DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Mitchell Fuller
v
Madison Branson Lawyers Pty Ltd
(U2024/10086)

DEPUTY PRESIDENT BELL MELBOURNE, 7 APRIL 2025

Application for an unfair dismissal remedy – summary dismissal due to serious misconduct - whether Small Business Fair Dismissal Code applies – Code applies – dismissal consistent with Code – dismissal not unfair – application dismissed.

[1] Mr Mitchell Fuller was employed as a practising solicitor with the respondent law firm, Madison Branson Lawyers, until he was summarily dismissed on 4 August 2024. He was dismissed from his employment primarily because, on the respondent's case, Mr Fuller had lied about being sick, or at least his whereabouts, on Friday 5 April 2024 and 8 April 2024.

[2] On those two days, Mr Fuller was otherwise expected to be at work in Melbourne. He was not at work on either day, having caught a plane to Adelaide on the evening of Thursday, 4 April 2024 after finishing work. In Adelaide, Mr Fuller met with friends who were also from Melbourne. Over the next few days, Mr Fuller and his friends watched Australian Football League 'Gather Round' games, among other social activities which included time at the pub and the beach. He shared a car trip home with his friends on Monday, 8 April 2024. None of these matters were known to the employer at the time but came to light about three months later. What Mr Fuller instead told his employer at the time was, for the Friday, he "had a tough time sleeping last night and am not feeling up to coming into the office" and, for the Monday, he was "still in a bit of discomfort today and don't think I can hack taking public transport." Both statements were knowingly evasive of the true situation and were all the more serious given that Mr Fuller wrongly claimed sick leave entitlements. Mr Fuller did not provide a medical certificate for the Friday but later made a statutory declaration asserting he was sick and was unable to speak to his regular doctor that day. For the Monday, Mr Fuller obtained a medical certificate from an online provider of medical certificates.

[3] As the employer has fewer than fifteen employees, it is a "small business employer" for the purposes of s 388(2) of the *Fair Work Act 2009* (Cth) (Act). Because the respondent is a small business employer, it is sufficient for it to demonstrate that the dismissal was consistent with the Small Business Fair Dismissal Code (Code) as an answer to Mr Fuller's unfair dismissal claim. Relevantly, a dismissal is consistent with the Code if the employer "believes on reasonable grounds" that the employee's conduct was "sufficiently serious to justify immediate dismissal". For the reasons explained below, I am readily satisfied that the dismissal

was consistent with the Code. Even if the Code 'defence' was not available or made out, I do not find the dismissal was unfair.

Factual findings

[4] Madison Branson Lawyers is a law firm in Melbourne, practising primarily in commercial law. At least since November 2023, there have been two principal lawyers at the firm, being Mr Simon Tsapepas and Mr Nicholas Agetzis. Each of those two gave evidence in the hearing. At the time Mr Fuller was dismissed from his employment, there were six employees of the firm.

[5] Mr Fuller was admitted to practise as a solicitor and barrister in the State of Victoria in about May 2021. Mr Fuller commenced employment as a solicitor with Madison Branson Lawyers in about January 2023, having signed an employment agreement for that purpose on 11 January 2023.

[6] Mr Fuller's evidence details, somewhat seriatim, a series of complaints or grievances he has about many aspects of his employment and Mr Tsapepas in particular. Nearly all of it is irrelevant and as best as I can discern, the purported relevance of it was to demonstrate that the employer's witnesses should not be believed about the actual events of dismissal or possibly as a thin excuse for Mr Fuller's own conduct. I have had regard to that material but it is not necessary to set out. As to the issue of the credibility, I have no difficulty in accepting the evidence of each of Mr Tsapepas and Mr Agetzis as honest and accurate.

[7] Mr Fuller's evidence is that he has attention deficit hyperactivity disorder or 'ADHD'. This was not a matter known to his employer. Mr Fuller's evidence, which I broadly accept, is that he takes some medication to assist him with ADHD. Mr Fuller also stated, which I broadly accept, that there was a nationwide shortage for Mr Fuller's usual medication in the first half of 2024. That was a matter confirmed by Mr Fuller's doctor, Dr Taylor, with whom he spoke to in March 2024. Dr Taylor appears to be a General Practitioner who Mr Fuller attends on occasion. Dr Taylor works out of a clinic called One Point Medical in Prahran, Victoria.

The Gather Round plans

[8] In around March 2024, Mr Fuller resolved to use some of his leave to "de-stress" at some point over the following few weeks. Also at around this time, a small number of Mr Fuller's friends had arranged a trip from Melbourne to Adelaide in early April 2024. Mr Fuller's friends encouraged him to join, which he initially declined.

[9] At some point by the end of March 2024, Mr Fuller changed his mind. Mr Fuller also gives evidence that, at some point (it is not clear) he considered taking annual leave but, according to Mr Fuller, that leave would not be approved because he believed Mr Tsapepas would only approve leave applied for one month in advance.

[10] Notwithstanding that the Easter break occurred at the end of March 2024, Mr Fuller determined he needed a further break and resolved to join his friends in their trip to Adelaide. Mr Fuller's friends were planning to drive to Adelaide on Thursday, 4 April 2024. The exact

time this decision crystallised in Mr Fuller's mind is unclear but it seems to have occurred over the Easter break.

[11] On Monday, 1 April 2024 (Easter Monday), Mr Fuller booked a flight to Adelaide. A document produced by Mr Fuller in response to an order for production shows a successful booking receipt with an internet travel provider 'eDreams' at 7.14pm that night. The flight booking was for 8.15pm, Thursday 4 April 2024 with Virgin Australia. The email stated a 'confirmation' would be sent within 24 hours and gave a booking reference number. The total cost for that booking was $152.96. The flight was a one-way flight, with Mr Fuller intending to return to Melbourne by car with his friends.

[12] The original return date from Adelaide is somewhat ambiguous. In his written statement, Mr Fuller says he was intending to return "by" 8 April 2024. In his oral evidence, he states that the "original plan was to come back on Sunday night." I accept this, although the firmness of the plan to return on the Sunday is unclear.

[13] Tuesday, 2 April 2024 was a regular work day, and Mr Fuller attended work at the office. He did not mention his intentions to go to Adelaide that weekend nor make any application for leave.

[14] At 4.20pm on the same Tuesday, Mr Fuller booked and paid for a ticket to watch an AFL game at the Adelaide Oval, scheduled for 7.40pm on Friday, 5 April 2024. The total cost for that ticket was $56.60. At 8.16pm that night, Mr Fuller received an email confirmation from Virgin Australia regarding his forthcoming flight. That email contained the same booking reference number as the email from eDreams the day before.

[15] Wednesday, 3 April 2024 was a regular work day, and Mr Fuller attended work at the office. He did not mention his intentions to go to Adelaide that weekend nor make any application for leave.

[16] Thursday, 4 April 2024 was a regular work day, and Mr Fuller attended work at the office. He did not mention his intentions to go to Adelaide that night nor make any application for leave. Nor did Mr Fuller at any point in that week tell anyone at work he was feeling unwell or needed more time away from the office.

[17] After work, Mr Fuller caught his flight with Virgin Australia to Adelaide. Upon arriving in Adelaide, Mr Fuller met with his friends, who had already arrived by car. They went to the pub.

The first sick leave claim

[18] The following morning, Friday, 5 April 2024, was a regular work day for Mr Fuller. The employer was entirely unaware that Mr Fuller had flown to Adelaide the night before.

[19] Quite clearly, Mr Fuller did not attend for work. At 8.17am, he writes the following email titled "Out of office today" to the firm's two principals and others:

> "Morning team,
>
> Unfortunately I had a tough time sleeping last night and am not feeling up to coming into the office. I'll speak to a doctor and hope to follow up with a medical certificate later today.
>
> As always, if there's any way I can help in my absence, shoot me an email or text and I'll get to it as soon as I can."

[20] This email falsely conveyed that the reason Mr Fuller was unable to come into the office was because he had a "tough time sleeping last night". To state the obvious, the real reason Mr Fuller could not come into the office was because he was in Adelaide, pursuant to a trip he planned and partly paid for four days earlier.

[21] The 5 April email was materially misleading in this respect and I find that Mr Fuller knew it was misleading when he wrote it – the omission of any reference to Adelaide or his trip with friends was deliberate, not inadvertent. Mr Fuller was never going to be in the office on Friday, 5 April 2024, since the time he booked his flight from Melbourne on Monday. I briefly note Mr Fuller gave evidence that he might still have attended work, even after booking his airfare and paying for an AFL ticket. Whatever theoretical possibility there might have been that Mr Fuller would have voided the price of his airfare and AFL ticket through some unforeseen reason, it had nothing to do with the prospect that, say, on Thursday, 4 April 2024 Mr Fuller felt he should attend work.

[22] A general part of Mr Fuller's case is that he was unwell and entitled to take sick leave. I am not satisfied he was sick or unfit to work. Mr Fuller led no evidence of illness beyond his own word. I describe further my findings about Mr Fuller's honesty below but for present purposes, it suffices to say that Mr Fuller's word on the matter is clearly insufficient. It was put to Mr Fuller he was well enough to attend work on the Monday and the Friday. Mr Fuller admitted he was well enough to get to work but says he was not well enough to be productive.[1]

[23] The medical certificate for 5 April 2024 that Mr Fuller produced for the proceeding was dated 9 October 2024. That certificate, from Mr Fuller's regular General Practitioner, states:

> "Mr Mitchell Fuller has ADHD and in the first half of this year there had been supply issues, causing him to have difficulty accessing his regular medication, which has impacted on his focus and energy levels. He missed a day of work on April 5th, feeling unwell without his medication."

[24] This certificate, so far as it concerns Mr Fuller's capacity to work on 5 April 2024, was plainly based solely on what Mr Fuller told the doctor in October 2024 and not on any assessment at the time or even vaguely contemporaneously to that time. There is no account of what Mr Fuller told his doctor in October 2024.

The weekend in Adelaide and change in plans

[25] After sending that email, Mr Fuller proceeded to enjoy the day and weekend with his friends. On the Friday night, that included the AFL game at 7.40pm with the tickets Mr Fuller purchased on the Tuesday.

[26] On the Saturday, Mr Fuller and his friends went to the beach, saw another football game (this one with the South Australian National Football League), and went to the pub again.

[27] On the Sunday, Mr Fuller went to another AFL game, that one starting at 4.40pm local time. The ticket for the Sunday game was supplied by one of Mr Fuller's friends, and appears to have been bought days before if not earlier. It is not clear if a ticket had been specifically bought for Mr Fuller but one was made available for him. On the Sunday, there were return visits to the pub Mr Fuller and his friends went to the day before. Mr Fuller again stayed the night in Adelaide that evening. As noted above, Mr Fuller stated that the "original plan" was that they would return home that night.

[28] Despite the original plan envisaging being in Melbourne by the following morning and, presumably, being available for work, Mr Fuller was in Adelaide. When the "plan" changed, Mr Fuller did not notify work that he would be unable to attend the next day (or at least attend the office).

Monday, 8 April 2024 – the second sick leave claim

[29] The following day, Monday, 8 April 2024, Mr Fuller commenced the return journey to Melbourne by car with the friends he had spent the weekend with. They left at around 8am in the morning.

[30] Monday, 8 April 2024, was a regular work day for Mr Fuller. The employer remained unaware that Mr Fuller was in Adelaide or had been in Adelaide at all on the weekend just passed.

[31] At 8.07am (Melbourne time) on that Monday, Mr Fuller sent an email titled "OOO" (presumably, 'Out Of Office') and stated:

> "Hey team, unfortunately I'm still in a bit of discomfort today and don't think I can hack taking public transport quite yet. I'll speak to a doc and get a medical certificate when I can, hopefully will be OK tomorrow morning."

[32] Mr Fuller's email on 8 April 2024 falsely conveyed that it was the alleged "discomfort" that was the reason Mr Fuller was unable to attend work that day. To again state the obvious, the real reason was not discomfort but was because it was physically impossible to be at work, owing to the fact that he was in a car with friends presently located approximately 700km away.

[33] The reference to "public transport" was a fiction aimed at concealing his actual location. Not even Mr Fuller was willing to suggest that there was "public transport" from Adelaide to Melbourne.

[34] Unlike the previous Friday, Mr Fuller did obtain a medical certificate for 8 April 2024. Mr Fuller cannot recall whether he spoke to a doctor or the certificate was obtained wholly online. He certainly did not see a doctor. The best information before me is that the medical certificate was procured wholly online, that is without speaking to or seeing the doctor. The doctor was not a doctor Mr Fuller had attended or, perhaps more accurately, interacted with before. The evidence discloses no attempt to contact his usual practitioner.

[35] Despite the provision of that medical certificate, I do not accept that Mr Fuller was unfit to work on 8 April 2024. The medical certificate, such as it is, goes no higher than information provided by Mr Fuller himself. None of that information was provided in evidence and Mr Fuller gave no evidence about it.

[36] Mr Fuller's "original plan" would have seen him at work on 8 April 2024. It was only once that plan changed that Mr Fuller got sick. That claim is simply not credible in the face of the planning involved for the weekend, the weekend itself, the evasive language used to explain his absence, and a medical certificate that rises no higher than the information provided by Mr Fuller (which is not known). It is, of course, possible that an unexpected illness or ailment can arise but that was not the case here.

Mr Fuller's statutory declaration

[37] As noted above, Mr Fuller did not have a medical certificate for his absence on 5 April 2024 and he made a statutory declaration on 28 April 2024, which he then provided to his employer. Relevantly, that declaration provides:

> "On 5 April 2024, I was unwell and unable to work.
>
> That day, my regular GP clinic, One Point Medical in Prahran, was unable to offer me an appointment to ask for a medical certificate.
>
> On 8 April 2024, I obtained a medical certificate from another practitioner, but they could not backdate it to 5 April 2024."

[38] One of the reasons given by the employer for dismissing Mr Fuller was the employer's belief that Mr Fuller made a false statutory declaration. Making a false declaration is a very serious matter and knowingly doing so renders a person liable to perjury. Because of the consequences attached to making a false declaration, when the subject of the statutory declaration was arrived at during the course of cross-examination, I issued Mr Fuller a caution about the potential consequences and indicated that I would not require him to answer questions about that matter. Mr Fuller elected not to answer questions about the declaration. My findings below are not based upon the fact that Mr Fuller declined to provide evidence about that matter but on the evidence that was separately before me.

[39] There are parts of Mr Fullers declaration that I consider are inaccurate or wrong, but I do not conclude he knowingly made a false declaration. Specifically, I consider the statement "I was unwell and unable to work" was contrary to the evidence before me, but whether Mr Fuller did not believe that declaration is less clear. Mr Fuller appeared to believe he would be better off if he did not work on 5 April 2024. That is clearly not the same as being unwell and

unable to work but a recurring theme of Mr Fuller's evidence is a conflation of those concepts. I return to this matter below.

[40] The statement that Mr Fuller's regular medical clinic was "unable to offer me an appointment to ask for a certificate" raises different issues. The notion the clinic was "unable to offer" an appointment conveys that a statement to that effect was made to Mr Fuller by the clinic, most likely on an inquiry from Mr Fuller. Conceivably, that information could have been obtained by an online booking inquiry, although Mr Fuller gave no evidence about such a practice.

[41] As the evidence shows, the *only* communication Mr Fuller had with One Point Medical clinic was on 4 April 2024, when that clinic called him about an unpaid account. It is possible that Mr Fuller inquired during that call whether an appointment might be available and was told 'no'. Mr Fuller does not give evidence about that issue but given Mr Fuller's intentions for travel the following day, I conclude it was at least plausible that he asked, during that call, if an appointment was available and was told there was not. In those circumstances, I am not sufficiently satisfied that Mr Fuller has knowingly made a false statutory declaration, having regard to the seriousness of those matters.[2]

Local government preselection

[42] On 16 May 2024, Mr Fuller was preselected as a candidate for local government elections set to take place in October 2024. The fact of the preselection is not itself a matter relevant to Mr Fuller's dismissal but the "significant time commitment" Mr Fuller describes in his evidence would be a matter I consider relevant to any remedy, in the event that Mr Fuller's dismissal was found to be unfair.

The performance show cause

[43] As indicated above, the employer was unaware of Mr Fuller's trip to Adelaide. Mr Fuller was initially paid sick leave for both 5 April 2024 and 8 April 2024.

[44] In early July 2024, Mr Tsapepas directed Mr Fuller and another practitioner at the firm to stop work on a particular file, because certain monies had not been paid into trust from the client. Mr Tsapepas locked the file (I assume electronically) to prevent further work.

[45] On about 21 July 2024, Mr Tsapepas became concerned that Mr Fuller was continuing to work on the file and was using another matter to record time worked on the file. Mr Tsapepas raised the matter with Mr Fuller.

[46] Mr Fuller's dim assessment of the state of his employment was evidently somewhat mutual, as there were clearly a number of other performance concerns that the employer had about Mr Fuller – it is not necessary to set these out. The issue of Mr Fuller continuing to work on a 'locked' file appears to have been a tipping point.

[47] At some point around these events, the employer sought assistance of a human resources consultant. A witness statement was filed for the consultant but ultimately the employer did not require that person to give evidence.

[48] Mr Fuller's initial explanation or response to the 'locked' file issue did not satisfy Mr Tsapepas' concerns because on 22 July 2024, he sent Mr Fuller a letter titled "Notice of Meeting" setting out various "allegations" about the work on the locked file. A meeting was set for 23 July 2024 although it was subsequently deferred, at Mr Fuller's request, to 26 July 2024.

[49] It would appear that the human resources consultant, on her own initiative, undertook a review of Mr Fuller's social media accounts. In about mid-late May 2024, Mr Fuller posted a small number of photographs from the Saturday and Sunday of Gather Round weekend with his friends. The location of the photographs was stated to be 'Adelaide Oval'. Some of the photographs showed a connection to football, others were Mr Fuller and his friends socialising, such as at the beach or with beers at a pub.

[50] On 25 July 2024, the photographs from Mr Fuller's Instagram account were drawn to the attention of Mr Tsapepas and Mr Agetzis, each of whom eventually compared those photographs with the taking of the sick leave either side of that weekend.

[51] Mr Agetzis' evidence, which I accept, is that he immediately considered that Mr Fuller had acted dishonestly and misled the firm about the purpose of leave in April. Mr Tsapepas spoke with the human resources consultant, and formed the view Mr Fuller should be suspended on pay. A letter was prepared to that effect.

[52] The same day, Mr Tsapepas handed Mr Fuller a letter titled "Suspension from your Employment". The letter did not, in terms, identify the conduct from Gather Round that provoked the suspension with pay.

[53] Friday, 26 July 2024 was the day scheduled for the initial "allegations" meeting. On the morning of that day, the employer gave Mr Fuller a further letter titled "Further conduct allegations". It identified "additional allegations" for discussion (in addition to providing some further specifics of the original performance/misconduct allegations), as follows:

> "4. Engaged in conduct that is harmful to the reputation of the firm by procuring the approval of paid sick leave on 8 April 2024, and seeking paid sick leave on 5 April 2024, despite not being sick."

[54] The above allegation was referred to by the parties at the time in later correspondence as "allegation 4".

[55] The meeting on 26 July 2024 does not appear to have been particularly productive. Aspects of that outcome arose because of the last-minute provision of the allegations concerning 5 – 8 April 2024. Aspects were due to Mr Fuller not answering questions being asked of him. It is not clear to me if the photographs from Mr Fuller's Instagram account were referred to or provided to him at the meeting.

[56] On Monday, 29 July 2024, Mr Tsapepas sent Mr Fuller an email with a number of attachments, which included Mr Fuller's emails from 5 and 8 April 2024 and his statutory declaration. The Instagram photographs were not attached. The email asked for a further response by the following day regarding "allegation 4" (among other allegations).

[57] There was further correspondence between the Australian Services Union (who was now representing Mr Fuller at that time) and the firm seeking requests for further documents and particulars. It is not necessary to set them out.

[58] On 31 July 2024, Mr Fuller sent an email to Mr Tsapepas and others. So far as Mr Fuller's email concerns "allegation 4", he wrote:

> "I deny having engaged in any conduct harmful to the reputation of the firm. I have not been able to identify any evidence of reputational damage to the firm in the materials you have provided.
>
> Do let me know if there is something I have missed."

[59] Further emails ensued between Mr Fuller and Mr Tsapepas on 31 June and 1 August. On 1 August 2024, Mr Tsapepas sent a more directly-worded email about allegation 4 to Mr Fuller (and his ASU representative). That email, which was titled "Allegations of dishonesty", relevantly stated:

> "We are not concerned with your interpretation of the *Fair Work Act 2009*, nor is it relevant. The allegations made against you relate to dishonesty in your statutory declaration and medical certificate provided to us for the period 5 to 8 April (inclusive), which were used to claim payment for sick leave from the firm.
>
> We have become aware of information that is inconsistent with your assertion that you were unable to work due to "illness".
>
> We note that during the period 5 to 8 April (inclusive), contrary to your claims in your statutory declaration, medical certificate and emails on 5 and 8 April 2024, you travelled to Adelaide to attend, amongst other things, the AFL Gather Round (operational from 4 to 7 April 2024), Adelaide Oval, Elder Park, Glenelg beach and various licensed hospitality venues. We provide photos confirming the above as follows: [omitted]
>
> Additionally, we note that you had purchased tickets for an event in South Australia with SANF (attached) which tickets were purchased before 5 April 2024, but related to an event during the period of leave claimed by you. [referenced attached ticket omitted]
>
> Accordingly, it is unreasonable to conclude that you were unfit to work during this period."

[60] Five photographs, obtained from Mr Fuller's Instagram account were attached to the above email conforming with the description given by Mr Tsapepas, save that each of the photographs were for the Saturday or Sunday only.

[61] Mr Fuller replied to the above email on 2 August 2024. Relevantly, he wrote (original emphasis):

> "The allegation is "*Engaged in conduct that is harmful to the reputation of the firm* by procuring the approval of paid sick leave on 8 April 2024, and seeking paid sick leave on 5 April 2024, despite not being sick".
>
> I have still not been provided with any evidence of reputational damage to the firm. Otherwise, I refer to the points made in my previous email, which have remained unaddressed."

[62] Also on 2 August 2024, Mr Agetzis' opinion that Mr Fuller's statutory declaration was misleading and contained a false statement about being unwell on 5 April 2024 was so strong he called the Legal Services Board + Commissioner for Victoria (the independent statutory authorities responsible for the regulation of the legal profession in Victoria) about the matter.

[63] On 4 August 2024, the firm sent Mr Fuller a letter terminating Mr Fuller's employment with immediate effect. In respect of "allegation 4", it conveyed the firm's view (through Mr Tsapepas) that Mr Fuller had made a false statutory declaration and falsified leave requests. The letter also stated the firm had referred the matter to the Legal Services Board + Commissioner for Victoria.

Employers' belief at time of dismissal

[64] Consistent with the letter of termination, Mr Tsapepas gave evidence that the termination of Mr Fuller's employment was due to his belief that (among other matters) Mr Fuller had not been honest when claiming he was sick while in Adelaide, he did not believe the truth of the statutory declaration, and that Mr Fuller had not been honest during the investigation in late July 2024.

[65] Mr Agetzis also gave evidence that, in his view, Mr Fuller had misled and deceived the firm about the claim of sick leave in April 2024. I accept evidence of the two Principals.

Did Mr Fuller speak to Dr Taylor on 4 April 2024?

[66] Mr Fuller, in paragraph 19(k)(a) and 19(p) of his witness statement which he adopted upon affirmation, deposed to speaking with Dr Taylor on Thursday, 4 April 2024. Whether Mr Fuller spoke to Dr Taylor on or about that day is a significant matter. Mr Fuller's sworn evidence states:

> "[19(k)(a)] While attending the office as usual (and ensuring that I had no urgent work tasks to attend to the following day or the following Monday), I made a phone call to Dr Taylor confirming my mental state and my plans, which he would later use to prepare a medical certificate. A copy of the relevant invoice can be seen at page 125."
>
> "[19(p)] On 9 October 2024, I mentioned Mr Tsapepas' allegation to Dr Taylor, who was happy to produce a postdated note confirming that I was feeling unwell that day based on our conversation on 4 April 2024."

[67] I did not include Mr Fuller's evidence of this alleged conversation on 4 April 2024 in the chronological narrative above because the evidence was false in nearly every single respect. Mr Fuller:

- did not speak to Dr Taylor that day;
- did not confirm to Dr Taylor his mental state and plans; and
- Dr Taylor did not refer to that exchange to later prepare a medical certificate.

[68] Mr Fuller's evidence about that alleged event is a matter that has further informed my assessment of Mr Fuller's reliability and honesty as a witness regarding the critical issue of his absences on 5 and 8 April 2024, including whether he was unfit to work.

[69] The invoice which Mr Fuller says he received from Dr Taylor *is* genuine. However, that invoice is for a consultation occurring over a month earlier, on 28 February 2024. Mr Fuller's evidence separately contained a medical certificate dated 28 February 2024 from that doctor. That medical certificate was for the purpose of excusing Mr Fuller from work on 26 February 2024 and the doctor records in the certificate "I had not seen him on the day but it's within expected outcomes for the particular issue at hand."

[70] This was not a case where there was a mistake as to which invoice was prepared, such that Mr Fuller inadvertently referred to an earlier consultation in lieu of a consultation on 4 April 2024. This is also not a case where the call was on a different date and Mr Fuller mixed up his dates – the call never happened. There was no evidence of *any* consultation occurring on 4 April 2024, with Dr Taylor or anyone else.

[71] Mr Fuller produced his telephone records for the period from 4 – 8 April 2024. The log of calls in his mobile telephone bill showed two outgoing calls from Mr Fuller for the period 3 April to 8 April 2024. Each call was to a mobile telephone number and was not to any doctor – Mr Fuller acknowledged he did not speak to Dr Taylor on Dr Taylor's mobile telephone.

[72] Mr Fuller also produced screenshots of the call log directly from his mobile telephone. Those showed one incoming call at 11.49am on 4 April 2024, which *is* from One Point Medical. The call lasted 1 minute. Mr Fuller acknowledged in cross-examination that the call was not a consultation from the doctor but was probably about a bill for the clinic. The invoice dated 4 April 2024 from that clinic recorded a 'receipt date' of 4 April 2024, consistent with the acknowledgement that the one (and only) call with the medical clinic that day was a call *from* the clinic for the administrative purpose of chasing up a bill. On about 9 October 2024, Mr Fuller procured a medical certificate from Dr Taylor (the certificate is described above). That certificate makes no reference to any consultation on 4 or 5 April 2024, providing further confirmation that there was no consultation, and appears to be based solely upon what Mr Fuller told his doctor in about early October 2024.

[73] It was put to Mr Fuller that paragraph 19(k)(a) of his witness statement was completely false, to which Mr Fuller answered "Yeah, I guess so".[3]

[74] Perhaps recognising the seriousness of the false evidence he had given in his witness statement, Mr Fuller then proffered an explanation that "I think I just made a mistake and got confused with the other phone call we were talking about." He also said "I must have looked at my phone records and misinterpreted what they meant".

[75] I do not accept Mr Fuller's explanations.

[76] Even if (which I also do not accept) he was mistaken about *making* a call to the doctor's clinic – as opposed to *receiving* a call – the conversation with Dr Taylor is a fiction. There was never a conversation with Dr Taylor, or another doctor from One Point Medical, or any doctor on about 4 April 2024.

[77] I take further comfort in the above conclusion from the statutory declaration Mr Fuller made on 28 April 2024. The assertion in the statutory declaration that One Point Medical was positively "unable" to offer an appointment for his planned absence from work on 5 April 2024 underscores the falsity of Mr Fuller's claim in his witness statement that, in fact, he made a phone call to and spoke with Dr Taylor "confirming" his mental state and his plans during that call.

[78] Not only was the evidence in paragraph 19(k)(a) and 19(p) of Mr Fuller's witness statement untrue, it appears that Mr Fuller knew it was untrue when he prepared his witness statement.

[79] In his oral evidence, Mr Fuller also speculated that he might have attempted to contact his regular GP on the weekend of 6 or 7April 2024. That evidence was qualified by Mr Fuller saying "I don't remember whether I did or not".[4] Having regard to Mr Fuller's unreliability as a witness and that there are no telephone call records showing any call beyond the one-minute call from the clinic, I find he did not attempt to call, or call, Dr Taylor or the One Point Medical clinic at any time from Thursday, 4 April to Monday, 8 April 2024 inclusive. His evidence about the purported call to Dr Taylor on or around 4 April 2024 is an untrue reconstruction.

[80] I am very mindful that my findings that Mr Fuller made false representations to his employer and gave false evidence to the Commission is an extremely serious conclusion to reach, particularly in relation to an individual who holds a legal practising certificate and ought to be acutely aware of the seriousness of such matters. The most generous conclusion that could be made is that Mr Fuller was simply indifferent to the accuracy of his witness statement to the point of falsity. Either way, it is conduct no witness should engage in; for a practising solicitor giving evidence about a critical event, it is inexcusable.

Consideration

[81] There is no dispute that Mr Fuller was a person protected from unfair dismissal for the purpose of s 382 of the Act. For the purpose of s 385 of the Act, there was no dispute that Mr Fuller was dismissed, and that the dismissal was not a genuine redundancy. There was no dispute that the employer was a 'small business' employer but there was a dispute as to whether the Small Business Fair Dismissal Code (Code) had been complied with or if the employer was entitled to rely upon it. Finally, if it is found that there was not compliance with the Code, there was a dispute as to whether the dismissal was harsh, unjust or unreasonable. There was also dispute about remedy in the event the dismissal was found to be unfair.

The Small Business Fair Dismissal Code – general matters

[82] In relation to the Code, the employer was clearly a small business at the time of Mr Fuller's dismissal. In circumstances where Mr Fuller was summarily dismissed, compliance with the Code is enlivened. The issue of the Code was raised relatively late by the employer, evidently upon involvement of senior counsel.

[83] Ideally, the issue of the Code would have been raised earlier and Mr Fuller's complaint about that lateness has some force but, ultimately, it is a matter that must be addressed: it is a mandatory factor under s 385 of the Act that I was required to consider regardless of it being not being raised initially.[5] While there was lateness in that issue being squarely raised, I consider that there was no prejudice arising in any event. Mr Fuller was able to (and did) cross-examine the employers' witnesses. On one view, the raising of the Code issue was of assistance to Mr Fuller, as it significantly simplified the conduct of the matter.

[84] The text of the Small Business Fair Dismissal Code is as follows:

> "**The Code**
>
> **Summary Dismissal**
>
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
>
> **Other Dismissal**
>
> In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.
>
> The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.
>
> **Procedural Matters**
>
> In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

> A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."

[85] The "Summary dismissal" section of the Code applies to dismissals without notice on the ground of serious misconduct as defined in reg.1.07 of the *Fair Work Regulations 2009*.[6]

[86] The employer relies on the Summary Dismissal part of the Code and states that the employer "believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal". Where an employer summarily dismisses an employee and seeks to rely upon the Code, there is a two-step process:[7]

- Firstly, there needs to be a consideration of whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal.
- Secondly, it is necessary to consider whether that belief was based on reasonable grounds.

[87] It has also been held that the second element incorporates the concept that the employer has carried out a reasonable investigation into the matter, but that it is not necessary to determine whether the employer was correct in the belief that it held.[8]

The Code – what was the employer's belief?

[88] I have no hesitation in concluding, for the purposes of the Code, that the employer held a belief that Mr Fuller's conduct was sufficiently serious to justify immediate dismissal. I have set out my findings of direct evidence from the firm's two Principals, which I accept. They each believed that Mr Fuller had lied to the firm about being sick and had also made a false statutory declaration in doing so. The Principals' direct evidence about their belief is entirely consistent with the correspondence between Mr Fuller and the employer at the time regarding "dishonesty" and the letter of termination of employment.

[89] Those beliefs, if found correct, were beliefs about matters that were grounds for summary dismissal. Grounds for summary dismissal include fraud (i.e. a species of dishonesty) and wilful or deliberate behaviour that is inconsistent with the contract of employment.

Was that belief on reasonable grounds?

[90] I also have no hesitation in concluding, for the purposes of the Code, that the employer's belief was based on reasonable grounds.

[91] On the information available to the employer at the time, the employer had highly credible evidence – i.e. photographs and ticket purchases - that Mr Fuller had spent at least the weekend of 6 – 7 April 2024 in Adelaide in what was obviously a social setting, with no evidence of illness or sickness at all from those photographs. Against those circumstances, there was no doubt that Mr Fuller had asserted he was unwell on the Friday and Monday either side

of that weekend, which was a circumstance that called for an explanation about Mr Fuller's claims for those two work days. Those same circumstances also called for an explanation regarding Mr Fuller's statutory declaration, which asserted he was unwell.

[92] While "reasonable grounds" can incorporate the concept that the employer has carried out a reasonable investigation into the matter, what is a reasonable investigation might depend on the circumstances. In some cases, little or even no investigation might be required where the matters underpinning the belief are demonstrably clear – for example, directly witnessing an unprovoked assault would require little or no investigation at all. In other circumstances, the employer might be required to undertake considerable further work to ensure that they do not summarily dismiss the employee prematurely – for example, receiving an anonymous tip off the employee has engaged in unspecified instances of theft might require considerable investigation.

[93] In the present case, the employer put its concerns about "allegation 4" to Mr Fuller for a specific response. Initially, the employer did not refer to the photographs but, by 1 August 2024, both the photographic evidence at hand and a very clear allegation of "dishonesty" was put. Mr Fuller's response that the employer had not demonstrated he had "Engaged in conduct that is harmful to the reputation of the firm" was a glib deflection. An allegation of dishonesty is serious and when made against a solicitor is more so. The allegation, if established, had the potential to call into question Mr Fuller's fitness to practise as a lawyer. Rather than engaging with the substance of that serious allegation, Mr Fuller engaged in unmeritorious debating points by seeking to frame this issue about proof of the firm's reputation.

[94] I am satisfied that the employer's belief of Mr Fuller's dishonesty was based on reasonable grounds.

The Code 'defence' must succeed

[95] It follows that the employer's Code 'defence' must succeed. As Mr Fuller's dismissal was consistent with the Code, Mr Fuller was not unfairly dismissed.

Other matters

[96] Even if I took the view that the employer's reliance on the Small Business Fair Dismissal Code was unsuccessful, I do not consider that Mr Fuller's dismissal was harsh, unjust or unreasonable (s 387) and I have serious doubts that he would be entitled to compensation even if that were not the case.

[97] Dealing with the factors in s 387 of the Act, there were multiple valid reasons for dismissal. They are:

- Mr Fuller made false statements to his employer in each of his emails sent on 5 April 2024 and 8 April 2024.
- Mr Fuller wrongly claimed paid sick leave in circumstances where he was not entitled to do so.

[98] Dealing with the first of those two matters, I refer to my conclusions about them above. They are each a valid basis for summary dismissal. A recurring theme of Mr Fuller's evidence

concerns his mental health. On no basis do I consider Mr Fuller's mental health supplies an explanation for wilful falsity.

[99] Dealing with the second of those two matters, I am not satisfied Mr Fuller was unwell and entitled to paid personal leave. Mr Fuller's employment contract provides for personal leave and states such leave will be "in accordance with the Fair Work Act". By s 97 of the Act, an employee may take paid personal leave if the leave is taken because the employee is not fit for work because of a personal illness affecting the employee.

[100] There are two elements to note about s 97 – there must be an actual unfitness for work and that unfitness must be "because" of a personal illness affecting the employee. The evidence before me demonstrates neither criteria are met.

[101] For the first of those two criterion, even Mr Fuller conceded he could work on 5 and 8 April 2024, albeit he says he would not be productive. Even without Mr Fuller's concession, the notion that, on Monday 2 April 2024 when he was booking an airfare that he anticipated being unfit for work on Friday belies any credible basis for believing he was unfit for work, period, let alone because of an illness.

[102] Section 107(1) of the Act required Mr Fuller to give notice "as soon as practicable" for the taking of leave and the anticipated period of leave. Mr Fuller waited until the last minute before giving notice on Friday, 5 April 2024. The fact that he waited until the last minute underscores that even Mr Fuller appears to have recognised that if he gave notice at the time when he was first expecting to be away – i.e. Easter Monday – his story would not have been believed.

[103] A more nuanced issue is whether Mr Fuller knowingly claimed sick leave which he knew he was not entitled to. A number of factors would ordinarily strongly indicate this was clearly the case: the original intention to take annual leave but his expectation that that form of leave would not be approved; the decision to take sick leave was based on advanced plans for a holiday; and the knowingly evasive emails given to his employers. For the leave taken on Monday, 8 April 2024, the "original plan" was to be in Melbourne for the Monday. That plan – and Mr Fuller's alleged unfitness for work on 8 April 2024 – only arose on around the afternoon of Sunday, 7 April 2024 when it became clear that the road trip back to Melbourne wouldn't be leaving until the following day.

[104] Remarkably, however, Mr Fuller appeared to genuinely believe he was entitled to sick leave. In Mr Fuller's further written outline of submissions, he states "insofar as utilising personal leave to take a mental health day amounts to misconduct of any sort, which remains disputed". The label "mental health day" is unhelpful and reveals little. The highest that might be said is that Mr Fuller was not enjoying work, was experiencing stress or anxiety, and felt his situation would be improved with the weekend off. To state the obvious yet again, there are not many people whose outlook on life, health or work would not be improved by taking a paid day off and spending it with friends. But that does not elevate those circumstances to unfitness for work because of an illness or injury.

[105] Mr Fuller's provision of a medical certificate for his day off on 8 April 2024 does not conclusively demonstrate he was unfit for work that day because of any illness. Far from it.

That certificate is simply one aspect of the overall evidence. The fact that Mr Fuller obtained the certificate for 8 April 2024 in a purely online forum, with no direct consultation by the practitioner who signed the medical certificate diminishes the evidentiary value of that certificate. Even by the low standards required for Mr Fuller to procure a medical certificate as shown by the certificate he did procure, he did not even do that for his absence on 5 April 2024.

[106] In written submissions with leave after the hearing, Mr Fuller submits that the issues in dispute centre around procedural fairness. Mr Fuller says his case is "not about one misstep—it is a systemic failure to provide me with procedural fairness, from ignoring Code obligations to vague allegations and contradictory evidence." As ought to be clear, I do not accept Mr Fuller's submissions about the evidence presented to me.

[107] In relation to the procedural matters (s 387(b) – (e)), Mr Fuller was notified of the reasons for dismissal and he was given multiple opportunities to respond to them. He was not refused representation and was in fact assisted by the ASU. In fairness to Mr Fuller, the disciplinary process was initially somewhat confused, because it began with a quite different set of concerns. There was some initial coyness from the employer about disclosing what it knew regarding Mr Fuller's whereabouts during the Gather Round weekend but in a short time, the employer's concerns about Mr Fuller's integrity on those matters were put squarely and clearly. Mr Fuller's unedifying decision to elide any direct response to those matters does not change that he was given an opportunity to respond.

[108] Mr Fuller's conduct and attitude was utterly incompatible with his ongoing employment as a solicitor at the firm, where integrity and honesty are paramount. I have taken in account the size of the employer and its absence of human resources specialists, although in this case it had engaged specialist assistance. There were no other matters drawn to my attention in the evidence that alters my conclusion about that matter.

[109] This is not a matter where reinstatement would be appropriate. Mr Fuller contends he was entitled to be paid notice and, at the time of his final submissions, stated he had not obtained work for 19 weeks. As I do not consider Mr Fuller was unfairly dismissed, no compensation is payable. In any case, I am not satisfied that Mr Fuller has acted to mitigate his loss of employment – I do not consider standing in an election for local council meets the criteria for mitigation. I would also not be inclined to award compensation on account of Mr Fuller's misconduct as well as his failure to mitigate.

[110] Mr Fuller's application for an unfair dismissal remedy is dismissed. An order[9] giving effect to these reasons will be separately issued.

DEPUTY PRESIDENT

Appearances:

M. Fuller on his own behalf.
N. Harrington KC for the Respondent.

Hearing details:

2024.
Melbourne:
December 5, 16.

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[1] Transcript at PN899.
[2] *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336.
[3] Transcript PN636: "That, Mr Fuller, is completely false, isn't it?---Yeah, I guess so. That's - -".
[4] Transcript PN559.
[5] *Austin v Sandgate Taphouse Pty Ltd T/A Sandgate Post Office Hotel* [2024] FWCFB 323 at [45].
[6] *Ryman v Thrash Pty Ltd* [2015] FWCFB 5264 at [38].
[7] *Pinawin T/A RoseVi.Hair.Face.Body v Mr Edwin Domingo* [2012] FWAFB 1359 at [27] – [29]; *Smerff Electrical v Jordan Lamacq* [2019] FWCFB 1767 at [9]; *Ryman v Thrash Pty Ltd* [2015] FWCFB 5264 at [38]; *Thi Phuong Trinh Le v Vivid Nails & Beauty* [2023] FWCFB 96 at [9] – [10], [31].
[8] *Ryman v Thrash Pty Ltd* [2015] FWCFB 5264 at [41](2); *Thi Phuong Trinh Le v Vivid Nails & Beauty* [2023] FWCFB 96 at [11].
[9] PR785349.