alleging he was unfairly dismissed by Roof Safe Pty Ltd (**Roof Safe**).

[2] Mr Vincent was dismissed as Chief Executive Officer of Roof Safe following an investigation into allegations that he had misappropriated company funds.

[3] On 7 November 2023, Roof Safe filed a *Form F3 - Employer's response to unfair dismissal application* stating that it had no jurisdictional objections to the Application.

[4] On 9 January 2023 and 16 March 2023, the parties participated in conciliation conferences. The matters in dispute could not be resolved.

[5] Taking into account the parties wishes and circumstances, a Determinative Conference, rather than a Hearing, was determined to be the most effective and efficient way to determine the Application. Consequently, the Application was listed for a Determinative Conference in Perth on 17 March 2023. The cross examination of witnesses could not be completed on that day and the Application was subsequently listed for a second day of Determinative Conference on 17 April 2023 (**Determinative Conference**).

[6] Directions for the filing of materials in advance of the Determinative Conference were issued to the parties on 12 December 2022 and amended on 10 January 2023 (**Directions**).

Permission to be represented

[7] The Directions invited the parties to make submissions as to whether the FWC should grant permission to the parties to be represented. A determination of this issue is necessary to ensure that the manner in which any hearing is conducted is fair and just.¹

[8] Roof Safe sought permission to be represented at the Determinative Conference.

[9] The Application was listed for an in person hearing in Perth on 10 March 2023 to determine whether permission should be granted to Roof Safe to be represented at the Determinative Conference.

[10] Having considered the submissions of the parties, permission to be represented was granted to Roof Safe, pursuant to section 596(2)(a) of the FW Act, on the grounds that it would enable the matter to be dealt with more efficiently taking into account the complexity of the matter. The reasons for this decision were provided to the Parties orally on 10 March 2023.

[11] At the Hearing, Mr Vincent represented himself and Mr Jay Singh, a lawyer from BMS Law represented Roof Safe.

Evidence

[12] The Directions required the parties to file their witness evidence in chief in advance of the Determinative Conference.

[13] In accordance with the Directions, Mr Vincent filed a witness statement setting out his own evidence in chief.² He subsequently filed a Reply Witness Statement.

[14] At the Determinative Conference Mr Vincent gave further oral evidence and was cross examined by Mr Singh.

[15] In accordance with the Directions, Roof Safe filed witness statements setting out the evidence in chief of the following witnesses:

- a. Mr Dexter Menzies (**Mr Menzies**)³ – Mr Menzies is Roof Safe’s accountant. Mr Menzies is a certified practising accountant employed by 4C Consulting.
- b. Mr James Hayman (**Mr Hayman**)⁴ – Mr Hayman is the sole Director of Roof Safe and the owner of the business.
- c. Ms Krysten Farrar (**Ms Farrar**)⁵ – Ms Farrar was the Scheduling Coordinator for Roof Safe responsible for scheduling all work performed by Roof Safe.
- d. Mr Patelesio Wright (**Mr Wright**)⁶ – Mr Wright was initially employed as an Installer and was later promoted by Mr Vincent to the role of Operations Manager of Roof Safe. As Operations Manager he was responsible for overseeing the delivery of services by Roof Safe.
- e. Ms Rachel True (**Ms True**)⁷ – Ms True is Mr Wright’s partner. At the request of Mr Vincent she provided a personal loan of \$16,000 to Roof Safe.
- f. Ms Michelle Bentley (**Ms Bentley**)⁸ – Ms Bentley is the Administration Officer for Roof Safe. Her responsibilities include accounts, administration, payroll.

[16] All of the Roof Safe witnesses gave further oral evidence at the Determinative Conference and were cross examined by Mr Vincent.

[17] The parties jointly prepared and filed a digital court book containing the evidence and submissions of the parties prior to the Determinative Conference date (**DCB**). The DCB was admitted at the Determinative Conference as an exhibit and marked Exhibit DCB1.

[18] The following exhibits were also admitted at the Determinative Conference:

- a. Exhibit R1 – Employment Agreement dated 17 March 2022

[19] Final written submissions were filed on behalf of Mr Vincent on 3 May 2023. Final written submissions were filed by Roof Safe on 17 May 2023.

[20] In reaching my decision, I have considered all the submissions made and the evidence tendered by the parties, even if not expressly referred to in these reasons for decision.

Background

[21] Roof Safe is a privately owned company manufacturing specialist parts for roofing companies. The company was established by Mr Hayman's father more than thirty years ago. At the time the company was registered, Mr Hayman and his father were appointed Directors and his father, himself and his two brothers were shareholders. Mr Hayman's father passed away in July 2021. Mr Hayman is now the sole Director of the company.⁹

[22] Mr Hayman left school at 16. Until his marriage broke down, his wife managed the administration of the company which was at that time commercially successful. After his marriage broke down Mr Hayman struggled with managing the administration of the company.¹⁰

[23] Mr Hayman subsequently employed a series of managers with adverse consequences for the business. In 2021 the then manager stole company assets, destroyed company records, dismissed employees and told clients of the business that it was closing. The impact of these actions caused the company to briefly cease trading in October 2021.¹¹

[24] In November 2021, Mr Hayman was put in touch with a potential buyer of the business (**Mr B**). Mr Hayman says that Mr B indicated that he wished to buy the business. Mr Hayman allowed Mr B to set up an office at the company's business premises and gave Mr B access to the Company's bank account in the course of the acquisition.¹²

[25] Mr B recommended that Roof Safe hire Mr Vincent, who is an undischarged bankrupt,¹³ to provide information technology assistance to the business. On or around 11 November 2021, Mr Vincent commenced employment with Roof Safe, he says in the role of General Manager. Mr Hayman says that Mr Vincent was initially employed in the role of IT support and it was not until February 2022 that Mr B informed Mr Hayman that he had appointed Mr Vincent as General Manager. Mr Hayman believed that as the purchaser of the business it was within Mr B's prerogative to do so.¹⁴

[26] Mr Hayman says that after his appointment as General Manager, Mr Vincent informed him that Mr B was stealing money from the business. Mr Hayman confronted Mr B with these allegations. Ultimately the sale did not proceed and Mr B left the business.¹⁵

[27] Mr Hayman says that in March 2022 Mr Vincent demanded that he appoint him as Chief Executive Officer or he would leave the business. Mr Hayman says that given the size of the company he did not think the role was necessary however, given the precarious state of the business he agreed to the appointment rather than face the upheaval of losing another manager so soon.¹⁶

[28] Mr Hayman says that Mr Vincent demanded that his terms of engagement include that:

- a. Roof Safe purchase a Mercedes which had an outstanding balance owing of \$16,000 for Mr Vincent's use; and
- b. he be paid \$120,000 per year and a car allowance of \$400 a fortnight.

[29] Mr Vincent prepared a written contract of employment (**Employment Agreement**) and covering letter (**Offer**) setting out the terms of his own employment.¹⁷

[30] Mr Vincent says he was appointed Chief Executive Officer on 11 February 2022. The Offer in fact provides that Mr Vincent would be employed on full time basis as Chief Executive Officer commencing on 21 March 2022.¹⁸

[31] The Employment Agreement relevantly provides in relation to location that:¹⁹

- “2.4. *The location of your work will be as outlined in Schedule 1, however the Employer may direct you to perform your duties at other locations either temporarily or permanently. You may be required to undertake travel as part of your duties.*
- 2.5. *You will report directly to the position outlined in Schedule 1, or another position nominated by the Employer from time to time.*
- 2.6. *This Agreement will continue to operate in relation to your employment despite any temporary or permanent change in your location, duties, position or reporting line, until terminated in accordance with this Agreement or replaced by a new agreement made in writing between you and the Employer.”*

[32] Schedule One identifies the location as 29 Tulloch Way, Canning Vale WA 6155, the business premises of Roof Safe (**Worksite**).²⁰

[33] In relation to duties the Employment Contract relevantly provides:²¹

- “5.2. *During your employment you must:*
- (a) *report to the person(s) named in Schedule 1, or to such other person as the Employer may direct from time to time;*

- (b) *serve the Employer faithfully and diligently and in a conscientious and professional manner;*
- (c) *act in the Employer's best interests at all times and not do anything which may directly or indirectly impair the good name and reputation of the Employer;*
- (d) *refrain from acting, or being seen to act, in conflict with the Employer's best interests and disclose to the Employer any matter which you, acting reasonably, consider is or may potentially be in conflict with the commercial or strategic interests of the Employer;"*

[34] In relation to remuneration the Employment Contract relevantly provides:²²

"9.2. Except as otherwise provided in this Agreement, you agree that your salary has been calculated to compensate you for all ordinary hours, all additional hours that you work in order to fulfil the requirements of your position and all other obligations under this Agreement. You will not be paid any additional penalty rates, overtime rates, allowances or loadings, unless expressly agreed with the Employer in advance."

[35] In relation to business expenses the Employment Contract relevantly provides:²³

"16. Reasonable Expenses

16.1. The Employer will reimburse you for any authorised and reasonable business-related expenses which you incur in the performance of your duties, subject to you providing tax receipts or other reasonable documentary evidence acceptable to the Employer."

[36] The Schedule to the Employment Contract identifies the Director as Mr Vincent's manager.²⁴

[37] The Schedule to the Employment Contact also contains the following special conditions:²⁵

"Special Offer:

- *Payout of current bankruptcy (Approx \$20K to be confirmed) and then offered the position as a Director of Roof Safe Pty Ltd.*
- *Regarding your vehicle as agreed what the balance is by the 22nd of April, Roof Safe offer to pay the balance and then set an affordable amount will be deducted from your fortnightly pay, to pay the balance back to Roof Safe Pty Ltd.*
- *As agreed for the current CCTV Solution and renovations being completed at Roof Safe 29 Tulloch way, Canning Vale on completion you are to invoice Roof Safe Pty Ltd with your personal ABN."*

[38] Mr Wright says that Mr Vincent told him that he would pay him to perform the renovations. Mr Wright says he told Mr Vincent he anticipated the cost of the renovations would be approximately \$40,000 to \$50,000. Mr Wright says that he performed approximately 400 hours of work on the renovations.²⁶

[39] Mr Hayman left the day to day running of the business to Mr Vincent asking that he specifically focus on the outstanding business loans, ensuring that accounts were paid and that staff were given written contracts of employment. Mr Hayman insists that he informed Mr Vincent that Mr Vincent should involve him in the decision making process. Mr Hayman says that until he became aware of the misappropriation of company funds, he believed that Mr Vincent was consulting him about all business decisions because he consulted him about matters such as the installation of CCTV, the purpose of software, the movement of the company accounts to a different banking institution and the purchase of a forklift.²⁷

[40] In late May 2022, Mr Vincent told Mr Wright that the Company did not have sufficient funds to pay employees' wages. Mr Wright arranged for his partner Ms True to provide \$16,000 to Roof Safe as a short term loan. Ms True says that Mr Vincent promised that he would prepare loan documentation and the loan would be repaid by November 2022.²⁸ Mr Vincent told Mr Wright that the sum provided by Ms True was insufficient, so Mr Wright arranged a personal loan from his bank from which he lent a further \$24,000 to Roof Safe. Mr Wright says that Mr Vincent assured him that both loans would be repaid.²⁹

[41] On 17 June 2022, Mr Hayman and Mr Vincent met with the company's accountants to discuss the lack of cash flow to meet ongoing expenses including payments to the ATO and various financial institutions. The debt owed to the ATO at that time was approximately \$209,000.³⁰

[42] Mr Vincent began looking for a new rental property in which to live around Christmas 2022. In early August he located a suitable property (**Rental Property**). Mr Vincent was concerned that due to his status as an undischarged bankrupt he would not be successful in his application to rent the Rental Property. Mr Vincent says that he therefore asked Mr Hayman if Roof Safe could rent the property on his behalf. Mr Vincent says that Mr Hayman agreed and that in the presence of Ms Bentley signed a letter to this effect. Mr Vincent described his recollections of what occurred in an email to Mr Hayman:³¹

"I then had contacted You regarding the house and offered the Idea of the lease being in the company name and if you could drop in to have a chat about it. You did so the next day and after me reminding you of my Bankruptcy, I did not want to take any chances of the application being rejected and I was moving there PURELY for Roof Safes advantage, or I would of moved to where I planned, back North of the River and there would more than likely be some type of tax benefits (which I would confirm exactly what with Dexter), which you then had already said sure no problem. Now I don't remember if Michelle typed the letter or me or if Michelle was a Witness but Michelle knew of this, as did you since you signed the letter. That letter was immediately, sent through to the Real Estate as I also completed the lease questions through a link sent by the Real Estate."

[43] Mr Vincent tendered the letter he says was typed by Ms Bentley or in her presence and signed by Mr Hayman (**Lease Letter**). The Lease Letter is dated 3 August 2022 and states as follows:³²

"I am writing to you regarding Max Vincent our CEO and his interest to rent the premises at 31 Draycott Loop, Canning Vale."

I am confirming that Roof Safe is willing to have the lease in their name and rent payments will be made by Roof Safe.

If you need any further regarding Max moving in ASAP, please do not hesitate to contact me direct on ...”

[44] Mr Vincent says that Mr Hayman in the presence of Ms Bentley also agreed that Roof Safe would pay the rental bond and the lease payments for an undetermined period of time before Mr Vincent would take over responsibility for the rental payments.³³

[45] Mr Hayman denies approving the lease arrangements or signing the Lease Letter.³⁴ Ms Bentley does not recall Mr Hayman approving the lease arrangements or the payment of the lease costs. Ms Bentley denies typing the Lease Letter and does not recall seeing the Lease Letter before it was produced in these proceedings.³⁵

[46] Mr Vincent says around 12 August 2022 he informed Ms Bentley that he would be using the company credit card to purchase furniture for his new home and none of the purchases would exceed \$10,000. Mr Vincent says that he told Ms Bentley that she should withhold his pay that week until there was sufficient cash flow in the business.³⁶ Ms Bentley denies that Mr Vincent informed her that he intended spending company funds on personal purchases for his home before she saw the purchases appear in the company bank statements.³⁷ She concedes that his pay was initially withheld for that week but says that it was subsequently paid to Mr Vincent.³⁸

[47] In around August or September 2022, Mr Hayman began to suspect company funds were being misappropriated when he checked the company’s bank account after discovering that the company’s telephone account had not been paid and services had been disconnected.³⁹ Mr Hayman says that company bank account statement showed expenses associated with the business which he did not authorise such as purchases at Furniture Mart, JB Hifi, and Amart Furniture.⁴⁰

[48] On 8 August 2022, Mr Vincent began moving into the rental property. Mr Vincent says that he informed the ‘management team’ that he would be working at home during this period. He also says that he was in touch with employees of the business on each day of the period.⁴¹

[49] Both Ms Bentley and Ms Farrar say that in the last 4-5 weeks of his employment Mr Vincent was rarely in the office and when he was in the office he would stay less than half an hour. Both deny he told them or other staff that he was working from home during this period.⁴² Mr Hayman says that he was unable to contact Mr Vincent during this period, was unaware of his whereabouts and did not give Mr Vincent permission to work from home.⁴³

[50] Mr Vincent concedes that during the period 8 August to 10 August 2022 that he was aware that Mr Hayman was trying to contact him. Mr Vincent says he unsuccessfully tried to return the calls and when he could not catch Mr Hayman asked Ms Bentley to organise a management meeting on 12 August 2022 (**Management Meeting**). The Roof Safe witnesses say that the meeting in fact occurred in late August or early September 2022.⁴⁴

[51] At the management meeting Mr Hayman raised the anomalies in the bank account. Mr Vincent declined to provide an explanation during the meeting and promised to speak to Mr Hayman privately after the meeting. Mr Hayman says that following the meeting Mr Vincent avoided him, refusing to take his calls or speak to him in person.⁴⁵ Conversely, Mr Wright went to visit Mr Hayman at his home to explain why he had been reimbursed moneys by the company. Mr Hayman was satisfied that the transactions were satisfactorily explained as company expenses.⁴⁶

[52] On 14 September 2022, Roof Safe sent a letter to Mr Vincent (**Show Cause Letter**) informing him that he had been suspended while Roof Safe investigated the following allegations that he:⁴⁷

- a. Had misappropriated company funds;
- b. Failed to attend work for an extended period; and
- c. Had been uncontactable for an extended period.

(Allegations)

[53] The Show Cause Letter invited him to provide a response to the Allegations within 14 days.⁴⁸

[54] On 27 September 2022, Mr Vincent sent an email to Mr Hayman (**Show Cause Response**). In the Show Cause Response Mr Vincent acknowledged that:⁴⁹

- a. he had been absent from work for two weeks while he was moving house;
- b. he had paid himself for 'renovations, CCTV, website' "*... I did make the decision to finally pay myself for some of the work completed so far with renovations, CCTV, website over the past 8 mths [SIC] this figure is approx. \$45K at this time*"
- c. he had not invoiced Roof Safe for the renovations "*...even if I didn't invoice on how I would normally for the renovations or any other tradesman for that matter ...*"
- d. he had charged purchases of a personal nature to the Company "*Even though I am not needed to I have always either informed or updated Michele with any purchases I have made personal or business ...*"
- e. he believed he had authority to change his contract as he thought fit "*as the CEO I am authorised to make changes to my hours, schedule or where I was working from*"
- f. the car was registered in the company name and that he would return the vehicle.

[55] In the Show Cause Response, Mr Vincent says that he had calculated the cost of the renovations as 4 hours per week night, 5 days per week and 8 hours on Saturday and Sunday for 6 months at the rate of \$50 per hour.

[56] On 28 September 2022, Mr Vincent received a text message stating that a zoom meeting would be held the following day to allow him to respond to the allegations (**Show Cause Meeting**).⁵⁰ Mr Vincent said that he was unavailable until 4pm that day but could attend a meeting on 30 September 2022.⁵¹

[57] On 29 September 2022, Roof Safe sent Mr Vincent a letter confirming that the Show Cause meeting would proceed on 30 September 2022 to discuss his Show Cause Response.⁵²

[58] The meeting proceeded on 30 September 2022. According to Mr Vincent the meeting ran for less than twenty minutes, and he was only asked six questions. He says he was denied the opportunity to respond to the allegations made against him.⁵³

[59] Roof Safe's contemporaneous notes of the meeting suggest that:⁵⁴

- a. the meeting took approximately 30 minutes.
- b. Mr Vincent was asked and answered the following nine questions:

"Q1. What Max believed his tasks or duties were as CEO?

...

Q2. Why Max believed he has the right to use company funds in any way he sees fit?

...

Q3. Why he believed he could enter into a residential tenancy agreement.

...

Q4. Explain your expenses (eg: ACP Mechanical Services/Amart Furniture).

...

Q5. Does Max understand Jim's role as a sole Direction. Whether he understands that Jim is the only decision maker in Roof Safe as to all expenses incurred by Roof Safe (e.g. Jim had to sign off on all expenses)?

...

Q6. Absence from work and non communication.

...

Q7. Ask Max to explain why he paid himself \$45k & who authorized this, is he aware Jim should sign off on all expenses

...

Q8. Ask Max why he failed to meet loan repayments required by Roof Safe, such as ANZ, Macquarie & Latrobe.

...

Q9. Why did you stop making payments to the ATO?"

- c. The attendees also discussed the contractual arrangements for the renovations.

[60] During the meeting, Mr Vincent acknowledged that he had used company funds to pay for personal expenses such as the purchase of furniture from Amart for his new home but insisted that as CEO he was entitled to authorise expenses both company and personal expenses without approval from Mr Hayman.⁵⁵

[61] On 7 October 2022, Roof Safe notified Mr Vincent of his dismissal in writing effective immediately (**Termination Letter**).⁵⁶ The Termination Letter identified the reasons for dismissal as:⁵⁷

"1.1. Between 5 August 2022 and 12 September 2022, you caused/instructed expenses/withdrawals in the total sum of approximately \$28,000 to be incurred by Roof Safe, which are described on Roof Safe's bank statements/online transaction history as:

- a. Bunnings
- b. Amart

- C. Office Works*
- d. JB HIFI*
- e. Afterpay*
- f. ACP Mechanical*
- g. Kitchen Warehouse*
- h. Bridgestone*
- i. Private rent*
- j. Beacon lighting*
- k. Moving Truck and trailer*
- l. "Max's Reimbursement"*
- m. Super Cheap Auto*
- n. Department of Justice*
- o. ARB*
- p. Adrenaline Experience*

1.2. You caused Roof Safe to enter into, and be liable for, a residential lease agreement for a property located at 31 Draycott Loop, Canning Vale ("the Rental Property"), which is your place of residence.

1.3. You caused Roof Safe to incur ongoing costs associated with the Rental Property, which is for your personal benefit such as:

- a. Rental payments of \$1360.00 per fortnight accumulated over the period of 22 August 2022 to 4 October 2022.*
- b. A rental/security bond of \$2720 paid on the 19 August 2022.*

1.4. You caused Roof Safe to incur substantial costs associated with modifications, alterations to a work vehicle (Registration No. "IGGH874") ("the Vehicle") that was provided to you by Roof Safe.

1.5. You caused the company to fall behind on its financial and taxation obligations by causing the company to divert funds away from paying the following:

- a. Roof Safe's Australian Taxation Office/Superannuation instalments*
- b. ANZ Bank loan*
- c. Macquarie*
- d. Latrobe*
- e. Council Rates*
- f. Multiple suppliers used by Roof Safe.*

1.6. You accessed Roof Safe's bank accounts and diverted/transferred funds as you saw fit.

1.7. Between 25 July 2022 and 14 September 2022, during this period, without seeking approval from Mr. Hayman, you took it upon yourself to do reduced hours at work.

1.8. Between 15 August 2022 and 9 September 2022, during this period, you were

uncontactable and/or it is alleged that you were evading communication with Roof Safe and/or Mr. Hayman.”

[62] The Termination Letter sought to return of the Mercedes with registration 1GGH874, office keys, a laptop and a mobile phone.⁵⁸

[63] On 1 November 2022, Mr Vincent sent Mr Hayman another email. In the email Mr Vincent claimed that he had been successful in three previous unfair dismissal claims before the Commission.⁵⁹ A search of the FWC’s records reveals only one other unfair dismissal application involving an applicant named Mr Max Vincent. In that application the applicant was dismissed for defrauding their employer. The application was discontinued by the applicant before the matter was heard.

[64] Mr Vincent did not return the Car, Office Keys, Laptop, Mobile phone or the personal items he purchased with company funds.⁶⁰

[65] Mr Vincent says that in December 2022 he secured casual employment as a RV Technician being paid an hourly rate of \$29.50.⁶¹

[66] Mr Vincent’s annual salary as at the time he was dismissed was \$120,000 gross.⁶²

[67] Mr Vincent seeks various orders for the return of property and the recovery of unpaid wages beyond the jurisdiction of the FWC. Mr Vincent also seeks an order for payment of lost wages since his dismissal.⁶³

Is Mr Vincent protected from unfair dismissal?

[68] An order for reinstatement or compensation may only be issued if Mr Vincent was unfairly dismissed and Mr Vincent was protected from unfair dismissal at the time of his dismissal.

[69] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- a. the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- b. one or more of the following apply:
 - i. a modern award covers the person;
 - ii. an enterprise agreement applies to the person in relation to the employment; and
 - iii. the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the *Fair Work Regulations 2009* (Cth) (**Regulations**), is less than the high income threshold.

[70] For the purposes of Part 3-2 of the FW Act an ‘employee’ means an employee of a national system employer. There is no dispute and I am satisfied that Roof Safe is a national system employer and Mr Vincent is therefore a national system employee.

[71] If the employer is not a small business, the ‘minimum employment period’ is six months ending at the earlier of the following times:⁶⁴

- a. the time when the person is given notice of the dismissal; or
- b. immediately before the dismissal.

[72] There is no dispute,⁶⁵ and I am satisfied, that Roof Safe is not a small business employer for the purposes of section 383 of the FW Act.

[73] Mr Vincent commenced employment with Roof Safe on or around 11 November 2021.⁶⁶

[74] Mr Vincent was dismissed on 7 October 2022.⁶⁷

[75] I am therefore satisfied that at the time of dismissal, Mr Vincent was an employee who had completed a period of employment of at least the minimum employment period.

[76] The high income threshold at the relevant time was \$162,000 there is no dispute and I am satisfied that the sum of Mr Vincent’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the Regulations was less than the high income threshold.

[77] Consequently, I am satisfied that Mr Vincent was protected from unfair dismissal.

Was Mr Vincent unfairly dismissed?

[78] Section 385 of the FW Act provides that a person has been unfairly dismissed if the FWC is satisfied that:

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

Was Mr Vincent dismissed?

[79] Section 386(1) of the FW Act provides that a person has been dismissed if the person’s employment was terminated at the employer’s initiative or the person resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by their employer.

[80] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[81] There was no dispute,⁶⁸ and I find, that Mr Vincent’s employment with Roof Safe was terminated at the initiative of Roof Safe.

[82] I am therefore satisfied that Mr Vincent has been dismissed within the meaning of section 385 of the FW Act.

Was Mr Vincent's dismissal a case of genuine redundancy?

[83] Pursuant to section 389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

- a. the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- b. the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[84] It was not in dispute,⁶⁹ and I find, that Mr Vincent's dismissal was not due to Roof Safe no longer requiring his job to be performed by anyone because of changes in Roof Safe's operational requirements.

[85] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

Was Mr Vincent's dismissal consistent with the Small Business Fair Dismissal Code?

[86] Section 388 of the FW Act provides that a person's dismissal is consistent with the Small Business Fair Dismissal (SBFD) Code if:

- a. immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- b. the employer complied with the SBFD Code in relation to the dismissal.

[87] It was not in dispute,⁷⁰ and I find, that Roof Safe was not a small business employer within the meaning of section 23 of the FW Act at the relevant time, having in excess of fourteen (14) employees.

[88] As Roof Safe is not a small business employer within the meaning of the FW Act, I am satisfied that the SBFD Code does not apply to Mr Vincent's dismissal.

Was the Application made within the period required?

[89] Pursuant to section 396 of the FW Act, the FWC is obliged to decide whether an application was made within the period required in subsection 394(2) of the FW Act before considering the merits of an application.

[90] Section 394(2) of the FW Act requires that the Application is to be made within twenty-one (21) days after the dismissal took effect.

[91] It is not disputed,⁷¹ and I find, that Mr Vincent was dismissed from his employment on 7 October 2022 and made the Application on 27 October 2022. I am therefore satisfied that the Application was made within the period required in subsection 394(2) of the FW Act.

Was the dismissal harsh, unjust or unreasonable?

[92] The ambit of the conduct which may fall within the phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd* by McHugh and Gummow JJ 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.”⁷²

[93] Section 387 of the FW Act provides that, 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);
- b. whether the person was notified of that reason;
- c. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
- 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;
- e. if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal;
- 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;
- 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.

[94] Each of these criteria must be considered to the extent they are relevant to the factual circumstances of the Application.⁷³

Was there a valid reason for the dismissal related to Mr Vincent’s capacity or conduct?

[95] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁷⁴ and should not be “capricious, fanciful, spiteful or prejudiced.”⁷⁵ It is not the role of the FWC to stand in the shoes of the employer and determine what the FWC would do if it was in the position of the employer.⁷⁶

[96] The employer carries the onus of establishing a valid reason.⁷⁷

[97] The reasons on which Roof Safe rely for Mr Vincent's dismissal were identified in the Termination Letter as follows:⁷⁸

- a. Between 5 August 2022 and 12 September 2022 Mr Vincent caused Roof Safe to incur approximately \$28,000 unauthorised expenses.
- b. Mr Vincent caused Roof Safe to be liable for a residential lease for his personal benefit.
- c. Mr Vincent caused Roof Safe to be liable for fortnightly payments of \$1360 between 22 August 2022 and 4 October 2022 for the rental of the Rental Property for his personal benefit.
- d. Mr Vincent caused Roof Safe to pay the security bond of \$2720 for the Rental Property.
- e. Mr Vincent caused Roof Safe to incur unauthorised costs associated with the modification of the vehicle registration No."1GGH874" (**Vehicle**).
- f. Mr Vincent caused Roof Safe to fall behind in the payment of its bank loans, superannuation remittance, council rates and supplier invoices.
- g. Mr Vincent accessed Roof Safe's bank accounts and diverted/transferred funds without authority.
- h. Between 25 July 2022 and 14 September 2022, Mr Vincent was absent for work or performed reduced hours of work without authority.
- i. Between 15 August 2022 and 9 September 2022 Mr Vincent was uncontactable or evade communication with Mr Hayman.

[98] Mr Vincent submits that there was no valid reason for his dismissal because he was authorised to make the purchases in question and that he did not engage in misconduct as alleged.⁷⁹

[99] In the Show Cause Response Mr Vincent acknowledged that:⁸⁰

- a. he had been absent from work for two weeks while he was moving house;
- b. he had authorised the payment to himself for 'renovations, CCTV, website';
- c. he had not invoiced Roof Safe for the renovations;
- d. he had charged purchases of a personal nature to the Roof Safe;
- e. he believed he had authority to change his contract as he though fit
- f. the car was registered in the company name and that he would return the Vehicle.

[100] At the Show Cause Meeting, Mr Vincent reaffirmed that he had used company funds to pay personal expenses.

[101] In his witness statement in these proceedings Mr Vincent stated that:⁸¹

"From the time we opened the new account I made many purchase from various suppliers, retailers and online shopping with the debit card. Nearly 98% of purchases are always for Roof Safe and sometimes for me ..."

[102] At the Determinative Conference, Mr Vincent admitted to paying himself a sum of approximately \$10,000 for purchases of a personal nature without authorisation. These include purchasing food and cigarettes and paying for rent and bond amounts for his residence.⁸²

[103] Mr Vincent maintains that as a CEO he was entitled to make decisions on behalf of the Company as he saw fit without oversight or limitation. Mr Vincent asserts that the Employment Contract reflected his verbal arrangements with Mr Hayman and imposed "... no conditions or limitations to my authority".⁸³ In support of this Mr Vincent points to his online banking access to the company transaction account not requiring dual authorisation by Mr Hayman.

[104] The common law and his Employment Agreement provide the contrary.

[105] The following clauses make clear that the obligations contained in the Employment Contract do not override any oral arrangements Mr Vincent says he entered into with Mr Hayman (which Mr Hayman disputes):⁸⁴

"3. Employee's Warranties

3.1. You warrant that:

(c) in entering into this Agreement, you have not relied on any direct or indirect conduct or representation of the Employer or any of its directors, officers, employees or agents (or anyone authorised by any of them), or any matter other than the terms expressed in this Agreement;

27. Severability and Entire Agreement

27.1. This Agreement constitutes the entire agreement between the parties and supersedes all prior understanding or agreements whether oral or in writing. Any amendment to the Agreement must be agreed to in writing by the parties."

[106] The Employment Agreement relevantly provides that the location at which Mr Vincent was to perform his work was Roof Safe's premises. The Employment Agreement provides that he reports to Mr Hayman.⁸⁵

[107] At the Hearing, Mr Vincent admitted that he did not attend work between 25 July 2022 and 14 September 2022.⁸⁶

[108] There is no evidence that he was directed by Mr Hayman to work from home nor is there any evidence that Mr Hayman authorised Mr Vincent to work from home. To the contrary, the evidence is that Mr Vincent chose to work at home of his own volition. There is no evidence that it was customary for Mr Vincent or other employees to work from home.⁸⁷

[109] Mr Vincent's expenditure of company funds whether or not requiring express authorisation on each occasion by Mr Hayman are governed by common law fiduciary duties and the express terms of his contract.

[110] The Employment Agreement requires that Mr Vincent:⁸⁸

"(b) serve the Employer faithfully and diligently and in a conscientious and professional manner;

(c) act in the Employer's best interests at all times and not do anything which may directly or indirectly impair the good name and reputation of the Employer;

- (d) *refrain from acting, or being seen to act, in conflict with the Employer's best interests and disclose to the Employer any matter which you, acting reasonably, consider is or may potentially be in conflict with the commercial or strategic interests of the Employer;*"

[111] In relation to remuneration the Employment Contract relevantly provides:⁸⁹

- "9.2. *Except as otherwise provided in this Agreement, you agree that your salary has been calculated to compensate you for all ordinary hours, all additional hours that you work in order to fulfil the requirements of your position and all other obligations under this Agreement. You will not be paid any additional penalty rates, overtime rates, allowances or loadings, unless expressly agreed with the Employer in advance.*"

[112] In relation to businesses expenses, the Employment Contract relevantly provides:⁹⁰

"16. *Reasonable Expenses*

- 16.1. *The Employer will reimburse you for any authorised and reasonable business-related expenses which you incur in the performance of your duties, subject to you providing tax receipts or other reasonable documentary evidence acceptable to the Employer.*"

[113] The Schedule to the Employment Contract also contains the following special condition:⁹¹

"As agreed for the current CCTV Solution and renovations being completed at Roof Safe 29 Tulloch way, Canning Vale on completion you are to invoice Roof Safe Pty Ltd with your personal ABN."

[114] Mr Vincent concedes that he solely authorised the payment to himself of \$10,000 for the renovation work which he says he undertook.⁹² Mr Vincent concedes that he did not invoice Roof Safe for the renovations he says that he undertook nor did he provide them with an ABN.⁹³ The payment of funds to him for the renovation work is therefore not authorized by the Special Conditions.

[115] The evidence of Ms Bentley is that Mr Vincent did not provide receipts or invoices to her for his personal expenses paid for with company funds.⁹⁴

[116] Mr Vincent says that he reimbursed the company for his personal expenses but provided no evidence of transactions from his own bank accounts to the Company accounts or identified any dates upon which he says such reimbursements occurred.⁹⁵

[117] Mr Vincent also says that he deducted his personal expenses charged to the company from the amount owed to him for the renovations. He provided no evidence of any calculation of the cost of the renovations less the amounts which he says he attributed to personal expenses.⁹⁶

[118] The expenditure of company funds on personal expenses particularly in circumstances in which a company is in financial distress is clearly contrary to the best interests of the business, likely to impair the reputation of the business and therefore be in direct conflict with the best interests of the business. Such conduct is not only in direct breach of the terms of the Employment Agreement but also in breach of the common law fiduciary obligations owed by an employee to their employer.

[119] Mr Hayman denies approving the lease arrangements or signing the Lease Letter.⁹⁷ Ms Bentley does not recall Mr Hayman approving the lease arrangements or the payment of the lease costs. Ms Bentley denies typing the Lease Letter and does not recall seeing the Lease Letter before it was produced in these proceedings.⁹⁸

[120] The Contract of Employment relevantly provides that termination of employment may occur without notice in the following circumstances:⁹⁹

“21.3. Termination Without Notice

Despite any other provisions of this Agreement, in cases of serious misconduct, the Employer may dismiss you without giving notice (or making payment in lieu). Circumstances which may amount to serious misconduct include, but are not limited to, the following:

- (a) engaging in dishonest conduct or other gross misconduct (including, but not limited to theft, fraud, assault, being intoxicated at work, refusing to carry out the Employer’s lawful and reasonable instructions that are consistent with your employment and this Agreement);*
- (b) wilful or deliberate behaviour that is inconsistent with the continuation of your employment;*
- (c) conduct that causes serious and imminent risk to the health or safety of a person or the reputation, viability or profitability of the Employer’s business;*
- (d) gross incompetence or wilful neglect of duty, or committing any other serious breach of any of the provisions of this Agreement;*
- (e) committing or assisting in the commission of an act of fraud or criminal offence;
or*
- (f) acting in a manner (whether in the course of your duties or otherwise) which, in the Employer’s view, does or is likely to bring you or the Employer into serious disrepute.”*

[121] Mr Vincent’s conduct falls with multiple sub clauses above.

[122] Based on the evidence before me and the submissions of the parties for the reasons above I find that a valid reason existed for Mr Vincent’s dismissal.

Was Mr Vincent notified of the valid reason?

[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,¹⁰⁰ and in explicit,¹⁰¹ plain and clear terms.¹⁰²

[124] The Allegations were put to Mr Vincent in writing on 14 September 2022 in the Show Cause Letter.¹⁰³ It is clear from the Show Cause Response, the notes of the Show Cause Meeting and the subsequent email sent by Mr Vincent to Mr Hayman on 27 September 2022 that Mr Vincent was fully aware of the Allegations.

[125] Mr Vincent was dismissed for expending company funds on private expenses. He does not dispute that he did so, rather he asserts he was authorised to do so. Consequently, the lack of particulars in the Show Cause Letter of the dates upon which the expenditure was incurred does not detract from the fact that Mr Vincent was notified of the reasons for his dismissal or his opportunity to respond to the reasons for his dismissal.

[126] I am satisfied that Mr Vincent was notified of the reasons for his dismissal before the decision was made to terminate his employment.

Was Mr Vincent given an opportunity to respond to any valid reason related to his capacity or conduct?

[127] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.¹⁰⁴

[128] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.¹⁰⁵ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.¹⁰⁶

[129] Mr Vincent says that he was not given an opportunity to respond to the reasons for his dismissal because at the Show Cause Meeting he was simply asked a series of questions via a Zoom and did not have the opportunity to fully respond to the Allegations in person.¹⁰⁷

[130] Mr Vincent did not object to the Show Cause meeting proceeding by way of Zoom meeting.

[131] While the Show Cause Meeting proceeded based on a preprepared script the questions asked provided Mr Vincent with an opportunity to address the Allegations. There is no evidence that he was curtailed in providing an answer to the questions asked of him. Mr Vincent did not identify any additional information he might have provided at the Show Cause Meeting which might have led to a different outcome than the termination of his employment.

[132] In addition to the Show Cause Meeting, Mr Vincent was given multiple other opportunities to respond to the Allegations.

[133] At the Management Meeting, Mr Hayman raised the anomalies in relation to the bank account. Mr Vincent declined to provide a response, immediately telling Mr Hayman that he would speak to him privately and then subsequently avoided Mr Hayman.¹⁰⁸

[134] Following the Management Meeting, Mr Vincent refused to take Mr Hayman's calls or speak to him in person.¹⁰⁹

[135] The Show Cause Letter set out the Allegations and invited Mr Vincent to provide a response to the Allegations within 14 days.¹¹⁰ Mr Vincent provided a detailed response to the Allegations on 27 September 2022 in the Show Cause Response.¹¹¹

[136] On the evidence before me I am satisfied, that Mr Vincent was given an opportunity to respond to the reason for his dismissal prior to the decision to dismiss being made.

Did Roof Safe unreasonably refuse to allow Mr Vincent to have a support person present to assist at discussions relating to the dismissal?

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

[138] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”¹¹²

[139] It is not in dispute and I am satisfied, that Roof Safe did not unreasonably refuse to allow Mr Vincent to have a support person present at discussions relating to his dismissal. This consideration is therefore neutral in this Application.

Was Mr Vincent warned about unsatisfactory performance before the dismissal?

[140] As the dismissal did not relate to unsatisfactory performance, this consideration is not relevant to this Application.¹¹³

To what degree would the size of Roof Safe's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[141] Where an employer is substantial and has dedicated human resources personnel, and access to legal advice, there will likely be no reason for it not to follow fair procedures.¹¹⁴

[142] Roof Safe is a small business without internal dedicated human resource management specialists.

[143] In *John Pinawin T/A Rose Hair Face Body v Mr Edwin Domingo*¹¹⁵, the Full Bench stated:

*“Acting reasonably does not require a single course of action. Different employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned.”*¹¹⁶

[144] I am satisfied that the process followed by Roof Safe to investigate the Allegations and afford Mr Vincent procedural fairness were appropriate having regard to the size of its enterprise.

To what degree would the absence of dedicated human resource management specialists or expertise in Roof Safe’s enterprise be likely to impact on the procedures followed in effecting the dismissal?

[145] The absence of dedicated human resource management specialists does not relieve an employer of extending an appropriate degree of courtesy to its employees “even when implementing something as difficult and unpleasant as the termination of a person’s employment.”¹¹⁷

[146] Roof Safe’s enterprise lacked dedicated human resource management specialists and expertise.

[147] Mr Vincent submits that his dismissal was unfair because the Termination Letter was emailed to him and he was not dismissed in person.

[148] Both the notes of the Show Cause Meeting and the Termination Letter were emailed to Mr Vincent and sent to him by registered mail.

[149] Given the size of the organisation, the fact that Mr Vincent was suspended at the time of his dismissal due to the nature of the Allegations and the past difficulties in undertaking face to face or telephone communication with Mr Vincent I am satisfied that communicating with Mr Vincent in this way was appropriate and did not deny him procedural fairness.

[150] I am satisfied that the procedures followed by Roof Safe in investigating the Allegations and effecting the dismissal were appropriate having regard to the size of its enterprise. This consideration is therefore neutral in this Application.

What other matters are relevant?

[151] Section 387(h) of the FW Act requires the FWC to take into account any other matters that the FWC considers relevant to determining whether the dismissal was harsh, unjust or unreasonable.

[152] Roof Safe reported the Allegations to the Western Australian Police. Mr Vincent asserts that the Western Australian Police have decided not to investigate the matter further and that therefore the Allegations can not justify his dismissal.

[153] The evidence of Roof Safe is that the criminal investigation is ongoing.¹¹⁸ Mr Vincent provided no evidence to the contrary. In any event conduct does not have to be of a criminal nature in order to constitute misconduct and or to form a valid reason for dismissal.

[154] It is also relevant to note that the prosecution of crimes require a different standard of proof than that required to establish that misconduct occurred such as to warrant dismissal.

[155] In addition to the submissions made by the parties in relation to whether the dismissal was harsh unjust or unreasonable I have also taken into account Mr Vincent's age, employment prospects as an undischarged bankrupt and his personal circumstances of which I am aware. I have also taken into account Mr Hayman's educational and business vulnerabilities of which Mr Vincent was clearly aware.

Conclusion

[156] I have made findings in relation to each matter specified in section 387 of the FW Act as relevant.

[157] I have considered and given due weight to each factor as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.

[158] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Mr Vincent was not harsh, unjust or unreasonable.

[159] The dismissal was just because Mr Vincent had breached his contract of employment and engaged in serious misconduct.

[160] The dismissal was reasonable because the decision was reached only after a procedurally fair investigation occurred which concluded that Mr Vincent had engaged in misconduct.

[161] The dismissal was not harsh given the nature of the misconduct and Mr Vincent's role within the business.

[162] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that Mr Vincent was unfairly dismissed within the meaning of section 385 of the FW Act.

[163] The Application is therefore dismissed. An Order¹¹⁹ to this effect will be issued with this Decision.



DEPUTY PRESIDENT

Appearances:

Mr M Vincent, for the Applicant.

Mr J Singh, for the Respondent.

Determinative Conference details:

2023

PERTH

17 March and 17 April

Final written submissions:

Applicant's final closing written submissions, 3 May 2023.

Respondent's final closing written submissions, 17 May 2023.

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¹ *Warrell v Walton* (2013) 233 IR 335, 341 [22].

² Digital Court Book (DCB) 109.

³ *Ibid* 116.

⁴ *Ibid* 118, 676-681.

⁵ *Ibid* 156.

⁶ *Ibid* 162.

⁷ *Ibid* 167.

⁸ *Ibid* 171.

⁹ *Ibid* 118-119.

¹⁰ *Ibid* 119-120.

¹¹ *Ibid* 119-120.

¹² *Ibid* 119-120.

¹³ *Ibid* 78, Transcript 17 March 2023 PN909-PN921.

¹⁴ DCB (n 2) 120, 5, 93.

¹⁵ Ibid 120.

¹⁶ Ibid 117-126.

¹⁷ Ibid 47.

¹⁸ Ibid 48.

¹⁹ Ibid 48.

²⁰ Ibid 65.

²¹ Ibid 50.

²² Ibid 51.

²³ Ibid 54.

²⁴ Ibid 64.

²⁵ Ibid 65.

²⁶ Ibid 164.

²⁷ Ibid 678.

²⁸ Ibid 168.

²⁹ Ibid 164.

³⁰ Ibid 116.

³¹ Ibid 79.

³² Ibid 87.

³³ Transcript 17 March 2023 at PN989 – PN1012.

³⁴ Transcript 17 April 2023 at PN160.

³⁵ Ibid at PN253-254

³⁶ Ibid 111.

³⁷ PN256-PN261

³⁸ Transcript 17 April 2023 at PN277-PN279

³⁹ DCB (n 2) 23.

⁴⁰ Ibid 122.

⁴¹ Ibid 111, 122.

⁴² Ibid 160, 174.

⁴³ Ibid 117-155.

⁴⁴ Ibid 98.

⁴⁵ Ibid 122. Transcript 17 April 2023 at PN194-PN195.

⁴⁶ Transcript 17 April 2023 at PN190-PN195

⁴⁷ Ibid 127.

⁴⁸ Ibid 127.

⁴⁹ Ibid 34-38.

⁵⁰ Mr Vincent says that the text was sent on 29 September at DCB 8 but it is apparent from DCB 42 that it was sent on 28 September.

⁵¹ DCB (n 2) 42.

⁵² Ibid 128.

⁵³ Ibid 8.

⁵⁴ Ibid 39-41.

⁵⁵ Ibid 39-41.

⁵⁶ Ibid 5, 19, 66-71.

⁵⁷ Ibid 28-33.

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- ⁵⁸ Ibid 32.
- ⁵⁹ Ibid 125.
- ⁶⁰ Ibid 125.
- ⁶¹ Ibid 104.
- ⁶² Ibid 20.
- ⁶³ Ibid 6, 103.
- ⁶⁴ *Fair Work Act 2009* (Cth) s 383.
- ⁶⁵ DCB (n 2) 425.
- ⁶⁶ Ibid 120.
- ⁶⁷ Ibid 5, 19, 66-71.
- ⁶⁸ Ibid 95.
- ⁶⁹ Ibid 426.
- ⁷⁰ Ibid 425.
- ⁷¹ Ibid 426.
- ⁷² (1995) 185 CLR 410, 465 (McHugh and Gummow JJ).
- ⁷³ *Sayer v Melsteel Pty Ltd* [\[2011\] FWA 7498](#), 4 [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB), (Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].
- ⁷⁴ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- ⁷⁵ Ibid.
- ⁷⁶ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ⁷⁷ *Culpeper v Intercontinental Ship Management Pty Ltd* (2004) 134 IR 243.
- ⁷⁸ DCB (n 2) 28-33.
- ⁷⁹ Ibid 457.
- ⁸⁰ Ibid 34-38.
- ⁸¹ Ibid 109-114.
- ⁸² Ibid 686, Transcript, 17 March 2023 at PN1032-PN1035, PN1040, PN1088-PN1094, 449.
- ⁸³ Ibid 448.
- ⁸⁴ Ibid 109-114, 124.
- ⁸⁵ See clause 5.2; Ibid 50.
- ⁸⁶ Transcript, 17 March 2023 at PN1017-1018
- ⁸⁷ Ibid 109-114, 124.
- ⁸⁸ Ibid 50.
- ⁸⁹ Ibid 51.
- ⁹⁰ DCB (n 2) 54.
- ⁹¹ Ibid 65.
- ⁹² Transcript, 17 March 2023 at PN1032-PN1034.
- ⁹³ Transcript, 17 March 2023 at PN1063-PN1069.
- ⁹⁴ DCB (n 2) 175.
- ⁹⁵ Ibid 680, Transcript, 17 March 2023 at PN1103-1104, PN1108-1113.
- ⁹⁶ Ibid 684.
- ⁹⁷ Transcript 17 April 2023 at PN160.
- ⁹⁸ Ibid at PN253-254.
- ⁹⁹ Ibid 58.
- ¹⁰⁰ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151 [73].

¹⁰¹ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

¹⁰² *Ibid.*

¹⁰³ DCB (n 2) 100-101.

¹⁰⁴ *Crozier* (n 160), 151 [75].

¹⁰⁵ *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1, 14 – 15 [26] quoting *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7 (Wilcox CJ).

¹⁰⁶ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7 (Wilcox CJ).

¹⁰⁷ DCB (n 2) 102.

¹⁰⁸ *Ibid* 122.

¹⁰⁹ *Ibid* 122.

¹¹⁰ *Ibid* 127.

¹¹¹ *Ibid* 34-38.

¹¹² Explanatory Memorandum, *Fair Work Bill 2008* (Cth), DCB (n2) [1542].

¹¹³ *Ibid* [223].

¹¹⁴ *Jetstar v Meetson-Lemkes* (2013) 239 IR 1, 21 – 22 [68].

¹¹⁵ [\[2012\] FWAFB 1359](#).

¹¹⁶ *John Pinawin T/A RoseVi.Hair.Face.Body v Mr Edwin Domingo* [\[2012\] FWAFB 1359](#), [30].

¹¹⁷ *Sykes v Heatly Pty Ltd t/a Heatly Sports* [PR914149](#) (AIRC, Grainger C, 6 February 2002), [21].

¹¹⁸ Transcript 17 April 2023 at PN197-198.

¹¹⁹ [PR764959](#).