



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Gary Shawn Linegar

v

World Wide Waste & Recycling Pty Ltd ATF World Wide Waste Unit Trust

(U2024/13038)

COMMISSIONER REDFORD

MELBOURNE, 4 MARCH 2025

Application for an unfair dismissal remedy

Background

[1] On 30 October 2024 Mr Gary Linegar filed an application pursuant to s 394 of the *Fair Work Act 2009* (Cth) (**the Act**) seeking a remedy in relation to unfair dismissal with respect to his former employer, World Wide Waste & Recycling Pty Ltd ATF World Wide Waste Unit Trust T/AS CSC Waste & Recycling (**CSC**).

[2] CSC terminated Mr Linegar's employment by letter dated 16 October 2024 after he had been absent from work for six weeks, during which time Mr Linegar was certified unfit for work due to illness.

[3] The application was the subject of a hearing conducted in the Commission at Melbourne on 4 and 5 February 2025. Both parties were self-represented at the hearing.

[4] The following persons gave evidence at the hearing and were subjected to cross-examination:

- a. Mr Gary Linegar;
- b. Ms Ashley Clark, Director of CSC;
- c. Mr Justin Clark, Reporting Manager of CSC;
- d. Ms Haritha Velindandi, Officer Administrator, CSC;
- e. Mr Declan Worrall, Development Manager, CSC.

Ordering a remedy in relation to unfair dismissal.

[5] Section 390 of the Act provides that the Commission may order remedy if:

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

[6] Section 396 requires that the Commission decide several matters relating to an application for an unfair dismissal remedy before considering the merits of the application. Those matters are:

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

[7] While CSC is not a large business, at the time of the termination of Mr Linegar's employment it did not have less than 15 employees; and thus, was not a small business employer as defined by the Act¹. The SBFDC is not relevant in this matter. Also, Mr Linegar's dismissal was not a case of genuine redundancy, and the application was made within the period required in s 394(2) of the Act.

[8] Section 382 of the 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;
 - 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.

[9] At the time of his dismissal, Mr Linegar had been employed for eight years (more than the minimum employment period) and his annual rate of earnings was less than the high income threshold, which at that time was \$175,000.00 per annum. I find that Mr Linegar was a person protected by unfair dismissal at the time he was dismissed.

[10] Given my findings in relation to these initial matters, I am required to determine whether Mr Linegar was unfairly dismissed.

The witness evidence

[11] I consider it appropriate at the outset to comment on one aspect of the witness evidence. While each of the persons who gave evidence in this matter did so in a generally forthright and truthful manner, during the evidence of Ms Clark, an exchange occurred which is set out below. The exchange relates to the circumstances in which it appears a conscious decision was made to stop Mr Linegar's paid personal leave prior to the termination of his employment. It appeared to be uncontested this occurred: that the last period for which Mr Linegar was paid was 19 September 2024 to 25 September 2024² and from 26 September 2024 to the date of the termination of his employment Mr Linegar was not paid³. The exchange was as follows⁴:

Commissioner: Yes, but I think it's also been asserted by Mr Linegar that there was a point at which his pay stopped, perhaps in late September, perhaps in October. I'm not sure. Do you dispute that?

Ms Clark: I know that there was a period where – where there were some delays, Commissioner, given that we had to verify the legitimacy of the medical certificates.

Commissioner: Yes?

Ms Clark: We had been provided – not by Mr Linegar, by other employees, we'd been provided false medical certificates so we changed our company policies and procedures. We now verify the legitimacy of a medical certificate before we pay out the sick pay. So I know that there were some delays in relation to that and those payments were made.

In the later weeks – I'll be really honest, Commissioner – yes, I did withhold wages on the sick leave.

Commissioner: Yes. And did that relate to some failure to return company property?

Ms Clark: He – he did fail to return company property, Commissioner.

Commissioner: Well, let me put it this way. Why did you make the decision to withhold wages?

Ms Clark: I just – I need a minute. Sorry.

Gary was like family to us and we supported him through a separation, his daughter being addicted to drugs, his son leaving the country, furniture being provided, personal and professional business loans, and personal loans, to help him move in and out of new residences, damage that his daughter had caused to their buildings. And I felt that Gary was abusing the policy.

I believed that he was healthy to return to work and I believe that he had no intention of returning to work when he took sick leave.”

[12] The reason given to Mr Linegar by CSC for the termination of his employment was not that he had falsified the reason for his absence from work, or that his impairments were contrived, or that he had no intention of returning to work. The letter provided to Mr Linegar advising of the termination of his employment said⁵:

“Your continued failure to follow our Policy, and reasonable and lawful directions to communicate with us, appears to be deliberate, intentional and inconsistent with the continuation of the Employment Contract. We cannot allow this conduct to continue. As you are actively taking steps to breach our internal policies and ignore reasonable and lawful directions, we believe your actions (or inactions) constitute serious and wilful misconduct.

We have therefore made the decision to terminate your employment effective immediately, and without notice.”

[13] This purported justification for the termination of Mr Linegar’s employment was, as I understood it, the crux of CSC’s response to the application. In its Form F3 response, it said the reasons for dismissal were “serious misconduct, including the continued and wilful failure to comply with lawful and reasonable directions”⁶. In its written submissions it said that Mr Linegar’s dismissal was “based on his refusal to follow reporting protocols, policies and procedures”, and that under the heading “Grounds for Dismissal” asserted “Failure to Comply with Lawful Directions”⁷. Much of the evidence produced by CSC related to its policies in relation to sick leave, and its allegation that Mr Linegar failed to follow them.

[14] Ms Clark’s evidence was therefore somewhat revelatory in this regard, and as I explain below, I consider an objective analysis of the evidence shows that the primary motivator for the decision to terminate Mr Linegar’s employment was that there was a belief on the part of Ms Clark – legitimate or otherwise – that Mr Linegar’s absence from work was not genuine, and that his employment should be terminated because of his perceived duplicity.

[15] Accordingly, I consider that much of what has been said by CSC to the effect that the decision to terminate Mr Linegar's employment was because he refused or failed to follow its lawful and reasonable instructions and that he comply with its policies is to some extent, self-serving. The fundamental reason CSC terminated Mr Linegar's employment was because Ms Clark did not believe he was really sick and unable to work and her belief he was attempting to deceive her.

Evidentiary matters

[16] Mr Linegar commenced working at CSC on 10 October 2016 as Operations Manager. A position description provided in evidence outlined the duties of this role which included rostering and management of truck drivers and other staff members, recruitment, coaching, training and evaluation of staff, working to reduce turnaround time for trucks in and out of the work site, as well as a range of associated duties⁸. It also appeared from the evidence that Mr Linegar would perform operational duties associated with the waste management services performed by CSC, including driving its trucks.

[17] There was no evidence before me that there were any concerns held by CSC as to Mr Linegar's work performance or conduct before August 2024, nor was I told there were problems or issues with the employment relationship between Mr Linegar and CSC or its senior management in the nearly eight years of his employment before this date. Both parties confirmed that I was not being asked to have regard to any matter occurred before 28 August 2024⁹.

[18] On 28 August 2024, Ms Clark conducted an "evaluation" in relation to Mr Linegar's work performance. Neither party's submissions appeared to place a great deal of relevance on this evaluation. Documents relating to the evaluation were tendered by CSC in evidence. To the extent there was any particular criticism about Mr Linegar's work performance arising from the evaluation, he said it was unjustified, and that he was being required to work long hours, including having to work "in the truck" which took time away from his capacity to fulfil his role as the Operations Manager. An email exchange occurred between Mr Linegar and Ms Clark on 29 and 30 August 2024 during which Mr Linegar made this point, and Ms Clark reiterated some of the requirements of his role¹⁰.

[19] There was a discernible level of tension between Mr Linegar and Ms Clark in the tone of this email exchange. Ms Clark is particularly direct, stating that "[i]f your feel that supporting your team outside of standard shift hours is not aligned with your expectations, it may be time to reassess whether managing a team is the right fit for you ...", and then on a second occasion, in a subsequent email "[p]lease reassess whether this role and its requirements are the right fit for you".

[20] Despite the nature of this exchange, neither party submitted to me that there was a breakdown in the relationship at this time. In particular, it was not submitted, for example, that the evaluation review which had occurred in relation to Mr Linegar's work performance, or his response to it, provided further justification for the ultimate decision to terminate his employment.

[21] On 29 August 2024 it was said that Mr Linegar was late for work. This was also a matter which while it was raised before me, was not said to be relevant to the ultimate demise of this employment relationship.

[22] On 30 August 2024 Ms Linegar commenced an absence from work due to illness which continued until the end of his employment with CSC.

[23] A medical certificate was tendered in evidence in respect to Mr Linegar's absence from work on 30 August 2024, which said that:

"I have examined Mr Gary Linegar today.

*He has a medical condition and will be unfit for work or study from 30/08/2024 to 03/09/2024 inclusive."*¹¹

[24] Mr Linegar provided a number of other medical documents in his evidence, relating to his health during the period from 30 August 2024 until the date of his termination of employment, including reports prepared by some of the medical practitioners attending to him during this period¹². I did not find this evidence to be of any great assistance in the determination of this matter. Much of the material was difficult to interpret and Mr Linegar was not able to explain several of the reports or in some cases their relevance.

[25] Having said this, it seemed to be suggested to Mr Linegar in cross examination that the medical information he provided did not support the proposition that during the relevant period, or that he was suffering from the ailments he claimed to be, or that he was unable to work¹³. In answer, Mr Linegar disputed this proposition and re-asserted that during the period, he was ill and unable to work. I do not agree that the medical information Mr Linegar tendered in evidence, while it was not entirely clear, does not support the proposition that he was suffering from medical ailments during this period. The information does show that he was seeing Doctors and does indicate that some of the issues he was dealing with related to blood pressure and required consultations with a cardiologist. When read in conjunction with the medical certificates provided to CSC by Mr Linegar (and tendered in evidence) the material fortifies the proposition that he was ill and unable to work during the period. If it is submitted by CSC that the medical information casts doubt on the veracity of the medical certificates provided by Mr Linegar from his Doctors (which were also in evidence) I do not agree that it does. To the extent it is submitted that the medical information casts doubt on the veracity of Mr Linegar's claims that he was ill during this period and unable to work, I also do not agree with that submission.

[26] As will become evident, the medical certificate provided by Mr Linegar to CSC on 30 August 2024 was the first of a series of similar certificates provided by him covering the period of his absence from work. None of these certificates provided anything like the detail provided in the medical documents he produced in evidence, and simply said he was "unfit for work", without further explanation. It is however notable that CSC confirmed in its evidence that its practice when it is provided with a medical certificate by one of its employees is to send an email to the relevant clinic to "verify" the certificate. It was confirmed this occurred in respect of each of Mr Linegar's certificates and verification was received¹⁴.

[27] It was said in evidence that when a CSC employee is absent from work due to illness, there is a requirement they upload a medical certificate on to an online system. While there may have been an issue with Mr Linegar uploading one of his medical certificates to the system, which was later rectified¹⁵, there did not appear to be any evidence before me that Mr Linegar did not upload his medical certificates to the system in accordance with the requirement. The evidence from both parties as to precisely *when* the medical certificates were uploaded by Mr Linegar was not clear. I did not understand CSC to complain, for example, that Mr Linegar had not provided the medical certificates in a timely fashion. In these circumstances, I consider that Mr Linegar uploaded (and therefore provided to his employer) medical certificates in relation to his absence from work due to sick leave on, or very close, to the date of each of those certificates.

[28] In the email exchange between Ms Clark and Mr Linegar which began on 29 August 2024 (referred to above), Mr Linegar said that he was late for work on 29 August 2024 because he had been struggling with a virus, and that he would need to take the following day (30 August 2024) off sick. Nothing in Ms Clark's replies to this email on 29 and 30 August 2024 sought more information about this absence from work or questioned it.

[29] Mr Linegar said in his evidence that on or about 29 August 2024, he was experiencing dizzy spells and did not feel comfortable driving¹⁶. It is unclear as to whether Mr Linegar told anyone at CSC that he was experiencing dizzy spells – he says he told Mr Worrell on 29 August 2024 that he had been suffering from dizziness – but Mr Worrell said he could not recall this conversation¹⁷. It seemed unlikely he told Ms Clark he was suffering from dizzy spells¹⁸. However, whether Mr Linegar told anyone or not, there is no evidence to contradict Mr Linegar's assertion that he was suffering from dizzy spells at work on or about the time he commenced his absence, and I accept this evidence.

[30] On 3 September 2024, an email was sent to Mr Linegar by Ms Velidandi in relation to missing "dockets", to which Mr Linegar replied via email saying that Mr Worrall had taken "all the hook lift docketts off my desk and uploaded them"¹⁹. He also said to Ms Velidandi that there were not enough iPads. Ms Clark later replied to Mr Linegar's response email and said that the issue had nothing to do with iPads and that the docketts had long been an issue and needed to be handed in on the day, so that the team is not chasing after them.

[31] A further medical certificate was provided by Mr Linegar dated 3 September 2024. Again, the certificate describes Mr Linegar as having a "medical condition" and unfit for work or study, this time until 6 September 2024²⁰.

[32] On 5 September 2024, in the evening, Ms Clark sent an email²¹ and then text messages²² to Mr Linegar advising that as she was taking bereavement leave, he should report to Mr Clark. Mr Linegar replied and advised that he was off work the following day. Ms Clark replied and said "... you are supposed to report to me tomorrow after your appt as your medical certificate is up to an [sic] including tomorrow. Instead you will report to Justin". Mr Linegar said in response "no problem understood". "Justin" is Mr Justin Clark, the Reporting Manager for CSC, who described himself as being responsible for overseeing Mr Linegar during his employment²³.

[33] On 6 September 2024, Mr Linegar provided another medical certificate, which said, in language similar to his previous medical certificates, that he would be unfit for work or study until 10 September 2024²⁴.

[34] On 6 September 2024, Mr Linegar was contacted by CSC in a manner not properly explained in the evidence and advised that arrangements would be made to take possession of his company-supplied Ute vehicle. It appears it was considered an opportune time to have the vehicle serviced, and in particular, to address an issue with its “EGR light” as Mr Linegar was absent from work on leave and presumably not using the vehicle. A text message exchange occurred on this day between Mr Linegar and Mr Clark, and an excerpt of this exchange was provided in evidence²⁵. What is discernible from the excerpt of this text message exchange is:

[35] CSC was aware of a problem with a dashboard warning light on Mr Linegar’s Ute;

[36] Mr Linegar advised Mr Clark that he had been ill, and that it was the first time in 8 years he had felt “this rough”; and

[37] Mr Linegar advised Mr Clark that he would ring him “Tuesday to arrange transportation in to work”.

[38] In relation to this latter reference, it was submitted to me by CSC that this evinced an intention on the part of Mr Linegar to return to work “on Tuesday” – which did not occur. To the extent that it was also submitted to me that this is evidence of Mr Linegar’s *fitness* for work at this time, I do not consider it is.

[39] Further evidence was provided that when Mr Linegar’s company-supplied ute was taken to the mechanic, it was discovered that it was in an unroadworthy condition, because of tire wear²⁶. It was submitted to me that the relevance of this matter is that it brings into question Mr Linegar’s reliability and honesty²⁷, perhaps because he should have been aware of the issue with the ute’s tires, and should have reported it to CSC (and didn’t), and perhaps also the dashboard warning light issue. It is plain to me from the text message exchange on 6 September 2024 with Mr Clark that CSC was aware of the dashboard warning light issue – presumably because Mr Linegar *did* report it. In any event, I do not consider this matter impugns Mr Linegar’s character or bring into question the quality of his evidence.

[40] Another medical certificate was provided by Mr Linegar dated 10 September 2024, certifying him unfit for work until 16 September 2024²⁸.

[41] On 10 September 2024, Ms Clark sent a text message to Mr Linegar advising that she was again on bereavement leave, and he should again report to Mr Clark, and also “I note the company phone is off again”²⁹. This latter reference relates to a complaint CSC appears to have had with Mr Linegar having turned off his company phone. It was submitted that at some point during his absence, Mr Linegar turned off his company phone, and that this was evidence of his intention not to return to work at CSC at all³⁰. I cannot discern from the evidence provided to me *when* Mr Linegar turned off his company phone or whether he did so permanently. It does appear from an email dated 5 September 2024³¹ that Ms Clark complained at 7:24PM that

evening that his work phone was off, although it appears from text messages in evidence that shortly thereafter, the phone was switched on again. On 13 September 2024, Ms Clark sent Mr Linegar a text message in which she advised that the work phone should be placed on a forward, which had not been actioned, and requested he do so immediately. In her evidence, Ms Clark she had herself taken steps to cause the phone to be placed on forward, because clients were contacting the phone and not being attended to, given Mr Linegar was absent from work. Mr Linegar was advised of this in an email sent to him by Ms Clark on 13 September 2024³².

[42] Also, on 13 September 2024 Mr Linegar emailed Ms Clark and said that “hopefully my sick pay entitlement will be in my account by the end of the day ...”. The answer provided by Ms Clark (in her email relating to her having forwarded the phone) was that “all payroll has been processed according to normal payroll procedures”³³.

[43] Later, on 13 September 2024, Mr Linegar emailed Ms Clark and said that his pay had been received but was “420 dollars light”. In response, Ms Clark said “I don’t manage payroll so I cannot determine if its correct or not”³⁴.

[44] On 15 September 2024, Mr Linegar sent an email to Ms Clark which said that he had no access to emails, Teams or “Wastedge”. He also said he had messaged Ms Velidandi from his personal email regarding wages. Ms Clark responded and said that she had checked Mr Linegar’s access to emails and Teams and there is nothing wrong with them.³⁵

[45] Another medical certificate was provided by Mr Linegar dated 16 September 2024, indicating he was unfit for work until 20 September 2024³⁶.

[46] It was said that on 16 September 2024 Mr Linegar sent an email to Mr Worrell requesting the cancellation of holidays for 20 and 22 September 2024 although a copy of this email was not provided in evidence.

[47] On 18 September 2024, Mr Linegar was sent a letter from CSC, signed by Ms Velidandi³⁷. The key matters raised in this letter were:

- a. That Mr Linegar’s latest medical certificate is for a period 16 September 2024 to 20 September 2024 but his email to Mr Worrell indicated that he would be off sick until 22 September 2024;
- b. That the medical certificates provided by Mr Linegar do not provide any information as to the nature of his illness and he had not provided details as to the nature of the illness or his anticipated return date.
- c. That because Mr Linegar had not provided an information as to the nature of his illness since he last mentioned he “had a cold” nor his anticipated return to work CSC was unable to properly consider what steps need to be taken to manage his workload, or the estimated duration of the reallocation of his work duties.

- d. That not knowing the nature of his illness mean CSC was unable to determine whether any adjustments might need to be made to accommodate his return to work.
- e. The requirements of the policy, mentioned above, were re-stated.
- f. That the policy requires that Mr Linegar contact Mr Clark on a weekly basis to provide an update on the illness.
- g. That Mr Linegar had failed to adhere to the policy, failed to contact Mr Clark to report his sick leave, and most recently, did not make any contact with his manager regarding the latest period of absence.
- h. That Mr Linegar should provide information about the nature of his illness, when he anticipated returning to work and whether he anticipates any adjustments might need to be made to his normal work routine to accommodate his illness/injury and return to work.
- i. That Mr Linegar should contact Mr Clark prior to 20 September 2024 to provide this information.

[48] Mr Linegar said in evidence that he phoned Mr Clark a number of times during his absence, to provide him with more detail about his situation. Mr Clark confirmed this. Some of those communications involved Mr Linegar leaving a voicemail message, although Mr Clark confirmed in his evidence that on “several” occasions he had a verbal conversation with Mr Linegar³⁸. Recordings of some of the voicemail messages left by Mr Linegar on Mr Clark’s phone were provided, as well as a transcript of each of those messages. Mr Linegar accepted that the transcript was a faithful record of the messages. The first of these messages was dated 19 September 2024 at 5:01PM which says:

“Justin, it’s Gary. I’ve been to the doctors today, my blood pressure is way low, below 100 so I’ve got to go back on Monday and I’ll give you an update on Monday after I’ve seen you at 1:30 so I’ll call you after that.”

[49] At this point, it is appropriate to pause in the chronology of events to note the following. Below, I discuss the controversy that exists in this matter between CSC and Mr Linegar about whether he was adequately responsive in relation to his employer during this period, and whether he provided CSC with sufficient information about his reasons for being absent from work and his medical condition and the details it said were required by its policy. Mr Linegar presented as a person who does not tend to communicate with the same level of formality, and at times officiousness, as is evident from the tone of the communications sent to him by CSC, particularly in its letters. Taking this into account, I consider that the voicemail message left by Mr Linegar for Mr Clark on 19 September 2024 is an attempt, at least in part, to provide the information requested in the letter he received the previous day. While it does not provide any information about when Mr Linegar anticipated returning to work, it *does* provide a reasonably specific piece of information about Mr Linegar’s medical health – namely – that his blood pressure is below 100.

[50] For example, under cross examination, when challenged about his level of responsiveness, Mr Linegar said:

“I told him [Mr Clark] exactly what was going on. I just told him exactly what was going on. There was no like in-between or whatever. I told him as much as I knew, and the doctors, what they were saying to me, like they have to get the blood pressure under control before I can go back to work.”³⁹

[51] To the extent that I am being asked to draw a suspicion about cursory nature of Mr Linegar’s voice messages for Mr Clark or the omission of information about a timeframe for return to work, I do not consider it appropriate to do so. In the message left on 19 September 2024, it seems to me more likely Mr Linegar does not provide that information because at that point he didn’t know what his anticipated return to work date was and rather undertook to provide another update to Mr Clark “on Monday”.

[52] On 23 – 24 September 2024, Mr Linegar and Ms Clark exchanged a series of text messages relating to efforts to obtain from Mr Clark certain items of company equipment in his possession⁴⁰. The nature of these messages suggests the relationship between Mr Linegar and Ms Clark had continued to deteriorate, making it slightly difficult to analyse the evidence. What appears to have transpired is that Ms Clark decided she wanted a company laptop, phone and computer monitor in Mr Linegar’s possession returned, particularly because they were missing “important customer information”⁴¹. A courier was arranged to take delivery of these items from Mr Linegar’s house. It appears this coincided with issues Mr Linegar was experiencing with his pay – either it having been not paid on time or there being discrepancies in the amount⁴². This was causing him frustration, which he expressed to some extent in some of the text messages. During the exchange, Ms Clark suggested that Mr Linegar was not complying with company requests. She also asked that if Mr Linegar was “resigning” that he submit a written resignation, to which Mr Linegar says on at least two occasions that he is not resigning.

[53] There was also a verbal conversation between Mr Linegar and Ms Clark at this time. During this conversation, Ms Clark alleges that Mr Linegar started to “scream and yell” and “curse”⁴³. Mr Linegar concedes that he did raise his voice during this conversation but did not “say the wrong thing” and attempted to explain his conduct by reference to his frustration over issues with his pay⁴⁴.

[54] Also on 23 September 2024, at 4:24PM, Mr Linegar contacted Mr Clark to advise as to his medical status. Mr Clark did not answer the call and a message was left which said:

“Justin, it’s Gary. I’ve got to go for an ECG this week and trying to get my cardiologist as well. So yeah, definitely not back this week. I’ve got a load of certificates. So if you need anything else. Let me know. Thanks.”

[55] A medical certificate dated 23 September 2024 was also provided by Mr Linegar, indicating he was unfit for work until 27 September 2024⁴⁵.

[56] On 24 September 2024, Mr Linegar was sent a letter from CSC requesting that he provide consent to obtain a medical report from his doctor. The letter contained the necessary authorisation and material for Mr Linegar’s Doctor to provide the report, including the questions CSC sought answers to, and a copy of his job description⁴⁶. Mr Linegar did not respond to this letter. In his evidence, Mr Linegar explained that he decided not to provide this consent, because, for personal reasons, he did not wish CSC to access his “medical files”⁴⁷.

[57] On 25 September 2024, Mr Linegar was sent a letter from CSC described as a “warning” regarding conduct. The letter referred to the telephone conversation which occurred between Mr Linegar and Ms Clark in which it was said that Mr Linegar raised his voice⁴⁸.

[58] A medical certificate dated 28 September 2024 was provided by Mr Linegar indicating he was unfit for work until 4 October 2024⁴⁹.

[59] It appears that on 29 September 2024 Mr Linegar sent an email to Ms Clark, advising that despite having been advised not to contact her directly and instead use a “third party”, he “did not have that option” and that he had managed to upload another medical certificate on to the system. This appears to have provoked a response from Mr Clark, who emailed Mr Linegar to advise that Mr Linegar should not communicate with Ms Clark, that his contact should be with Mr Clark, and also that he had still not responded in relation to the request that CSC be authorised to speak with his doctor. The email said Mr Linegar had until Tuesday 4 October 2024 to “return these” (meaning the authorisations) or decline. This email was sent to Mr Linegar by Mr Clark at 12:18PM on 29 September 2024. Mr Linegar appears to have phoned Mr Clark at 12:49PM that day, but it appears there was no answer. In the voicemail message left, Mr Linegar advised that he had a cardiologist’s appointment the coming Tuesday and he would have a further update after that.

[60] On 3 October 2024, Mr Linegar was sent another letter from CSC, this time advising him of a direction that he attend an independent medical examination⁵⁰. The rationale provided for the direction was that Mr Linegar had not provided consent for CSC to “approach” his GP, and that Mr Linegar held a management position with CSC, but the “limited” information provided surrounding his illness had not assisted CSC in making decisions regarding the reallocation of his workload, the ongoing management of his workload and duration, how to plan for his return to work and ensuring a safe workplace for his return to work. The letter said that CSC was in the process of setting up an appointment, and that once it had been made, CSC would contact Mr Linegar with the time, date and location of the IME.

[61] In his evidence, Mr Linegar said that he was not contacted with the details of the IME appointment⁵¹, and that, had he been provided with the details, he would have been prepared to undertake it⁵². Ms Clark explained that as Mr Linegar did not respond to the letter, the appointment was not booked as there was a significant non-refundable cost involved, and CSC did not know whether Mr Linegar would attend the appointment or not⁵³.

[62] On 6 October 2024, Mr Linegar attempted to phone Mr Clark again and left a voicemail message indicating that he was going to the Doctor that morning and should get the results from his cardiologist at that time; and would provide an update the following day.

[63] On Monday 7 October 2024, Mr Linegar phoned Mr Clark again and his voicemail message said that he would have a further update “on Friday”.

[64] On Saturday 12 October 2024, Mr Linegar phoned Mr Clark again. In the voicemail message left he said that he had “another week off”, that he had uploaded a certificate and “its still not right, I’ll let you know, I’ll go next week”.

[65] A medical certificate dated 7 October 2024 was provided by Mr Linegar indicated he was unfit for work until 11 October 2024⁵⁴.

[66] On 12 October 2024, CSC sent Mr Linegar a letter which was headed “requirement to return to work”. It said, among other things, that despite “multiple requests for medical documentation to support your absence, you have not provided sufficient evidence to justify this continued leave”. It also said:

“As per Victorian law, you are required to either return to work by 14 October 2024 Monday or provide adequate medical evidence explaining why you are unable to do. If you fail to comply with this requirement, we will proceed with disciplinary action, which may include termination of your employment ...”⁵⁵.

[67] It should be noted that this letter was only provided in evidence after a question raised by the Commission, on the second day of the hearing, when it was produced by CSC. Neither party appeared to place any great emphasis on this letter. In his submissions, Mr Linegar characterised the letter as being an “unreasonable” direction⁵⁶.

[68] On 16 October 2024, Mr Linegar was sent a letter from CSC in which it was advised that his employment was terminated⁵⁷. The reason for the termination of Mr Linegar’s employment, as expressed in this letter, is set out above.

[69] Following the termination of his employment at CSC, Mr Linegar commenced in a new job. This occurred about five days following the termination, on 23 October 2024. The job was described as an “installer”, and in cross examination, Mr Linegar conceded the job is “sort of physical”⁵⁸. Mr Linegar said the job is for an “agency”, is casual and is “up and down”. Evidence was given (which I deal with below) about Mr Linegar’s earnings from this job since the termination of his employment with CSC.

Statutory provisions - unfair dismissal

[70] Section 387 of the 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.

[71] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me⁵⁹.

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

[72] It is well established that order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded” and should not be “capricious, fanciful, spiteful or prejudiced”⁶⁰.

[73] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred, and justified termination⁶¹.

[74] The reason given for the dismissal by CSC to Mr Linegar in the letter advising him of the termination of his employment was his failure to follow its policy, and “reasonable and lawful directions” to communicate with it. His failure was described as “active” and to be “serious and wilful misconduct”. The particular failing was described by CSC in the letter in various ways but at its core, the allegation was that Mr Linegar’s failure to communicate with CSC and provide it with details of his illness and his anticipated return to work date was misconduct, justifying his dismissal. In its material filed in the lead up to the hearing of this matter and even to a large extent during the hearing, this continued to be the apparent rationale for CSC’s decision to terminate Mr Linegar’s employment.

[75] Above, I indicated that I consider much of CSC’s charge against Mr Linegar, that he was unresponsive or failed to comply with its policy, was levelled against him as an attempt to justify a decision made to terminate his employment because in truth, it did not believe he was really sick. In any event, on the evidence before me, I also do not agree it can be said that Mr

Linegar was unresponsive or uncommunicative during the period of his absence, including with respect to the nature of his illness or medical condition.

[76] Even contact which might have caused Ms Clark frustration is, it seems to me, evidence of Mr Linegar's responsiveness during the period. The period in question is only six weeks, and during that period, there is a fairly constant stream of back and forth communication between the parties. For example, on 3 September 2025, notwithstanding that he was on sick leave, Mr Linegar engaged with Ms Velindandi through several emails about missing dockets. On 6 September 2024, in a manner not entirely explained by the evidence, it appears Mr Linegar engaged sufficiently to provide access to the company vehicle in his possession, so it could be sent for servicing. He also appears to be responsive to messages that Ms Clark was on bereavement leave and he should report to Mr Clark. He is also ultimately responsive, albeit in an apparently inappropriate way, about efforts to arrange for the return of some company property.

[77] It also cannot be said that Mr Linegar did not provide CSC with information about his medical condition. This occurred in two ways.

[78] First, medical certificates were provided by Mr Linegar (in my view, in a timely fashion) for the period of his absence, each indicating his unfitness for work. There is no reason to doubt the veracity of these certificates, particularly taking into account CSC's practice of contacting the relevant medical clinic to verify the legitimacy of the certificates, which it did in Mr Linegar's case and received confirmation they were legitimate.

[79] Secondly, Mr Linegar phoned Mr Clark on more than six occasions, and either spoke to him or left messages because Mr Clark did not answer these calls, which included information such as in relation to his blood pressure and his engagement with a cardiologist. There was not a great deal of evidence as to what was discussed in the two-way conversations that occurred. As I have mentioned above, Mr Linegar's evidence was that he was as forthcoming as he could be in those conversations, which were opportunities for Mr Clark to ask questions if he had them. The transcript of the voicemail messages left by Mr Linegar for Mr Clark, while understandably brief, do not cause me to doubt that Mr Linegar was as forthcoming with information as he felt could be.

[80] It did not appear Mr Linegar provided information to CSC that might have allowed it to understand how long his ongoing absence was likely to last, and to calibrate its business accordingly. It seems to me that Mr Linegar did himself a disservice in not at least attempting to provide CSC with some kind of forecast as to his likely length of absence. It is appropriate this failing be taken into account in the consideration of whether the reason for the dismissal was sound, defensible and well-founded, and I do so. However, I consider there are several factors which mitigate, to some extent, against this failing. First, it was not clear in the evidence before me as to whether Mr Linegar had this information. It seems to me likely that it was unclear how long he might require before his cardiological and blood pressure issues resolved⁶². This does not mitigate against the failure entirely – Mr Linegar could have made more effort to obtain information about how long his absence was likely to continue, or to explain the situation to, for example, Mr Clark. But I do consider it relevant to assess the degree of culpability that should be attached to Mr Linegar's failure to provide this information that it may not have been

information he had. Secondly, Mr Linegar did provide CSC with information, in the form of medical certificates, supplemented by contact with Mr Clark, about his illness, to the extent that he was comfortable revealing what would otherwise be private, personal information. This included information about the length of the absence – each certificate had a start date and an end date. The fundamental obligation Mr Linegar had during this period of paid personal leave was to provide notice of his taking the leave, and information that would satisfy a reasonable person that the leave was due to personal illness or injury⁶³. He complied with this obligation.

[81] In the letter advising Mr Linegar that his employment is terminated, CSC says “we have been keen to support you whilst you have been unwell, *but you have refused to engage with us* [my emphasis]”. This language is an overstatement. It seems to me CSC conflates the failure to provide a greater level of detail about the medical situation, with a failure to “engage”, or provide any information at all at all. CSC’s policy requires that the Company be kept “informed of the reason for their ongoing absence”. Arguably, Mr Linegar complied with this requirement. He did not fail to engage with CSC.

[82] This, however, brings us to what I consider to be at the heart of this matter. CSC’s tendency to exaggerate Mr Linegar’s failings, such as alleging a “failure to engage”, is borne of obvious frustration, particularly on the part of Ms Clark. And this frustration arises because CSC – particularly Ms Clark – simply doesn’t believe that Mr Linegar was unwell, and not capable of being at work. Without this scepticism, in circumstances where Mr Linegar is quite communicative, and does provide medical information (including medical certificates), the level of information he disclosed may well have been considered acceptable. But in my view, in this case, CSC says it does not consider it acceptable, because it doesn’t believe him.

[83] That much was eventually conceded by Ms Clark in her evidence, which I have extracted above.

[84] There is obviously a limit as to the nature of information an employer can demand be provided by an employee who is absent due to illness as a precursor to becoming satisfied as to the legitimacy of the absence. Naturally, that limit will depend on the circumstances, framed against the obligation to provide information that would satisfy a reasonable person that the absence is due to personal illness or injury if the absence involves paid personal leave. Ordinarily, information certified by a medical practitioner should be accepted⁶⁴.

[85] Based on the information Mr Linegar provided his employer, there was no objective basis for CSC to conclude that he falsified his illness or incapacity for work at the time his employment was terminated. A medical practitioner had certified the entire period of his absence. Certificates had been furnished. In addition to the certificates, Mr Linegar had phoned Mr Clark more than six times and provided more information. If there was some other cause for suspicion extant at the time the employment was terminated, it was not disclosed in evidence.

[86] I understood CSC to have submitted that the fact Mr Linegar commenced a new job only five days after being terminated, in a role that was “sort of physical” is indicative that his illness and reason for absence was contrived. I do not consider this submission assists CSC. When CSC made the decision to terminate Mr Linegar’s employment, it did not know he would

begin a new role five days later. It nevertheless, at this point, chose not to believe he was ill. When the point was put to Mr Linegar in cross examination, he explained that he was being told by his Doctors that they were hopeful he would be ready to return to work at the end of October 2024⁶⁵ and by 23 October 2024, when he started in the new role, he was fit to return. On the evidence before me there is no basis to doubt the veracity of the medical certificates indicating Mr Linegar was ill and unfit to work, his own evidence of this fact and the further material tendered in evidence indicating medical issues in existence at the time. The fact that Mr Linegar regained fitness for work later in October 2024 does not render this evidence unreliable.

[87] In these circumstances, I must conclude CSC did not have a sound, defensible or well founded reason for its decision to terminate Mr Linegar's employment. The reason for dismissal was unsound and unfounded. It was a suspicion of wrongdoing, un-supported by evidence, concerning Mr Linegar's exercise of his legal right to take personal leave.

[88] It is necessary to say three further things about the reason for the dismissal of Mr Linegar's employment.

[89] First, I did not understand it to be contended that Mr Linegar refused to attend the independent medical examination CSC proposed he undertake, or that his dismissal occurred because of an allegation that he refused to undertake an IME. In some circumstances, the direction to attend an IME will constitute a lawful and reasonable direction and the failure to follow such a direction, a justifiable basis for dismissal⁶⁶. However, Mr Linegar's evidence, which I accept, was that if he had been contacted by CSC as he was told he would be, he would have undertaken the examination, and he did not refuse to take it.

[90] Secondly, the termination letter sent to Mr Linegar alleges on a number of occasions that Mr Linegar failed to "contact his manager personally". The basis of this allegation is unclear. Questions were put to Mr Linegar and Mr Worrall apparently for the purposes of establishing that Mr Worrall was *not* Mr Linegar's "manager"⁶⁷. It might be that the basis of the allegation is that Mr Linegar was supposed to contact Ms Clark personally, which he did not do, rather than Mr Clark, who he did contact. To the extent this allegation is said to be a breach of the policy justifying dismissal, I do not accept it. It appeared from Mr Linegar's evidence that the identity of his "manager" is not clear, and could have easily included Mr Clark, who holds a position of managerial responsibility in the business. And in any event, Mr Linegar was told specifically, on several occasions, to contact Mr Clark, which he did.

[91] Thirdly, there was evidence provided, and submissions made to the effect that Mr Linegar should have been aware of the requirements of the policy because he himself had, in the past, been required to administer it in relation to other employees. I do not consider this submission assists CSC's case to any great degree. Mr Linegar's prior experience of the policy does not impose upon him a greater obligation of compliance than any other person subject to it. I agree with CSC that Mr Linegar was aware, or should have been aware of the policy, and that there were aspects of his conduct not in strict compliance with the letter of the policy. However, the question I must consider is whether, in the totality of the circumstances, CSC had a sound, defensible or well-founded reason to terminate Mr Linegar's employment. In these circumstances, I do not consider a rigid application of the policy provides that reason.

[92] As I have mentioned above, I have reached these conclusions based on the view that ultimately, what motivated the decision to terminate Mr Linegar's employment was the belief that he was falsifying his illness and reason for being absent from work. There was no evidence to support this belief. It was not therefore a valid reason for the dismissal.

Was Mr Linegar notified of the reason for dismissal?

[93] Notification of the valid reason for dismissal must be given to the employee explicitly and in plain and clear terms. But crucially, this must occur before the decision to terminate the employment is made⁶⁸.

[94] Mr Linegar was advised of the reason for his dismissal when he was advised of the termination of his employment, on 16 October 2024. He was not notified of the reason for his dismissal before the decision was made to terminate his employment. This factor weighs in favour of a finding that the termination of Mr Linegar's employment was unfair.

Was Mr Linegar given an opportunity to respond to the valid reason?

[95] An employee protected from unfair dismissal should be notified of a valid reason for the termination of their employment before a decision is taken to terminate that employment so that they can respond to it in such a way as there is an opportunity to influence the ultimate decision⁶⁹.

[96] While 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 fairly⁷⁰, the employee must be 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 concern⁷¹.

[97] Because Mr Linegar was not notified of the reason for his dismissal before the decision was made, he was not properly given an opportunity to respond to it. However, on 12 October 2024, he was warned that his failure to provide more information about his medical circumstances and prospects of returning to work may result in disciplinary action which could include the termination of his employment. For reasons I have already explained, I am not convinced Mr Linegar was obliged to provide more information than what he had already given. However, he failed to respond to the letter on 12 October 2024 at all.

[98] For this reason, I find that while the failure to provide Mr Linegar with an opportunity to respond to the reason for the termination of his employment, in the true sense of the obligation, weighs in favour of a finding that the termination of his employment was unfair, that weight is diminished somewhat by Mr Linegar's failure to respond to the letter of 12 October 2024 at all.

Did CSC unreasonably refuse to allow Mr Linegar to have a support person present to assist at discussions relating to the dismissal?

[99] This factor is not relevant in this matter.

Was Mr Linegar warned about unsatisfactory performance before the dismissal?

[100] The reason for the dismissal of Mr Linegar's employment did not relate to his performance. This consideration is therefore not relevant.

To what degree would the size of CSC's enterprise or the absence of human resources management specialists be likely to impact on the procedures followed in effecting the dismissal?

[101] There was no submission made by CSC or Mr Linegar about this matter. CSC is a reasonably small business and does not appear to have dedicated human resources specialists. It does however have a range of apparently professionally developed policies and procedures and, on the evidence before me, appears to devote significant resources to what might be described as human resources management. Having regard to some of its employee communications, some of its conduct appears to border on overzealousness which may arise from a lack of dedicated human resources expertise. However, it is well established that the absence of dedicated human resources management or specialisation does not justify a dismissal to be conducted without procedural fairness or the employee being provided with a fair go⁷². I consider this to be a neutral factor in this matter.

What other matters are relevant?

[102] Above I have explained that I consider CSC's scepticism about the legitimacy of Mr Linegar's absence from work was at the heart of its decision to terminate his employment. However, his failure to follow CSC's policy, in so far as it requires information about the "likely duration" should not be entirely overlooked. I consider it appropriate that this be taken account in the overall consideration of whether the dismissal was harsh, unjust or unreasonable.

[103] In his written submissions, Mr Linegar asserted that at the time of his dismissal, he was temporarily absent from work due to illness or injury of a kind contemplated by s 352 of the Act.

[104] Section 352 of the Act provides that an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations. Regulation 3.01 of the *Fair Work Regulations 2009* provides that an absence of this kind is one which does not extend for more than 3 months, or where the total absences of the employee within a 12 month period are not more than 3 months, where a medical certificate is provided about the illness or injury and any requirement to notify the employer about the absence is complied with.

[105] While this is not a proceeding brought pursuant to s 352 of the Act, and while I was not assisted by submissions from either party about this particular matter (other than Mr Linegar's brief reference to it in his written submissions), it is difficult to see how CSC can take issue with the proposition that Mr Linegar was terminated because he was temporarily absent from

work because of illness or injury, as defined by the Regulations. Perhaps it would be said by CSC that the termination occurred not because Mr Linegar was absent, but because he failed to comply with the policy. But as I have said, I consider this submission to be largely self-serving and that, as Ms Clark conceded, CSC did not believe he was really sick.

[106] The protection in s 352 is an important legal protection of the right of Australian workers to take sick leave. I consider it appropriate to take the apparent violation of this protection into account when considering whether the termination of Mr Linegar's employment was harsh, unjust and unreasonable. It weighs in favour of such a finding.

[107] Above, I extracted Ms Clark's evidence, that on or about 25 September 2024, and some two weeks before Mr Linegar's employment was terminated, while he was on sick leave, she decided to stop paying him, because she did not believe his claims of illness. This decision adds a further level of harshness to the dismissal. Further, the termination was summary in nature, and Mr Linegar was not provided with or paid in lieu of notice. I do not consider summary dismissal was justified in this matter (or dismissal at all). I consider that effecting a summary dismissal, with no notice, after already having withheld wages for about a fortnight, was a particularly harsh way to treat an employee of eight years standing. It adds further weight to a finding of unfairness in this matter.

[108] For completeness, I note that, having found that there is no sound basis to conclude either that Mr Linegar was unresponsive or uncommunicative, including about the nature of his illness, during his period of absence, or to conclude that he had falsified the reason for his absence, it follows that he cannot be said to have engaged in conduct amounting to "serious misconduct". Relevantly, serious misconduct is defined by the *Fair Work Regulations 2009* as including conduct such as wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment and refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment⁷³. In circumstances where an employee fails to follow a lawful and reasonable directive, including failing to follow a policy, in some circumstances such conduct can amount to serious misconduct⁷⁴. In this matter, the alleged failure to follow lawful and reasonable directives and / or a policy is based on the core allegation that Mr Linegar did not provide adequate information about his medical health to CSC. I have found this not to be the case, and as such, find he did not engage in serious misconduct. Whereas in some circumstances an assessment of seriousness of misconduct found to have occurred may be a relevant matter pursuant to s 387(h)⁷⁵, it is not a relevant matter here because I have found not found misconduct to have occurred.

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

[109] I have made findings in relation to each matter specified in s.387 of the Act. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable⁷⁶. Having considered each of the matters specified in s 387 of the Act, I consider that while there are factors which are either neutral or weigh slightly in favour of a finding that the termination was not harsh, unjust or unreasonable, the greater weight is in favour of a finding that it was. I am satisfied that the dismissal of Mr Linegar was harsh, unjust and unreasonable and I find Mr Linegar was unfairly dismissed.

Remedy

[110] Being satisfied that Mr Linegar:

[111] made an application for an order granting a remedy under s 394;

- a. was a person protected from unfair dismissal;

[112] and was unfairly dismissed within the meaning of s 385 of the Act, I may, subject to the Act, order Mr Linegar's reinstatement, or the payment of compensation to Mr Linegar.

[113] Under s 390(3) of the Act, I must not order the payment of compensation to Mr Linegar unless: (a) I am satisfied that reinstatement of Mr Linegar 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 Linegar inappropriate?

[114] Mr Linegar does not seek reinstatement, and it is opposed by CSC. I find in these circumstances that reinstatement is inappropriate.

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

[115] Mr Linegar has suffered financial loss in circumstances where I have found he was unfairly dismissed. Whilst it does not automatically follow that a payment of compensation is appropriate⁷⁷, in all the circumstances, I consider that an order for payment of compensation is appropriate.

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

[116] Section 392(2) of the 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 Linegar in lieu of reinstatement including:

- a. the effect of the order on the viability of CSC enterprise;
- b. the length of Mr Linegar's service;
- c. the remuneration that Mr Linegar would have received, or would have been likely to receive, if he had not been dismissed;
- d. the efforts of Mr Linegar (if any) to mitigate the loss suffered because of the dismissal;
- e. the amount of any remuneration earned by Mr Linegar 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 Linegar 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.

[117] I consider each of these matters below.

Effect of the order on the viability of CSC's enterprise

[118] The onus is on CSC to provide evidence of the financial situation of the business and the likely effect that an order of compensation will have on the viability of the business⁷⁸. I was provided with no evidence in this regard. I consider this is a neutral factor in respect of the s 392(2) considerations.

Length of Mr Linegar's service

[119] Mr Linegar was employed by CSC for just on 8 years. This is a reasonably lengthy period of service. While the employment relationship deteriorated significantly towards the end, it must be borne in mind that both parties accepted that up until quite recently, the employment relationship was unproblematic. The length of Mr Linegar's service weighs in favour of an appropriate order of compensation arising from the unfair termination of his employment.

Remuneration that Mr Linegar would have received, or would have been likely to receive, if he had not been dismissed.

[120] In determining the remuneration that Mr Linegar would have received, or would have been likely to receive, I am required to address myself to the question of whether if Mr Linegar's employment had not been terminated, the employment would have been likely to continue or would have been terminated at some time by another means, and in doing so, make an assessment as to the anticipated period of employment⁷⁹.

[121] On the evidence before me, the dismissal of Mr Linegar arose from a deterioration in the employment relationship occasioned by the belief that he was acting dishonestly. The perception of betrayal (which I consider to be unfounded) caused the relationship to deteriorate very quickly. Prior to this eventuality, the employment relationship had subsisted for about eight years and was, as far as I was told by both parties, unblemished. If it had not suddenly deteriorated, there is no evidence before me as to why the employment relationship would not have continued indefinitely or at least for a further 6 months. This is the "anticipated period of employment"⁸⁰.

[122] Mr Linegar's annual salary with CSC was \$115,940⁸¹. I calculate the remuneration Mr Linegar would have been likely to receive working for CSC for a further 6 months to be \$57,970.00 gross plus superannuation.

Efforts of Mr Linegar to mitigate the loss suffered by Mr Linegar because of the dismissal

[123] Mr Linegar obtained alternative employment by 23 October 2024. It therefore seems evident he attempted to mitigate his loss and did so.

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

[124] The remuneration being earned by Mr Linegar in the job he started post-dismissal, on 23 October 2024 was less than he was earning while working for CSC. Mr Linegar said, because the role was through an agency, and casual it was “up and down”. By 26 January 2025 he had earned \$20,202.52 gross in this role⁸² during 13 weeks, thus averaging \$1,554.04 per week (gross). I consider it appropriate to assume that Mr Linegar continued to earn about this remuneration since, over a period of a further 6 weeks, or a further \$9,324.24 gross. Thus, I consider Mr Linegar earnings are \$29,526.76 between the termination of his employment and the date of this decision.

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

[125] The Order I intend to make in this matter will be expressed such that it must be complied with within 14 days. I consider it reasonably likely Mr Linegar will earn a further \$3,108.08 during this period.

Other relevant matters

[126] CSC took the view that Mr Linegar had engaged in serious misconduct. However, I do not consider it relevant to the question of remedy because I do not consider there was any evidence supporting the allegation that Mr Linegar engaged in misconduct.

[127] In a matter such as this, I am not specifically empowered to make orders that Mr Linegar be paid unpaid wages which appear arise from a deliberate decision not to pay him between 25 September 2024 and 16 October 2024, or to pay him in lieu of notice, in accordance with s 117 of the Act.

[128] However, CSC’s failure to pay Mr Linegar in respect of these entitlements fortifies my view that an order of compensation is appropriate in this matter.

Calculation of compensation

[129] Below, I adopt the *Sprigg* formula to calculate the amount of compensation which should be awarded to Mr Linegar in respect to this matter⁸³. The formula is as follows:

- a. 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).
- b. Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered.
- c. Step 3: Discount the remaining amount for contingencies.
- d. 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

[130] I have estimated that Mr Linegar would have remained employed by CSC for at least a further six months. The remuneration Mr Linegar would have received, or would have been likely to have received, during this period is \$57,970.00 gross plus superannuation.

Step 2

[131] I have calculated that Mr Linegar's evidence will likely have earned \$29,526.76 since the termination of his employment, up until the date upon which I will order that he be paid compensation.

[132] A figure of \$28,443.24 is left after the deduction for remuneration earned.

Step 3

[133] I do not consider it is necessary to discount this amount for contingencies.

Step 4

[134] I have considered the impact of taxation but have elected to settle a gross amount of \$28,443.24, plus superannuation, and leave taxation for determination.

Compensation – is the amount to be reduced on account of misconduct?

[135] I do not consider Mr Linegar engaged in misconduct and do not intend to reduce the amount of compensation as a result.

Compensation – how does the compensation cap apply?

[136] The compensation cap⁸⁴ in this matter for the purposes is the total amount of remuneration received by Mr Linegar or to which he was entitled in the 26 weeks immediately before the dismissal. This figure is \$57,970.00 and does not require an adjustment in the amount of compensation I have calculated should be awarded in this matter.

Is the level of compensation appropriate?

[137] 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”⁸⁵.

[138] The application of the Sprigg formula has resulted in an outcome where Mr Linegar would be awarded compensation of \$28,443.24, plus superannuation.

[139] 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 Act.

Compensation order

[140] Given my findings above, I will make an order⁸⁶ that CSC must pay Mr Linegar \$28,443.24 less taxation as required by law, plus a superannuation contribution into his nominated fund of \$3,270.97, within 14 days of the date of this decision.



COMMISSIONER

Appearances:

Mr Gary Shawn Linegar on his own behalf

Ms Ashley Clark on behalf of the Respondent

Hearing details:

Melbourne:

4 February and 5 February 2025

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<PR784292>

¹ *Fair Work Act 2009* s 23

² Exhibit A#5

³ Transcript PN1144 - PN1145

⁴ Transcript PN840 – PN844

⁵ Exhibit #R32

⁶ Exhibit #R8

⁷ Exhibit #R48

⁸ Exhibit #R8

⁹ Transcript PN177; PN1221 – PN1222

¹⁰ Exhibit #R35

¹¹ Exhibit #R24

¹² Exhibits #A7 - #A18

¹³ Transcript PN326

¹⁴ Transcript PN851 - 854

¹⁵ Transcript PN173

¹⁶ Transcript PN205; PN2013; PN220 – PN222;

¹⁷ Transcript PN510

¹⁸ Transcript PN364 - 378

¹⁹ Exhibit #R41

²⁰ Exhibit #R17

²¹ Exhibit #R27

²² Exhibit #R44; Exhibit #R45

²³ Witness Statement of Justin Clark 28 January 2025

²⁴ Exhibit #R18

²⁵ Exhibit #R50

²⁶ Witness Statement of Justin Clark 28 January 2025; Exhibits #R10 and #R11

²⁷ Transcript PN964

²⁸ Exhibit #R21

²⁹ Exhibit #R45

³⁰ Transcript PN1245-1248

³¹ Exhibit #R27

³² Exhibit #R28

³³ Ibid

³⁴ Ibid

³⁵ Ibid

-
- ³⁶ Exhibit #R21
- ³⁷ Exhibit # R31
- ³⁸ Transcript PN1009
- ³⁹ Transcript PN273
- ⁴⁰ Exhibit #R46
- ⁴¹ Transcript PN789
- ⁴² Transcript PN301
- ⁴³ Transcript PN834
- ⁴⁴ Transcript PN301
- ⁴⁵ Exhibit #R22
- ⁴⁶ Exhibit #R33
- ⁴⁷ Transcript PN254; PN407-408
- ⁴⁸ Exhibit #R25
- ⁴⁹ Exhibit #R23
- ⁵⁰ Exhibit #R34
- ⁵¹ Transcript PN261; PN1117
- ⁵² Transcript PN273
- ⁵³ PN1250
- ⁵⁴ Exhibit #R19
- ⁵⁵ Exhibit #R51
- ⁵⁶ Applicant's Submissions [1(g)]
- ⁵⁷ Exhibit A#4; R#32
- ⁵⁸ PN419
- ⁵⁹ *Sayer v Melsteel Pty Ltd* [\[2011\] FWAFB 7498](#) [14]
- ⁶⁰ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 [373]
- ⁶¹ *Edwards v Giudice* [1999] FWC 1836 [7]
- ⁶² PN415-416; PN430
- ⁶³ FW Act 2009 s. 107(3)
- ⁶⁴ See for example *Wildman v IMCD Australia Limited* [2021] FCCA 1161
- ⁶⁵ PN415
- ⁶⁶ *Chris Ignall v Virgin Australia Airlines Pty Ltd T/A Virgin Australia* [\[2019\] FWC 4948](#)
- ⁶⁷ Transcript PN276-277
- ⁶⁸ *Newton v Toll Transport* [\[2021\] FWCFB 3457](#) [182]
- ⁶⁹ *Crozier v Palazzo Corporation* (1996) 98 IR 137 [73]
- ⁷⁰ *RMIT v Asher* (2010) 194 IR 1 [14] – [15]
- ⁷¹ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 [7]
- ⁷² *Pecker Maroo Verano Pty Ltd v Stevens* [\[2024\] FWCFB 147](#) [110]
- ⁷³ *Fair Work Regulations 2009* reg 1.07(2)(a) and (e)
- ⁷⁴ *Kolodjashnij v Lion Nathan T/A J Boag and Son Brewing Pty Ltd* [\[2009\] AIRC 893](#)
- ⁷⁵ *Sydney Trains v Gary Hilder* [\[2020\] FWCFB 1373](#)
- ⁷⁶ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) IR 117 357 [51]; *Edwards v Giudice* [1999] FCA 1836 [6] – [7]
- ⁷⁷ *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#) [9]
- ⁷⁸ *Vickery v Assetta* [2004] FCA 555; *D.A. Moore v Highpace Pty Ltd* (1998) Print Q0871

⁷⁹ *He v Lewin* [2004] FCAFC 161 [58]

⁸⁰ *Ellawalla v Australian Postal Corporation* Print S5109 [34]

⁸¹ PN1126; Exhibit #A5

⁸² Exhibit #A6

⁸³ *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21

⁸⁴ *Fair Work Act 2009* s 392(5) and (6)

⁸⁵ *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWCFB 7206](#) [17]

⁸⁶ [PR784930](#)