

[2025] FWC 215 [Note: An appeal pursuant to s.604 (C2025/755) was lodged against this decision - refer to Full Bench decision dated 18 March 2025 [[2025] FWCFB 59] for result of appeal.]



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Robert Dodd**

v

**Roadworx Surfacing Pty Ltd**

(U2024/8071)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 22 JANUARY 2025

*Application for an unfair dismissal remedy – jurisdictional objection – whether applicant dismissed – applicant found to be dismissed – dismissal found to be unfair – compensation awarded*

## Introduction and outcome

[1] On 11 July 2024, Mr Robert Dodd lodged an application with the Fair Work Commission (the Commission) under s. 394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that he had been unfairly dismissed from his employment with Roadworx Surfacing Pty Ltd (Roadworx).

[2] Mr Dodd was employed by Roadworx from 4 April 2014 to 8 July 2024 on a full-time basis initially as a driver, then as a supervisor.

[3] Roadworx denied that Mr Dodd was dismissed. Roadworx claimed it agreed to mutually terminate Mr Dodd’s employment because he was not willing to work with Roadworx in meeting its current needs.

[4] I have found that Mr Dodd was dismissed by Roadworx and that there was no valid reason for the dismissal. On the basis of this and other findings, I have determined that Mr Dodd’s dismissal was harsh, unjust and unreasonable and that an order for compensation is appropriate.

## The determinative conference

[5] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[6] After taking into account the views of Mr Dodd and Roadworx, I considered it appropriate to hold a determinative conference pursuant to s.398 of the FW Act.

[7] At the conference, Mr Dodd represented himself and gave evidence on his own behalf. Mr David Sciberras, Business Unit Manager, represented Roadworx and gave evidence on behalf of Roadworx.

[8] Mr Dodd filed material in the Commission on 11 September 2024 and 6 October 2024. Roadworx filed material in the Commission on 30 September 2024 and 18 October 2024. I have considered the submissions made by the parties and all of the evidence before me in my determination of this matter and the conclusions I have reached.

### **Background Facts**

[9] Mr Dodd commenced employment with Roadworx on 4 April 2014. Roadworx is a street sweeping business which is engaged by councils, car parks, construction companies and other organisations. Mr Dodd was initially employed to drive street sweepers and would operate these vehicles in any location and for any customer of Roadworx that he was allocated to.

[10] In 2019, Roadworx was successful in tendering for a street sweeping contract with Strathfield Council. The team responsible for performing the Strathfield Council contract comprised of a supervisor, street sweeper and two ground crew. Mr Dodd was appointed to the supervisor position following a competitive selection process which was open to both internal and external candidates. Mr Dodd received a higher rate of pay in the supervisor position compared to when he worked as a driver.

[11] Following his appointment as a supervisor on the Strathfield Council contract, Mr Dodd worked exclusively in this role for five years until the contract with Strathfield Council ended in January 2024 as a result of a different company successfully tendering for the work. He does not recall any discussion with Roadworx about what would happen to his role if the contract with Strathfield Council came to an end.

[12] At the time that the contract between Roadworx and Strathfield Council ended, Mr David Sciberras, Business Unit Manager told Mr Dodd that Roadworx management would understand if Mr Dodd wanted to stay working at Strathfield Council as an employee of the company who successfully tendered for the work. The company did not employ any supervisors, but offered Mr Dodd a job as a driver which Mr Dodd declined.

[13] Mr Dodd said that Roadworx is a large company and there are always things to do. Since February 2024, Mr Dodd has undertaken whatever work has been allocated to him. Mr Dodd said that jobs are usually allocated by text message by Mr Sciberras. Mr Dodd provided a list of approximately 40 jobs that he has undertaken since ceasing work as a supervisor at Strathfield Council. Mr Dodd said that these jobs have involved a mixture of driver and supervisor duties, and have included training drivers, attending meetings and liaising with customers, picking up and delivering trucks and other equipment, undertaking street sweeping work, working at nights, and travelling away from Sydney to locations such as Cootamundra, Williamstown and Nowra. Mr Dodd said that the travel and night work necessitated making arrangements to accommodate his family responsibilities.

[14] Mr Sciberras said that his communication with Mr Dodd was by email, not text. Mr Sciberras explained during the conference that after the contract with Strathfield Council

ceased, he had conversations with Mr Dodd about ongoing employment and how he could support the business on new projects. These involved specialty trucks, a contract at Macquarie University and pavement cleaning as a supervisor. Mr Sciberras said that Mr Dodd was prepared to work on specialty trucks but refused to work at night. Mr Sciberras said he received a lot of text messages from Mr Dodd saying that he could not attend work and that Mr Dodd had extensive leave. Mr Sciberras said that sometimes he asked Mr Dodd to do tasks that he was not able to complete and gave the example of installing GPS trackers in trucks.

**[15]** In response to these matters, Mr Dodd said that he did not refuse to do night work but that it is not easy to switch from day to night work as he has family responsibilities, and his wife cannot drive at night. In the end, Mr Dodd made arrangements and went on to night shift. During that period, Mr Dodd's son stayed with his grandparents and Mr Dodd did not get to see him. In relation to taking leave, Mr Dodd said that he had a few health problems and that he had taken 3-4 weeks of sick leave but pointed out that he had over 600 hours accrued. In relation to installing GPS trackers in trucks, Mr Dodd said that he was able to install most of these but did not have complete control of the situation and felt that he was being set up to fail by Mr Sciberras.

**[16]** On 4 July 2024, Mr Dodd was allocated work at Mosman Council. Roadworx has a contract with Mosman Council to perform street sweeping services. Two drivers were away on leave and Mr Dodd was asked to perform the street sweeping work that would usually be undertaken by them. Halfway through this work, Mr Dodd received a text message from Mr Sciberras directing him to leave the job and attend a different job in Castle Hill. Mr Dodd objected to this and said that he needed to stay and finish the work for Mosman Council. Mr Sciberras said that it was not Mr Dodd's job to argue or question Mr Sciberras' directions, however Mr Dodd disagreed as he was concerned about the impact on Roadworx's business of the job not being completed. Eventually, Mr Dodd agreed to leave the Mosman job and go to Castle Hill if Mr Sciberras put the direction in writing which Mr Sciberras did.

**[17]** Mr Sciberras' version of this incident is that on 4 July 2024, a Roadworx driver was sick and could not do a job at Castle Hill. The supervisor at Mosman said he could cover the Mosman job which is why Mr Sciberras asked Mr Dodd to attend the Castle Hill job. Mr Dodd initially informed Mr Sciberras that he did not have time to attend the Castle Hill job but eventually went to the job.

**[18]** On Monday 8 July 2024, Mr Dodd was called into a meeting at approximately 9.30am in the workshop office. In attendance at the meeting was Mr Dodd, Mr David Sciberras, and Mr James Tory, Logistics Manager. Mr Dodd said that the incident on 4 July 2024 was mentioned by both Mr Sciberras and Mr Tory at the meeting. Mr Sciberras informed Mr Dodd that Roadworx did not have a supervisor's role for him anymore due to work loss and it being quiet at the moment and the work they had for Mr Dodd was to help Mr Tory out with whatever he needed a hand with. Mr Dodd asked whether this was a redundancy situation and was informed by Mr Tory, 'You're not getting redundancy, it's not going to happen, get that out of your head'. Mr Dodd said after some back and forth discussion he eventually said,

If that's all you have then I guess I'll have to take it since I don't have a choice.

[19] At the conference, Mr Dodd explained that he said that he ‘do[es]n’t have a choice’ as he could not just walk away from his job because he had been provided with a company phone and company car. I understood Mr Dodd to mean that although the job may not have been as fulfilling as when he was working for Strathfield Council, it provided financial security and benefits such as a phone and car which he would lose if he left.

[20] Mr Dodd said that Mr Sciberras returned to the room after leaving to take a phone call and a conversation took place to the following effect:

Mr Sciberras: I’m sick of you never wanting to help out and taking excessive sick leave and thinking that you’re way better than what you really are.  
Mr Dodd: Remember that next time you call me to trouble shoot or fix something.  
Mr Sciberras: Leave your keys and go.  
Mr Dodd: Are you sacking me?  
Mr Sciberras: [again] Leave your keys and go.  
Mr Dodd: [again] Are you sacking me?  
Mr Sciberras: Yes I am.  
Mr Dodd: I’ll go get all my stuff to return.

[21] Mr Tory was in the room when this conversation took place.

[22] Mr Sciberras’ version of events, which was provided during the conference, is that he decided to have a meeting with Mr Dodd because there was refusal of duties and support for the business by Mr Dodd and that Roadworx found that it was difficult to get some duties completed by Mr Dodd.

[23] Mr Sciberras said that Roadworx had given a period of 4-6 months to work with Mr Dodd on a suitable placement in the business but that Mr Dodd had generally refused all of the duties allocated to him. There were also ongoing leave issues.

[24] Mr Sciberras said he wanted to sit down with Mr Dodd to clarify and work out a future for him and discuss what was available in the business given Mr Dodd’s refusal of other key projects that he was not interested in. Mr Sciberras said that he and Mr Tory had a ‘consultation’ with Mr Dodd in the hope of getting a positive working relationship with him and so he could support the needs of the business.

[25] Mr Sciberras said he wanted to formalise something where he could retain Mr Dodd’s employment. Mr Sciberras said it had got to a point where Mr Dodd wanted purely a supervisory role which Roadworx had a mixture of duties to support. Mr Sciberras said that Mr Dodd became argumentative during the meeting and that it was going round and round in circles. Mr Sciberras said to Mr Dodd, ‘it’s really simple – it’s a yes or a no if you want your employment.’ Mr Dodd said to pay him out and then stormed off in his company vehicle. Mr Sciberras said that he tried to contact Mr Dodd and Mr Dodd refused to take his call. Mr Sciberras said that Mr Tory then contacted Mr Dodd. Mr Dodd said he needed some time out. Mr Dodd then came back late to the office and returned his belongings on the same day. Mr Sciberras said that the meeting was transcribed on the day with a witness in the room and that he did not say ‘you’ve been terminated’ or ‘you’re redundant’. Mr Sciberras wanted Mr Dodd to come back and have a civil conversation about the future.

[26] Mr Dodd said that he drove home after the meeting to get all of his work issued items so he could return them such as uniforms, computer, phone and keys. Mr Dodd cleaned his car out, and then headed back to work to return Roadworx's property. Mr Dodd organised for his son to follow him back so he could drive Mr Dodd home.

[27] Mr Dodd said that Mr Tory called him to check what time he would be back. Mr Dodd told Mr Tory that he would be back in about an hour. Mr Tory said, 'ok see you soon'. Mr Dodd said when he returned to the workplace, he went upstairs to the office and handed all his equipment to Mr Abhi Rao, Administration Manager. Mr Dodd asked Mr Rao whether he had any paperwork for Mr Dodd. Mr Rao said he would find out. Mr Dodd said he spoke to a few people in the office about what happened then went downstairs with Mr Rao to check over the state of his work car. Mr Tory and Mr Rao looked over the car and confirmed there was no damage at around 12pm. Mr Rao informed Mr Dodd that he had not returned a gate key so Mr Dodd made a second trip home to collect the key. Mr Dodd returned with the key at approximately 1pm and asked Mr Rao for his termination paperwork. Mr Rao said he would send the paperwork to Mr Dodd later. Mr Dodd denied that Mr Sciberras attempted to contact him after the meeting.

[28] Mr Dodd contacted Mr Rao on Wednesday 10 July 2024 to ask for the termination paperwork. Mr Rao said he did not have it as it was with Mr Sciberras. As he had not received anything two days after ceasing employment and he was unsure of the reason why he was dismissed, Mr Dodd contacted the Commission to commence the unfair dismissal process. Mr Dodd filed a Form F2 unfair dismissal application with the Commission on 11 July 2024. Mr Dodd eventually received a letter from Mr Sciberras dated 15 July 2024 on Tuesday 16 July 2024.

[29] The letter relevantly provided:

Further to our meeting of 08/07/2024, you have been employed as a Road Sweeper Operator for a considerable time and assisted the company during the contract tenure at Strathfield council. Given that you are not willing to work with the company in meeting our current needs, we agree to mutually terminating your contract for employment.

Termination will be effective from the 09/07/2024, however we acknowledge your contribution to the company and will pay you a four week notice period together with your accrued annual leave.

My understanding is that all company property has been returned by you and therefore I will authorise payment which should be made by this Friday 19/07/24.

I wish you well in your future endeavours.

[30] After Mr Dodd ceased employment with Roadworx, he commenced employment with a labour hire company. Mr Dodd is currently receiving about sixty per cent of the pay that he was receiving while employed at Roadworx.

**When can the Commission order a remedy for unfair dismissal?**

[31] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the person was protected from unfair dismissal at the time of being dismissed; and
- (b) the person has been unfairly dismissed.

[32] Both limbs must be satisfied. I am therefore required to consider whether Mr Dodd was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Dodd was so protected, whether Mr Dodd has been unfairly dismissed.

### **When has a person been unfairly dismissed?**

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

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

### ***Initial matters***

*Was Mr Dodd dismissed?*

[34] A threshold issue to determine is whether Mr Dodd has been dismissed from his employment.

[35] Section 386 of the FW Act provides:

#### **386 Meaning of *dismissed***

- (1) A person has been *dismissed* if:
  - (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
  - (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
- (2) However, a person has not been *dismissed* if:
  - (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
  - (b) the person was an employee:
    - (i) to whom a training arrangement applied; and

- (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement; and the employment has terminated at the end of the training arrangement; or
  - (c) the person was demoted in employment but:
    - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
    - (ii) he or she remains employed with the employer that effected the demotion.
- (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

**[36]** The expression 'terminated on the employer's initiative' in s.386(1)(a) is well understood to be a reference to a termination that is brought about by an employer, and which is not agreed to by the employee. In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.<sup>1</sup>

**[37]** Mr Dodd contends that he was dismissed by Roadworx when Mr Sciberras said, 'leave your keys and go,' then answered, 'yes,' in response to Mr Dodd's question, 'Are you sacking me?' Mr Sciberras did not directly deny that this conversation took place but denies that Roadworx terminated Mr Dodd's employment. Mr Sciberras claimed that Mr Dodd 'stormed off in his company vehicle' and that the termination was mutual.

**[38]** Mr Dodd was at a considerable disadvantage compared to Roadworx in relation to addressing Roadworx's contention that there was no dismissal, given that there was no evidence that he had any prior notice of the meeting on 8 July 2024, any opportunity to bring a support person and any witnesses to corroborate his version of events. He was also disadvantaged in relation to other aspects of the case because he no longer had access to work related records like emails and text messages which may have verified his accounts of the various matters that were raised by Roadworx in relation to his absences and performance. Despite this, Mr Dodd filed a written statement which clearly articulated what he claimed occurred at the meeting, so Roadworx was in no doubt about the case it was required to meet in responding to Mr Dodd's claim that he was dismissed.

**[39]** The situation faced by Mr Dodd can be contrasted with Roadworx who was represented at the meeting on 8 July 2024 by both Mr Sciberras and Mr Tory. Mr Sciberras said that the meeting was transcribed on the day with a witness in the room, which I understand to mean that Mr Tory could corroborate Mr Sciberras' version of events that there was no dismissal. Surprisingly, Roadworx did not call Mr Tory to give evidence in the matter and did not provide any transcript of the meeting to the Commission. Throughout his evidence, Mr Sciberras referred to emails which were also not provided to the Commission. In fact, the only material which Roadworx provided to the Commission was the letter of termination and a one page letter from Mr Sciberras which outlined what had occurred at a 'consultation follow up' meeting on 8 July 2024. Roadworx attempted to file further material after the determinative conference

concluded, which I have not considered because it was filed outside of the timeframe provided in the directions I issued prior to the conference and Roadworx did not seek leave to reopen its case. In any event, this material was not in relation to the meeting on 8 July 2024.

[40] I note that there is clear evidence from Mr Dodd of the words that he alleges that Mr Sciberras said to effect the termination of his employment. However, there is no clear evidence from Mr Sciberras as to the discussion that took place on 8 July 2024 which could lead me to conclude that Mr Dodd and Mr Sciberras (on behalf of Roadworx) agreed to terminate the employment relationship. Mr Sciberras appears to rely upon Mr Dodd's request for a 'pay out' and Mr Dodd leaving the workplace in a company vehicle as evidence which established the 'mutual termination'. However there are a range of reasons why an employee may request a 'pay out' and/or leave the workplace.

[41] Mr Sciberras' claim that Mr Dodd asked for a 'pay out' is consistent with Mr Dodd's evidence that he inquired about redundancy after being told that Roadworx no longer had a supervisor role for him. I believe that such an inquiry was a reasonable one in the circumstances given that the role which Mr Dodd was undertaking for five years for Strathfield Council did, in effect, become redundant and in the context of the conversation that Mr Sciberras and Mr Tory wanted to have with Mr Dodd about his future role with Roadworx. However, it seems to me very unlikely that an employee inquiring about a redundancy payment would suddenly leave employment and therefore forego their chance of ever receiving the payment.

[42] Similarly, an employee leaving a workplace during the working day could indicate that the employee wished to leave the workplace and never return. However in this case, Mr Dodd left in the company vehicle so it was simply not possible for him to never return to the workplace. The fact that Mr Dodd returned the company vehicle and other company property that day indicates that he believed the employment relationship had ended. However, I am not satisfied that this alone is indicative of a mutual termination. The speed with which Mr Dodd returned the company property is consistent with his account that his employment was terminated. If the termination was mutual, I believe it is more likely that there would have been negotiation about Mr Dodd working for some or all of the notice period. On the date that the employment ceased, it was not even clear whether Mr Dodd would receive a notice payment.

[43] The termination being at the initiative of Roadworx is also supported by Mr Sciberras unilaterally determining, a week after the employment ceased, that Roadworx would provide Mr Dodd with a four week notice payment.

[44] I note that Mr Dodd's version of events is supported by his filing of an unfair dismissal application, which records that version, within three days of ceasing employment. In contrast, Roadworx waited until 16 July 2024 before sending Mr Dodd a letter confirming the alleged mutual termination.

[45] Mr Dodd presented as a genuine and credible witness. There was no suggestion from Roadworx that Mr Dodd had any history of dishonesty during the ten years that Mr Dodd was employed by the company. I have no reason to believe that Mr Dodd's recollection about what Mr Sciberras said during their conversation on 8 July 2024 is incorrect or that Mr Dodd was dishonest or exaggerated while giving evidence. I observe that Mr Sciberras chose his words carefully when giving evidence. Mr Sciberras did not specifically deny saying the words

attributed to him by Mr Dodd. Mr Sciberras' evidence at the conference was that he never said to Mr Dodd 'you've been terminated' or 'you're redundant' however Mr Dodd never alleged that Mr Sciberras said these words.

**[46]** In determining whether I accept Mr Dodd's or Mr Sciberras' account of what occurred at the meeting, I have taken into account Roadworx's failure to provide material which it claims is in existence and which verifies its account that there was no dismissal, my assessment of the evidence of Mr Dodd and Mr Sciberras, the lack of evidence supporting a finding of mutual termination and the fact that Mr Dodd made an unfair dismissal claim supporting his version of events within three days of his employment ceasing.

**[47]** In the circumstances, I prefer Mr Dodd's evidence over Mr Sciberras' evidence with respect to the events of 8 July 2024 and accept that Mr Sciberras said to Mr Dodd, 'leave your keys and go,' then answered, 'yes,' in response to Mr Dodd's question, 'Are you sacking me?' I find that Mr Sciberras saying these words to Mr Dodd was the principal contributing factor which resulted directly in the termination of Mr Dodd's employment. I believe that it was convenient for Mr Sciberras to latch on to Mr Dodd's query about redundancy and use this to justify his characterisation of the dismissal as a mutual termination. I find that a reasonable person in Mr Dodd's position would have, on the basis Mr Sciberras saying these words and the surrounding circumstances, regarded his employment as having been terminated by Mr Sciberras on behalf of Roadworx on 8 July 2024.

*Other matters*

**[48]** Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

**[49]** I have decided these matters below.

**[50]** Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

**[51]** I have found that the termination took effect on 8 July 2024. On 11 July 2024, Mr Dodd filed an Unfair Dismissal application with the Commission. I am therefore satisfied that the application was made within the period required in s.394(2).

**[52]** 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 his 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;
- (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 regulations, is less than the high income threshold.

**[53]** It was not in dispute, and I find, that at the time of dismissal, Mr Dodd had completed at least the minimum period of employment with Roadworx, and that he was covered by the *Waste Management Award 2020*.

**[54]** I am therefore satisfied that, at the time of dismissal, Mr Dodd was a person protected from unfair dismissal.

**[55]** It was not in dispute, and I find, that Mr Dodd's dismissal was not a case of genuine redundancy and that the Small Business Fair Dismissal Code does not apply.

**[56]** Having considered each of the initial matters, I am required to consider the merits of the application.

***Was the dismissal harsh, unjust or unreasonable?***

**[57]** Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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.

[58] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>2</sup>

[59] I set out my consideration of each of these criteria below.

*Was there a valid reason for the dismissal related to Mr Dodd's capacity or conduct?*

[60] In order to be a valid reason, the reason for the dismissal should be 'sound, defensible or well founded'<sup>3</sup> and should not be 'capricious, fanciful, spiteful or prejudiced.'<sup>4</sup> However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>5</sup>

[61] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>6</sup> The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.<sup>7</sup>

[62] The dismissal occurred during a meeting which Mr Sciberras arranged with Mr Dodd. According to Mr Sciberras, he wanted to sit down with Mr Dodd to clarify and work out a future for him and discuss what was available in the business given Mr Dodd's refusal of key projects that he was not interested in.

[63] During the meeting, Mr Sciberras was critical of Mr Dodd and Mr Dodd responded, 'Remember that next time you call me to trouble shoot or fix something'. Mr Sciberras then terminated Mr Dodd's employment. I have indicated earlier in this Decision that I accept Mr Dodd's evidence about what occurred at the meeting. On that basis, I find that Roadworx terminated Mr Dodd's employment because he said to Mr Sciberras, 'Remember that next time you call me to trouble shoot or fix something'. In my view, this was a reasonable comment for Mr Dodd to make in response to what he perceived was unfair and unwarranted criticism by Mr Sciberras.

[64] This comment did not justify termination and as such I find that this was not a valid reason for the dismissal related to Mr Dodd's capacity or conduct.

[65] There is a potential alternative reason for the termination as the letter of termination referred to Mr Dodd, being 'not willing to work with the company in meeting our current needs,' as the reason for mutually terminating his contract for employment.

[66] It is important to make some observations about the context of this alternative reason. Mr Dodd was a long serving employee. Mr Sciberras gave evidence about alleged conduct and

performance issues in relation to Mr Dodd. Roadworx did not produce any documentary evidence to support these allegations although Mr Sciberras's evidence was that he communicated to Mr Dodd by email, so such evidence would have been available if it existed. There was no evidence of any written warnings ever being issued to Mr Dodd. Mr Sciberras gave evidence about warnings being drafted but not issued to Mr Dodd because Mr Sciberras decided to adopt a conciliatory approach in dealing with Mr Dodd. This assertion was also not supported by any documentary material tendered by Roadworx in the hearing.

**[67]** In February 2024, Mr Dodd's role significantly changed because of the loss of the contract with Strathfield Council. For five years, Mr Dodd performed the same role at the same location during the same hours. From February 2024, Mr Dodd's role radically changed. Mr Dodd was expected to travel to regional locations, work night shift and perform a variety of different duties. Although on one hand, Roadworx is to be commended for keeping Mr Dodd employed rather than terminating his employment due to redundancy, the situation appears to have been poorly handled by Roadworx. There is no evidence that Roadworx consulted Mr Dodd about the significant changes to his employment as it was required to under the *Waste Management Award 2020*. Had proper consultation occurred, Mr Dodd would have been aware of Roadworx's expectations of him and there could have been a discussion about the nature of the duties available for Mr Dodd to undertake, having regard to his family responsibilities, skills and experience. There could have been an agreement reached about what duties that Mr Dodd would undertake which could have involved an acknowledgement by Roadworx that not every task available will be suitable for Mr Dodd. The fact that Roadworx decided that it wanted to retain Mr Dodd as an employee did not give Roadworx an unfettered right to require Mr Dodd to do any job it wanted him to do. It seems to me that Roadworx wanted to exercise such a right and this became a source of tension between Mr Dodd and Mr Sciberras.

**[68]** In relation to the allegation that Mr Dodd was not willing to work with Roadworx in meeting its current needs, Mr Dodd said that he did everything that was asked of him by the business such as drive trucks, liaise with customers, clients and employees, perform site inspections, work on trucks, train staff, go away from home for work and work nights. I have previously referred to the list of approximately 40 jobs that Mr Dodd had undertaken since ceasing work as a supervisor at Strathfield Council. Mr Sciberras did not dispute that Mr Dodd performed this work. Based upon this evidence, I find that Mr Dodd willingly undertook an extensive variety of work in response to requests by Roadworx and was prepared to work at a range of locations and times. Further, I find that there is insufficient evidence to support a finding that Mr Dodd was unwilling to work with Roadworx in meeting its current needs. To the extent that Mr Dodd may have expressed disinterest or unwillingness in relation to the performance of some tasks, it is likely that this can be attributed to the poor handling of the situation by Roadworx following the cessation of the contract with Strathfield Council. Taking all of these matters into account, the allegation that Mr Dodd was not willing to work with Roadworx in meeting its current needs was not a valid reason for the dismissal related to Mr Dodd's capacity or conduct.

*Was Mr Dodd notified of the valid reason?*

[69] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Dodd ‘was notified of that reason’. Contextually, the reference to ‘that reason’ is the valid reason found to exist under s.387(a).<sup>8</sup>

[70] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.<sup>9</sup>

*Was Mr Dodd given an opportunity to respond to any reason related to his capacity or conduct?*

[71] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.<sup>10</sup>

*Did Roadworx unreasonably refuse to allow Mr Dodd to have a support person present to assist at discussions relating to the dismissal?*

[72] There were no discussions relating to the dismissal before it occurred so there was no opportunity for Mr Dodd to have a support person in relation to the dismissal. In any event, as Mr Dodd had no prior notice of the meeting, he had no opportunity to request a support person or to organise for such a person to be in attendance at the meeting. This is a matter which weighs in favour of a finding that the dismissal was unfair.

*Was Mr Dodd warned about unsatisfactory performance before the dismissal?*

[73] There is no evidence to support a finding that Mr Dodd was warned about unsatisfactory performance.

*To what degree would the size of Roadworx’s enterprise be likely to impact on the procedures followed in effecting the dismissal?*

[74] There is no evidence in relation to this matter and the parties did not make any submissions about this matter.

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

[75] There is no evidence in relation to this matter and the parties did not make any submissions about this matter.

*What other matters are relevant?*

[76] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[77] It has long been established that the effects of dismissal on the personal or economic situation of the dismissed employee may be taken into consideration under s.387(h) of the FW Act.<sup>11</sup>

[78] Further, an employee's long and satisfactory work performance or history may be taken into consideration under s.387(h) of the FW Act and, depending on all the circumstances, may weigh in favour of a conclusion that the dismissal of the employee was harsh, unjust or unreasonable.<sup>12</sup>

[79] Mr Dodd had a considerable period of service with Roadworx. During this period, he was promoted from a driver to a supervisor role, working in a position which was likely to have involved considerable trustworthiness and competence on his part, given that he was the most senior employee working on the Strathfield Council contract. Following the conclusion of that contract, he showed a willingness to adapt his working hours, duties and location for the benefit of Roadworx, even when this involved spending less time with his family.

[80] Against this background, the circumstances of Mr Dodd's dismissal and Roadworx's subsequent denial that a dismissal occurred were particularly cruel. Mr Dodd was not given any notice of the meeting in which he was advised of the dismissal, or provided with an opportunity to organise a support person. Mr Dodd did not receive any notice or entitlements on the day of the dismissal and in fact waited over a week to be advised that he would receive payment in lieu of notice. Mr Dodd was therefore without income during this period. Mr Dodd was able to quickly secure employment but with significantly lower pay. Mr Dodd's long and satisfactory work history, the way in which the dismissal was carried out, and the financial impact of the dismissal are all matters which weigh in favour of a finding that the dismissal was unfair.

*Is the Commission satisfied that the dismissal of Mr Dodd was harsh, unjust or unreasonable?*

[81] I have made findings in relation to each matter specified in s.387 as relevant.

[82] I must consider and give due weight to each of these matters as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>13</sup>

[83] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Dodd was harsh, unjust and unreasonable because:

- There was no valid reason for the dismissal related to Mr Dodd's capacity or conduct,
- Mr Dodd did not receive any warnings about alleged unsatisfactory performance,
- Mr Dodd was not given any notice of the meeting in which he was advised of the dismissal, or provided with an opportunity to organise a support person,
- Mr Dodd had a long and satisfactory work history with Roadworx,
- Mr Dodd did not receive any notice or entitlements on the day of the dismissal and waited over a week to be advised that he would receive payment in lieu of notice,
- of the harsh consequences of the dismissal due to the financial impact of the dismissal on Mr Dodd.

[84] I am therefore satisfied that Mr Dodd was unfairly dismissed within the meaning of s.385 of the FW Act.

## **Remedy**

[85] Being satisfied that Mr Dodd made an application for an order granting a remedy under s.394, was a person protected from unfair dismissal, and was unfairly dismissed within the meaning of s.385 of the FW Act, I may, subject to the FW Act, order Mr Dodd's reinstatement, or the payment of compensation to Mr Dodd.

[86] Under s.390(3) of the FW Act, I must not order the payment of compensation to Mr Dodd unless:

- (a) I am satisfied that reinstatement of Mr Dodd is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

### ***Is reinstatement of Mr Dodd inappropriate?***

[87] Mr Dodd has not sought reinstatement and Roadworx has not made any submissions in relation to this matter. On this basis I consider that reinstatement is inappropriate.

### ***Is an order for payment of compensation appropriate in all the circumstances of the case?***

[88] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, '[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one...'<sup>14</sup>

[89] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.<sup>15</sup>

[90] Mr Dodd provided evidence in the form of correspondence and payslips which established that Mr Dodd has suffered financial loss as a result of the dismissal. Although Mr Dodd was successful in obtaining employment soon after the dismissal, Mr Dodd is receiving a lower rate of pay, compared to the amount he was receiving at Roadworx. Further, Mr Dodd was employed for over ten years at Roadworx and was accruing long service leave annually which was available for him to take. Mr Dodd will not be able to access long service leave at a new employer for at least ten years from the date of commencing employment (or five years if his employment is terminated prior to ten years service). Having regard to all of these circumstances, I consider that an order for payment of compensation is appropriate.

### ***Compensation – what must be taken into account in determining an amount?***

[91] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to Mr Dodd in lieu of reinstatement including:

- (a) the effect of the order on the viability of Roadworx's enterprise;

- (b) the length of Mr Dodd's service;
- (c) the remuneration that Mr Dodd would have received, or would have been likely to receive, if he had not been dismissed;
- (d) the efforts of Mr Dodd (if any) to mitigate the loss suffered by Mr Dodd because of the dismissal;
- (e) the amount of any remuneration earned by Mr Dodd from employment or other work during the period between the dismissal and the making of the order for compensation;
- (f) the amount of any income reasonably likely to be so earned by Mr Dodd during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[92] I consider all the circumstances of the case below.

#### **Effect of the order on the viability of Roadworx's enterprise**

[93] There is no evidence before me about this matter so I am unable to conclude that an order for compensation will have an effect on the viability of Roadworx's enterprise.

#### **Length of Mr Dodd's service**

[94] Mr Dodd's length of service was ten years.

[95] I consider that Mr Dodd's length of service does not support reducing or increasing the amount of compensation ordered.

#### **Remuneration that Mr Dodd would have received, or would have been likely to receive, if Mr Dodd had not been dismissed**

[96] As stated by a majority of the Full Court of the Federal Court:

[i]n determining the remuneration that the applicant would have received, or would have been likely to receive... the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination.<sup>16</sup>

[97] Mr Dodd and Roadworx did not make submissions about this matter. In determining how long the employment would have been likely to continue, I have taken into account Mr

Dodd's 10 year period of service and his good employment record which weigh in favour of a finding that he would have been employed for a lengthy period. However, I must also take into account the fact that Mr Dodd's substantive position had effectively become redundant when the Strathfield Council contract ceased, and that Mr Sciberras advised Mr Dodd at the meeting on 8 July 2024 that it was 'quiet at the moment', a matter which Mr Dodd acknowledged by querying whether redundancy was payable. Roadworx's actions in keeping Mr Dodd employed rather than terminating him on the ground of redundancy reflected well on Roadworx but also demonstrated that Mr Dodd was regarded as an asset to the business. It would not have made financial sense for Roadworx to retain Mr Dodd's employment at his supervisor's rate of pay if Roadworx was not benefitting from the arrangement. Taking all of these matters into account, I find that although Mr Dodd's substantive position became redundant in January 2024, Roadworx would have been able to continue to provide Mr Dodd with meaningful work for a period of time if he had not been dismissed. However, I do not think that this period would have been indefinite, given that the combination of reduced work opportunities and tension between Mr Sciberras and Mr Dodd may have led to Mr Dodd's eventual resignation, or alternatively, Roadworx terminating Mr Dodd's employment due to redundancy. I have therefore determined that the period that Mr Dodd would have continued to work for Roadworx if he had not been dismissed is one year that is, until 8 July 2025.

[98] Mr Dodd provided a payslip for the last pay period of the 2023/2024 financial year which showed that his year to date earnings from Roadworx were \$106,891.15. In other words, Mr Dodd earned the gross sum of \$106,891.15 for the one year period from 1 July 2023 to 30 June 2024. Roadworx has not provided any evidence in relation to Mr Dodd's remuneration. As the payslip for the last pay period of the 2023/2024 financial year is the only reliable evidence that I have of Mr Dodd's remuneration over a one year period, and as this payslip appears to have been issued just a few days before the dismissal, I find, based upon this evidence, that the remuneration that Mr Dodd would have received, or would have been likely to receive, if Mr Dodd had not been dismissed is the gross amount of \$106,891.15.

#### **Efforts of Mr Dodd to mitigate the loss suffered by Mr Dodd because of the dismissal**

[99] Mr Dodd must provide evidence that he has taken reasonable steps to minimise the impact of the dismissal.<sup>17</sup> What is reasonable depends on the circumstances of the case.<sup>18</sup>

[100] Roadworx did not make any submissions in relation to this matter. Mr Dodd produced a letter from a labour hire business dated 1 October 2024 advising that he first registered with it on 12 July 2024 and that he was provided work with a host employer from 15 July 2024 to 27 July 2024 then with a different host employer from 31 July 2024 on an ongoing basis. Taking into account this evidence, I find that Mr Dodd has made efforts to mitigate his loss by obtaining employment.

#### **Amount of remuneration earned by Mr Dodd from employment or other work during the period between the dismissal and the making of the order for compensation**

[101] The evidence produced by Mr Dodd establishes that Mr Dodd received gross amounts of \$26,666.66 during the period from the dismissal to 22 October 2024 comprising:

- \$5,920 in respect of four weeks notice from Roadworx; and

- \$20,746.66 in respect of employment with a labour hire company.

[102] Mr Dodd's current payslip showed that he is currently earning a gross amount of \$1,251.66 per week. On this basis, I find that Mr Dodd earned an amount of \$16,271.58 during the 13 week period from 23 October 2024 to 22 January 2025.

[103] The amount of remuneration earned by Mr Dodd from employment or other work during the period between the dismissal and the making of the order for compensation is \$42,938.24 which is the sum of \$26,666.66 and \$16,271.58.

**Amount of income reasonably likely to be so earned by Mr Dodd during the period between the making of the order for compensation and the actual compensation**

[104] Mr Dodd's current payslip shows that he is currently earning a gross amount of \$1,251.66 per week. I find that the amount of income reasonably likely to be earned by Mr Dodd during the two week period between the making of the order for compensation on 22 January 2025 and the payment of compensation on 5 February 2025 is \$2,503.32 which is two weeks pay at Mr Dodd's current weekly rate of \$1,251.66.

**Other relevant matters**

[105] The parties did not make any submissions about other relevant matters.

**How is the amount of compensation to be calculated?**

[106] As noted by the Full Bench:

[t]he well-established approach to the assessment of compensation under s.392 of the FW Act... is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket (Sprigg)*.<sup>19</sup> This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.<sup>20, 21</sup>

[107] The approach in *Sprigg* is as follows:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

***Step 1***

[108] I have estimated the remuneration Mr Dodd would have received, or would have been likely to have received, if Roadworx had not terminated the employment to be \$106,891.15 on the basis of my finding that Mr Dodd would likely have remained in employment until 8 July 2025. This estimate of how long Mr Dodd would have remained in employment is the ‘anticipated period of employment’.<sup>22</sup>

***Step 2***

[109] I have found that the amount of remuneration earned by Mr Dodd from the date of dismissal was \$42,938.24, and that the amount of income reasonably likely to be earned by Mr Dodd between the making of the order for compensation and the payment of compensation is \$2,503.32. The sum of these amounts is \$45,441.56.

[110] Only monies earned since termination for the anticipated period of employment are to be deducted.<sup>23</sup> I therefore deduct the sum of \$45,441.56 from \$106,891.15 which leaves an amount of \$61,449.59.

[111] There is no evidence to support a finding that Mr Dodd will leave his current employment during the estimated period of employment or that he will be successful in obtaining a higher paying job.

[112] There are 22 weeks remaining of the anticipated employment period from 5 February 2025 to 8 July 2025. I believe that Mr Dodd is likely to earn a total gross amount of \$27,536.52 during this period based upon his current gross weekly salary of \$1,251.66.

[113] I have deducted the amount of \$27,536.52 from \$61,449.59 which leaves an amount of \$33,913.07.

***Step 3***

[114] I now need to consider the impact of contingencies on the amounts likely to be earned by Mr Dodd for the remainder of the anticipated period of employment.<sup>24</sup>

[115] There is no evidence before me which establishes the occurrence of contingencies which might have brought about some change in earning capacity or earnings by Mr Dodd during the anticipated period of employment. I therefore do not consider there to be any evidentiary basis or that it is otherwise appropriate to deduct any amount for contingencies.

***Step 4***

[116] I have considered the impact of taxation but have elected to settle a gross amount of \$33,913.07 and leave taxation for determination.

[117] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that ‘the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case,’<sup>25</sup> including my findings that:

- It is likely that Mr Dodd would have remained employed by Roadworx until 8 July 2025 if he had not been dismissed;
- Mr Dodd has taken steps to mitigate his loss by obtaining alternative employment.
- Mr Dodd is currently earning less than he would if he was still employed by Roadworx.

[118] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act and that it does not include a component compensating for shock, distress and humiliation.

**Is the amount of compensation to be reduced on account of misconduct?**

[119] If I am satisfied that misconduct of Mr Dodd contributed to the employer's decision to dismiss, I am obliged by section 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[120] I am satisfied that misconduct of Mr Dodd did not contribute to the employer's decision to dismiss. Therefore, the amount of the order for compensation is not to be reduced on account of misconduct.

**How does the compensation cap apply?**

[121] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

- (a) the amount worked out under section 392(6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

[122] The amount worked out under section 392(6) is the total of the following amounts:

- (a) the total amount of the remuneration:
  - (i) received by Mr Dodd; or
  - (ii) to which Mr Dodd was entitled;
- (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
- (iii) if Mr Dodd was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by Mr Dodd for the period of leave in accordance with the regulations.

[123] Mr Dodd was not on leave without pay or without full pay during the 26 weeks immediately before the dismissal.

[124] Based on the payslips provided by Mr Dodd, I find that the total amount of the remuneration received by Mr Dodd during the 26 weeks immediately before the dismissal was \$53,445.58. This is less than half the high income threshold which applied immediately before the dismissal.<sup>26</sup> The amount of compensation ordered by the Commission must therefore not exceed \$53,445.58. I have determined the amount of compensation as \$33,913.07 gross plus superannuation which is below this amount.

### **Conclusion**

[125] I have found that Mr Dodd was dismissed at a meeting convened by Mr Sciberras where Mr Sciberras claimed that Mr Dodd was refusing duties and not supporting the Roadworx business. I have found that his allegation is not supported by the evidence before me and that the opposite is true, in that Mr Dodd willingly undertook an extensive variety of work in response to requests by Roadworx and was prepared to work at a range of locations and times, often at the expense of spending time with his family.

[126] I have found that Mr Dodd's dismissal was harsh, unjust and unreasonable for reasons which include that there was no valid reason for the dismissal, that Mr Dodd was not given any notice of the meeting where he was dismissed, that Mr Dodd had a long and satisfactory work history with Roadworx, that Mr Dodd did not receive any notice or entitlements on the day of the dismissal, and the financial impact of the dismissal on Mr Dodd.

[127] I have determined that an order for compensation is appropriate and that Roadworx should pay compensation to Mr Dodd in the sum of \$33,913.07 gross plus superannuation less taxation as required by law in lieu of reinstatement within 14 days of the date of this decision.

[128] An order giving effect to this decision is published with this decision.



DEPUTY PRESIDENT

*Appearances:*

Mr R. *Dodd*, Applicant

Mr D. *Sciberras*, Business Unit Manager, for the Respondent

*Hearing details:*

2024

21 October  
In person, Sydney and via Microsoft Teams

*Final written submissions:*

Applicant: 24 October 2024

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<sup>1</sup> *Mohazab v Dick Smith Electronics Pty Ltd* [1995] IRCA 625; 62 IR 200.

<sup>2</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

<sup>3</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

<sup>6</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].

<sup>7</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

<sup>8</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

<sup>9</sup> *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

<sup>10</sup> *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

<sup>11</sup> *Ricegrowers Co-operative v Schliebs* [PR908351](#) (AIRCFCB, Duncan SDP, Cartwright SDP, Larkin C, 31 August 2001), [26].

<sup>12</sup> *Telstra Corporation v Streeter* [2008] AIRCFB 15, [27].

<sup>13</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].

<sup>14</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

<sup>15</sup> *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

<sup>16</sup> *He v Lewin* [2004] FCAFC 161, [58].

<sup>17</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* [PR908053](#) (AIRCFCB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

<sup>18</sup> *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

<sup>19</sup> (1998) 88 IR 21.

<sup>20</sup> [2013] FWCFB 431.

<sup>21</sup> *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

<sup>22</sup> *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Enhance Systems Pty Ltd v Cox* [PR910779](#) (AIRCFCB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

<sup>25</sup> *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].

<sup>26</sup> The high income threshold which applied immediately before the dismissal was \$175,000.