



DECISION AND ORDER

Fair Work Act 2009
s.394 – Unfair Dismissal

Michael McGregor

v

The Trustee For The Eagle Twin Trust
(U2024/15509)

COMMISSIONER PERICA

MELBOURNE, 4 FEBRUARY 2026

Application for unfair dismissal remedy

INTRODUCTION

[1] On 12 December 2024, Mr. Michael McGregor made an application under s 394 alleging he had been unfairly dismissed from his employment with the Trustee For The Eagle Twin Trust, trading as Anteo Recruitment Group Pty Ltd (**Anteo**). Anteo is an enterprise engaged in the recruitment of workers for domestic construction companies. At the time Mr. McGregor was dismissed, Anteo had fewer than 15 employees.

[2] On 2 June 2022, Mr. McGregor signed a contract of employment with Anteo by which he was employed as a talent acquisition manager. He commenced work on 6 July 2022. The talent acquisition manager role involved managing recruitment for domestic building companies. This included conducting interviews, screening candidates, working with hire managers and the management of a team to deliver the recruitment services. At one time during his employment, he managed 12 workers. This was reduced to 4 workers by the time his employment ceased.

[3] Following two meetings on 20 and 21 November 2024 between Mr. McGregor and Mr. Anthony Wilks, the Director and Principal Consultant of Anteo, he received an e-mail dated 25 November 2024, which “formally” confirmed termination of his contract of employment. His contract was terminated on four weeks’ notice and he was placed on gardening leave until the expiration of the four weeks on 18 December 2024.

[4] The termination was justified by alleged breaches of the contract of employment, including: the conflict-of-interest term, the obligation of full attention, the prohibition on conducting a business that conflicted with Anteo’s business, and the prohibition on activities that damage Anteo’s reputation. It was asserted this conduct amounted to serious misconduct in terms of the contract.

[5] The conduct which Anteo claims breached the contract was starting and operating a life coaching and counselling business, creating a website and various social media pages, as well as publishing an e-book on life coaching topics.

[6] Mr. McGregor claims the actual reason for his termination was related to his refusal to take up a shareholding. He also claims, at least from March 2024, he had informed Mr. Wilks and others that he had been undertaking this counselling and coaching business. Mr. McGregor argues this amounted to either approval or condonation of the other business.

[7] The matter was heard on 10 June 2025. Mr. McGregor gave evidence and represented himself. Mr. Anthony Wilks represented Anteo and gave evidence. Mr. McGregor called Ms. Maria Ramilo, who had worked at Anteo. Anteo called Mr. Denzel Fuller, Mr. Oscar Duddridge and Ms. Suzie Wilks, all of whom still work at Anteo.

[8] For the reasons I set out below, I find:

- The dismissal was not consistent with the Small Business Fair Dismissal Code (“the Code”).
- I am not satisfied the dismissal was harsh, unjust or unreasonable.
- Mr. McGregor was not unfairly dismissed.

When can the Commission order a remedy for unfair dismissal?

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

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

[10] Both limbs of this section must be satisfied. I am therefore required to consider whether Mr. McGregor was protected and whether he has been unfairly dismissed.

[11] It was not contested Mr. McGregor was a person entitled to protection from unfair dismissal.

When has a person been unfairly dismissed?

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

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

[13] The matters referred to at points (a), and (d) are not in issue. It is not contested that Anteo is a small business. The contest is whether the Small Business Code had been complied with and whether Mr. McGregor’s dismissal was harsh, unjust or unreasonable. Before turning to consider that question, it is convenient to set out some of the factual background relevant to the proceedings.

THE RELEVANT CONTRACT TERMS

[14] What follows is a recitation of the relevant terms of Mr. McGregor’s contract of employment.¹ The emphasis in italics have been added.

Serious Misconduct

[15] **Clause 9.4** empowers Anteo to “summarily dismiss an employee without notice or payment in lieu” if an employee commits “serious misconduct”. “Serious Misconduct” is defined in **clause 1.1.22** as “*serious or persistent breach or non-observance of any of the provisions of the Agreement*” and (amongst other things) “behaviour which is likely to adversely affect Anteo’s reputation”.

Whole attention and other performance standards

[16] **Clause 3** sets performance standards requiring the employee to:

- Serve Anteo efficiently, faithfully and diligently.
- *Devote the whole of his time, attention and abilities exclusively to the business...or other activities for the benefit of Anteo.*²
- *Avoid conflicts and refrain from acting or giving an appearance of acting contrary to the interests of the company.*

Undertaking business other than with Anteo

[17] **Clause 3.5.1** prohibits undertaking any other business or profession which competes with Anteo or where the employee’s involvement would create a conflict of interest, either *actual or potential*.

Promotion of Anteo

[18] **Clause 3.9** contains an obligation to promote and enhance the business of Anteo, as well as an obligation not to intentionally “do anything which may be harmful to Anteo”.

Confidential Information

[19] **Clause 4.1** contains obligations with respect to confidential information. It prohibits the copy, disclosure, dissemination, reproduction or electronic storage of confidential information without written permission and limits the use of confidential information to

perform obligations under the Agreement.

Customers and Suppliers

[20] **Clause 13.1** prohibits an employee from establishing a “business relationship” with a customer of Anteo other than for the purpose of performing duties under the employment contract.

TERMINATION E-MAIL

[21] After meetings with Mr. Wilks (I refer to the evidence with respect to these meetings later) on 25 November 2024, Mr. Wilks sent Mr. McGregor a termination e-mail which relevantly states:

I’m writing to formally confirm the termination of your employment with Anteo Recruitment, effective 18th December 2024 (including the 4 weeks’ notice period).

We have elected to place you on gardening leave until your final day of employment. During this period, you will remain employed by Anteo but are not required to attend the workplace. You will, however, remain contactable where required. It is expected that you will uphold all of terms and conditions as outlined in your employment agreement (Attached). Furthermore, during your gardening leave (unless otherwise instructed) you will be:

- Prohibited from contacting Carlisle or any other Anteo client or candidate
- Prohibited from posting content related to Anteo or engaging in any activity that conflicts with Anteo’s interests or reputation

Any breach of your employment agreement and gardening leave terms during this period will result in a summarily dismissal.

We believe this approach is fair and reasonable under the circumstances and ensures a smoother transition for all parties involved.

Your full entitlements, including regular pay for November and a final pay inclusive of all outstanding salary and unused leave, will be processed as follows:

- Pay for November will be processed as usual on Thursday, 28th November 2024.
- Final pay for the balance of your entitlements will be processed on your final day of employment the 18th December 2024. A payslip detailing all payments will be provided via email.

The termination decision follows breaches of your employment contract (attached) due to:

- Starting and registering a business without the agreement and approval of Anteo or it’s director.
- Operating the business venture concurrently during your employment with Anteo, inclusive of:
 - Creating a website and social accounts dedicated to promoting and selling coaching and counselling services, courses, and materials.
 - Creating a direct conflict of interest with ongoing employment responsibilities, time and focus at Anteo.

This conduct has resulted in a breach of the employment contract for the following:

1. Conflict of Interest:
 - Clause 3.4.5 explicitly requires the employee to avoid all conflicts of interest and refrain from acting in a way contrary to the company's interests. By starting a private business, promoting it, and dedicating time to it, it has created a direct conflict with role and duties at Anteo.
2. Obligation of Full Attention:
 - Clause 3.4.3 mandates the employee to devote their full time, attention, and abilities exclusively to the business of the company. Running a private business constitutes a diversion of time and focus, breaching this clause.
3. Prohibited Outside Business:
 - Clause 3.5.1 prohibits the employee from undertaking any other business or profession that competes with or creates a conflict of interest with the employer. Operating and promoting a private business without full disclosure or approval creates a direct conflict of interest and breaches this clause.
4. Potential Harm to Company Reputation:
 - Clause 3.9.2 prohibits employees from engaging in activities that may harm Anteo's reputation. The coaching business and its branding jeopardises Anteo's professional image with key clientele creating a breach of this clause.
5. Serious Misconduct:
 - Clause 1.1.22 outlines "serious misconduct," including consistent breaches of duties and conduct likely to harm the company's reputation or interests, resulting in a summarily dismissal.

MATERIAL EVENTS LEADING UP TO THE TERMINATION INCLUDING THOSE ARGUED TO SUPPORT A CONDONATION ARGUMENT

[22] Mr. McGregor submits that he “repeatedly disclosed and discussed part-time professional coaching and counselling” with Mr. Wilks and others. Mr. McGregor’s argument is this disclosure meant that undertaking a paid coaching and counselling business was condoned by Anteo. He argues Anteo has waived its right to terminate him on that basis.³ What follows is the evidence in respect to each of the incidents he says brought his paid coaching to the attention of Mr. Wilks and others leading up to the process by which he was terminated.

MARCH 2024 MEETING WITH MR. AND MS. WILKS

[23] Around September 2023, Mr. McGregor began a program of study in life coaching. By March 2024, he had commenced coaching private clients outside of work hours. It was Mr. McGregor’s evidence that around March 2024, he informed Mr. and Ms. Wilks that he was coaching one client per month.⁴

Michael McGregor

[24] In his oral evidence, Mr. McGregor described this meeting as an “informal, unplanned meeting” over breakfast with Mr. and Ms. Wilks. “As part of the conversation ... I shared

[coaching] work coming up with a private client. I explained that through one of the courses I had undertaken [the client] had been referred to me and was “looking like paying”. Mr. McGregor explained he was “excited and didn’t feel there was any reason to hide anything, so I shared it with Suzie and Anthony”. Mr. Wilks responded with a question “you’re working with clients?”. Mr. McGregor confirmed that he was and there was no further response from either Ms. or Mr. Wilks in relation to the coaching and the conversation “moved on”.⁵

Anthony Wilks

[25] In his witness statement, Mr. Wilks says Mr. McGregor “never disclosed paid coaching in March 2024 to me or Suzie Wilks: “He shared personal counselling for his own wellbeing not a business”. He says he had “no knowledge of Mr. McGregor’s commercial coaching business until November 2024”. His “communications referred to his personal wellbeing support (e.g. counselling, retreats, acupuncture for migraines, spiritual experiences) which I understood to be personal not commercial”.⁶

Suzie Wilks

[26] Ms. Suzie Wilks, the other participant in the March 2024 meeting, is the wife of Mr. Wilks. She had been a Talent Acquisition Specialist at Anteo since 2020. She does not specifically mention the March 2024 meeting in her witness statement. She says she “never heard him mention any coaching or counselling business”. She says further, the only personal detail he shared was when he took leave for mental health retreats, which I assumed were purely for his own well-being.”⁷

[27] During Ms. Wilks oral evidence I took her through Mr. McGregor’s evidence about the March 2024 meeting. Her evidence was the March 2024 disclosure that he was taking paid clients for counselling “never happened.” She went on to say that she could “not remember any conversation” in March 2024 where counselling and coaching were brought up.⁸

12 JULY 2024 LINKEDIN POST

Michael McGregor

[28] In his witness statement, Mr. McGregor stated he “publicly posted” that he had received coaching certification from the International Coaching Federation” and then Mr. Wilks asked him about it. Mr. McGregor “explained what the credential entailed” and how it supported his “professional credibility”.⁹ According to Mr. McGregor, Mr. Wilks “made no objection”. Mr. McGregor elaborated on this in his oral evidence:

“I posted it on LinkedIn. It’s a small office that we work in and I have noticed, whenever I post anything, that it’s a very quick reaction, whether it’s a thumbs up or a question, and on this day Anthony was in his office and I think I was walking past and he asked me what it meant, and I explained because I had finished the coaching certification, this was like a professional body that I was now able to be a member of, and it gives credibility to coaches.”¹⁰

[29] Mr. Wilks did not respond further.¹¹

Anthony Wilks

[30] In his oral evidence, Mr. Wilks stated he “could not recall” this conversation.

DISCUSSION OF COACHING AT TEAM MEETINGS AND OTHER WORK INTERACTIONS FROM MARCH TO NOVEMBER 2024

Michael McGregor

[31] In his witness statement, Mr. McGregor states that between March 2024 and November 2024, he continued to “openly share” updates about his coaching activities, including at weekly team meetings, one-on-one conversations, and over team lunches with Mr. Wilks present. “At no point did Mr. Wilks express concern. On several occasions he stated that he saw the coaching as complementary to my work at Anteo.”¹²

[32] In his oral evidence Mr. McGregor elaborated on his evidence related to his disclosure of his paid coaching activity at work.

“So, we had a weekly team meeting routine that was probably upheld 90 to 95 per cent of the time on a Monday, and it would have all of the team present and there was a format to it. We share outside of work activities, so what we did on the weekend, or in my case, coaching. In many of those, and we're talking 37 between March to November, I mentioned coaching activity with clients or successes I had had.”¹³

[33] He went on to describe how he would update the staff of Anteo at team meetings about the progress or difficulties he was having in his coaching business:

“COMMISSIONER: So, what were the updates? What was progressing about it?”

MCGREGOR: From a coaching point of view, and it did vary, but it might have been success with a client that I had had, without sharing their personal details. Something about that personal learning that I got from a call. I had a couple of new clients in the middle of the year, so those sorts of highlights were things that I shared in real time.”¹⁴

Josefina Ramilo

[34] Ms. Josefina Ramilo was a talent acquisition partner at Anteo until July 2024. From March until July, Ms. Ramilo participated in team meetings and other interactions where Mr. McGregor claims he openly discussed his coaching business. In her witness statement, she relevantly states:¹⁵

- From approximately March 2024, I learned that Mike was working with a small number of private clients outside of work hours.
- I knew this because Mike regularly spoke about his coaching in the office and his longer-term interest in eventually doing more coaching.
- Mike often shared updates about his coaching during our weekly all-of-company team meetings at Anteo, which were led by Anthony Wilks. These meetings included personal updates where we were encouraged to share out-of-work interests. Mike spoke openly about coaching a small number of clients, what he was learning, and some client results.
- Mike also talked about his coaching work during team lunches. These were informal and frequent, and Anthony was often present. In all these settings, Anthony appeared supportive.

- I never heard Anthony raise any concerns or objections to Mike about his coaching work.
- Given how openly Mike shared these things, and the apparent support from Anthony, I was surprised to learn that Mike had been dismissed on the basis of this coaching work.

[35] Ms. Ramilo elaborated on these statements in her oral evidence:

Team meetings

“We had weekly meetings, one on one, as well as team meetings. We were - you were very vocal about it during lunchtimes when we were in group settings with the team. We typically would have lunch together being a very small company and you would - you were very proud to let us know that you were commencing your studies and put down actually a big payment to start your studies.”¹⁶

Other interactions at the office

“...when we were in the mornings, all around, grouped around, you would tell us, you know, what you had experienced the night before or at our lunch table. You know, informally, just chatting around your experiences, what you have done, as well as our weekly team meetings. So typically, we would have Monday weekly team meetings. We would go around with the whole team and share what we, you know, are achieving personally and professionally, and we would go around the table and share, you know, what we have been doing.”¹⁷

[36] After, Mr. McGregor asked the leading question: “And was it clear to you that was related to clients as opposed to my own just purely study?”¹⁸ After an attempt by Mr. McGregor to rephrase, Ms. Ramilo went on:

“You would talk about not just your - well, your studies, but also how you were applying your studies to your coaching sessions with clients”.¹⁹

[37] She then described the reactions of those present at the meeting and other work interactions to the coaching training and paid coaching Mr. McGregor was undertaking:²⁰

MCGREGOR: And was there a response or a reaction from them that you can recall at any point?

RAMILO: Always congratulating. You know, we were always very supportive of the business. Everyone was very supportive of everyone's achievements, personally and professionally.

MCGREGOR: Did you ever see any objection from Anthony in regard to my coaching?

RAMILO: No.

MCGREGOR: Any hesitation?

RAMILO: No

MCGREGOR: How would you characterise the responses that you saw from [Mr. Wilks]? ---

RAMILO: Supportive. Anthony was always very supportive. You know, for example, I was speaking to him about my own personal studies. He was very supportive of that as well.

[38] In cross examination, Ms. Ramilo gave evidence in relation to what she knew of the commercial coaching by Mr. McGregor:²¹

WILKS: Can you describe the type of coaching and counselling that Michael discussed with you?

RAMILO: Through his programs or through his studying?

WILKS: The commercial coaching. You mentioned that you're aware of commercial coaching?

RAMILO: Yes.

WILKS: We weren't aware of commercial coaching. We were aware of coaching study. ---

RAMILO: Mm-hm.

WILKS: We weren't aware that Michael was doing commercial coaching, so my question to you is can you describe the commercial coaching and counselling that he discussed with you?

RAMILO: Yes. So, he would have meetings in the evenings with a number of clients that he was working. So, he - I know for a fact he was doing like breath work, yoga, and had a network of clientele through there that he was networking with and coaching through.

WILKS: Is your assumption that breath work and yoga was a part of a coaching business? —

RAMILO: -I mean as a holistic overview of wellbeing, and I believe that's a lot of what Mike's business is about.

WILKS: Are you saying that Mike's business was providing yoga and was providing these services or he - - -? -

RAMILO: --No.

WILKS: Or he was attending those for his own personal wellbeing? ---

RAMILO: He was attending those through his own personal wellbeing. That's where he had a network.

Anthony Wilks

[39] Mr. Wilks denies he was part of a discussion in relation to Mr. McGregor's commercial coaching business in his witness statement.²² He says Mr. McGregor "never disclosed paid coaching", only "personal counselling for his own business not coaching" and "his communications referred to personal wellbeing and support (e.g. counselling, retreats, acupuncture for migraines, spiritual experiences) which "he understood to be personal not commercial. I approved significant leave for medical help, health retreats, supporting his wellbeing."

[40] In cross examination, Mr. Wilks gave evidence the "whole team"²³ was present at the team meetings where Mr. McGregor says he informed everyone that he was undertaking paid

team meetings “including Suzie [Wilks], Denzel [Fuller] and, Oscar [Duddridge]”²⁴ amongst others. Each of the named individuals gave evidence in the proceeding.

Suzie Wilks

[41] In her witness statement, Ms. Wilks says she “never heard him mention any coaching or counselling business” and that the “only personal detail he shared was when he took mental health retreats” which she assumed was for Mr. McGregor’s wellbeing”

[42] I put questions to Ms. Wilks regarding her memory of the team meetings which included the following:²⁵

COMMISSIONER: You can unequivocally say that's not true. Why do you – so you can remember a year's worth of team meetings? ---

MS. WILKS: Not a year's worth of team meetings but I think I would be aware if he said he was providing – running it as a business or – yes.

COMMISSIONER: Why would you remember that? ---

MS. WILKS: Well, because – why would I remember that because it would be a conversation that someone would have picked up if it happened. But, like I said, we discussed maybe his studying. Exams are coming near. Other – what work – during those meetings we discussed what our weekends involved, what work we did, what jobs we had on hold. What our clients were saying. Where we were stuck when it came to work. We were reading a book – anything we found fascinating in the book. But I do not recall that conversation, no.

Denzel Fuller

[43] Denzel Fuller is employed in Corporate Services at Anteo “overseeing accounting, technology and compliance issues.” In his written statement he says, “up to November 2024 he had no knowledge that Mr. McGregor was “running and coaching or counselling business” and he “never saw any reference to such a venture”:²⁶

[44] During his oral evidence, I asked him the following:²⁷

COMMISSIONER: Did you recall any occasion at team meetings where his coaching and counselling business was discussed?

FULLER: No.

COMMISSIONER: Was there any discussion about coaching and counselling at all?

FULLER: Other than his studies.

Oscar Duddridge

[45] Mr. Duddridge was another Talent Acquisition Specialist who joined Anteo in July 2022. He says that until Mr. Wilks told him²⁸ in November 2024, he had no idea that Mr.

McGregor was running or planning a coaching or counselling business: “He never mentioned it at work, and I never saw anything about it in e-mails or chats.”

[46] I asked him questions about his recollection of the team meetings:²⁹

COMMISSIONER: Can you remember coaching and counselling being brought up? And as I say there are three modes where that could be brought up. One in terms of the coaching and counselling business that Mr. McGregor could have. One is coaching and counselling him and he, himself is receiving, and the other is coaching and counselling that he was – and coaching in the context that he was learning how to do it. Do you recall any discussion about either of those three alternatives? ---

DUDDRIDGE: Not necessarily in this particular meeting.

COMMISSIONER: Yes. In the team meetings generally? ---

DUDDRIDGE: For the purposes of study, I remember it being mentioned in the past.

COMMISSIONER: ... So, you say that the coaching course was brought up in the team meetings and discussions? ---

DUDDRIDGE: I'm not sure if it was exactly in a team meeting or I guess like a discussion in general - - -

SEPTEMBER DISCUSSIONS AROUND HIS E BOOK

[47] While he was employed at Anteo, Mr. McGregor wrote an e-book entitled “9 Unique Keys to unlock your Full Potential”³⁰ which he completed in August 2024. Throughout the book, Mr. McGregor styles himself “Human Potentialist, Coach and Counsellor”. Mr. McGregor asserts that his disclosure and discussions around the book demonstrate that Anteo knew or ought to have known about his paid coaching and counselling. What follows is evidence concerning the e-book disclosure.

Michael McGregor

[48] Mr. McGregor says in a team meeting in September 2024, he discussed an e-book he had almost finished writing. Mr. McGregor says that particular team meeting was attended by Mr. Wilks, Ms. Wilks, Denzel Fuller and Oscar Duddridge. In that meeting Mr. Wilks said that it complemented his work at Anteo. He referred to this in his oral evidence:³¹

...I announced to the team at a team meeting, the same situation, that my e-book, I had finished writing an e-book. It had taken me like a year to write. I was going to be publishing it on my website, useful for clients, and in that conversation, Anthony offered that he saw it as complementary. I think I might have mentioned that I didn't see it as a conflict in that meeting and that's why the response back was it was complementary.

Anthony Wilks

[49] I asked Mr. Wilks questions concerning Mr. McGregor's claim he discussed his e-book at a team meeting. He said he did not recall the September 2024 meeting specifically. He did

recall telling Mr. McGregor that his *coaching study* was complementary to his role in talent acquisition at Anteo.³² He did not recall a discussion at a team meeting about an e-book before it was sent to him by e-mail.

Suzie Wilks

[50] In her oral evidence, Ms. Wilks conceded she works from home except for Monday's and Fridays and therefore give limited evidence on this topic. On my questioning she responded she did not remember Mr. McGregor bringing up his e-book or any comment by Mr. Wilks that the e-book or coaching and counselling generally was complementary to the business of Anteo.³³

Denzel Fuller

[51] During Mr. Fuller's oral evidence, I put Mr. McGregor's evidence about the September meeting to him:³⁴

COMMISSIONER: ... [Mr. McGregor] stated he had nearly finished writing an eBook and he wanted to service a small number of clients with coaching and counselling. The coaching was not in competition with the respondent. It supported and complemented the respondent's business and Mr. Wilks stated that he saw the applicant's coaching as complementary to the respondent.

FULLER: That did not happen.

Oscar Duddrige

[52] Mr. Duddridge does not expressly deal with the e-book issue in either his witness statement or in his oral evidence. He recalled discussion about a coaching course "for the purposes of study" at team meetings.³⁵ Mr. Duddridge was asked in examination in chief if his "coaching was ever divulged in Anteo team meetings", to which he answered "no".³⁶

8 SEPTEMBER E MAIL OF THE E-BOOK TO ANTHONY WILKS

[53] On 8 September 2024, Mr. McGregor sent an e-mail to Mr. Wilks which attached the 80-page e-book³⁷ he had written entitled "The Potency Keys – 9 Unique Keys to unlock your full potential." The e-mail which attached it read³⁸ (with emphasis added):

Sharing with you, my e-book. It still has typos and plenty of edits I want to make etc. but it's never ending. *I'm sharing it, there is no expectation of any sort e.g. Reading it at all.*

If you do read and there is anything you want to share, I'm open to that – including anything from an Anteo business point of view. I am mindful eventually, at some point somebody as an Anteo client might find my stuff online – so I am open to any comments from that point of view, if I need to adjust anything.

[54] Mr. Wilks responded "Thanks mate congrats on releasing it. I'll read it".

OCTOBER AND NOVEMBER 2024 DISCUSSIONS ABOUT LINKEDIN PROFILE

Michael McGregor

[55] In his witness statement, Mr. McGregor says in October 2024 he consulted Mr. Wilks about proposed amendments to his LinkedIn profile which included a reference to his job at Anteo as well as his coaching services. According to Mr. McGregor, Mr. Wilks “reviewed and approved a version focused on coaching, requesting only that I remove references to counselling”. Mr. McGregor says that he made the requested changes and sent the updated version to Mr. Wilks.³⁹

[56] In his oral evidence, Mr. McGregor stated that in October he “let Mr. Wilks know” that he “wanted to develop my professional profile” on LinkedIn. An exchange of e-mails on the topic from 8 November 2024 is in evidence (the most relevant of which are excerpted below).

McGregor 8 November 2024 at 8:04 PM

Attached in what I intend to add to my LinkedIn, the wordsmithing may evolve but the key parts are here for your review. I am mindful of our clients, any perception, risks etc. so just let me know if you think anything needs re-thinking. Happy to equip you with any extra info as needed, e.g. you said JD may ask “what’s counselling” just let me know.⁴⁰

[57] The LinkedIn profile Mr. McGregor sent on 8 November is in evidence.⁴¹ In the title next to his photo, it described Mr. McGregor as “Talent Acquisition Manager, Executive Counsellor & Coach.” The profile has two headings “Talent Acquisition Manager” at Anteo and “Executive Counsellor and Coach.” Under the heading “Executive Counsellor and Coach”, he states that the coaching and counselling is conducted by “Mike McGregor Counselling & Coaching which is said to be “part time”.

[58] After two further e-mails Mr. Wilks sent on e-mail on Friday 8 November 2025 at 8:55 PM.⁴²

Wilks 8 November 8.55PM

“What are you wanting to achieve with this new profile?”

McGregor 8 November at 9:02 PM

LinkedIn is a platform some people will find me via, so there’s an element of being findable

And it’s an update of my professional skills brand/skillset, these skills I have which are unique and valuable. It supports the value and credibility I offer to clients and candidates in the world of recruitment

Wilks 8 November at 9:07 PM

Understand. Definitely opportunity there to compliment you value prop at Anteo. Can you update your LinkedIn at Anteo. Give me a full view. So, we can review it for completeness. We will do it as a team

[59] There is a further exchange of two e-mails, then Mr. McGregor sent this:⁴³

McGregor 9 November at 9:33 AM

Sounds Great

OK so:

-Anteo: I'll develop a little further (I can see some opportunities to do so) and build further as a team.

Carlise: I'll draft and share back

-Coaching and counselling g2g? Maybe you want to look at my website and see if you're comfortable [included his personal web address]? I've developed the message since the e-book, oriented more corporate, a little less woo-woo, more tangible and business like

Anthony Wilks

[60] I asked Mr. Wilks for his explanation of the exchange about the LinkedIn profile.⁴⁴

COMMISSIONER: On 8 November he sent you his proposed LinkedIn amendments as had been agreed in October, and he requested Mr. Wilks to let him know if anything needed to be amended.

WILKS: Yep. I agree that Michael sent me LinkedIn profiles...But these weren't proposed or discussed, and that led to us meeting and discussing the coaching and counselling business around that time. So, I wasn't aware that - - -

[61] He later went on:⁴⁵

...It did have some material in there which was, you know, not consistent with recruitment. It did touch on some of the practices that he's got outside of work, and I did see that as a conflict, and I wasn't comfortable with it. I asked him what he was trying to achieve with it. We agreed to catch up. I asked him around the timeline, was there any urgency around it. I couldn't really understand why he was wanting to address it. I think, from memory, he emailed me on the weekend...-And then I received sort of multiple updates over the weekend, and we were –

[62] I then put to Mr. Wilks Mr. McGregor's assertion that "*An amended version of the applicant's LinkedIn page was approved by Mr. Wilks, focusing on coaching, not counselling.* I asked him what he said about that to which he replied: "There was absolutely no approval to put any coaching or counselling in any LinkedIn profile."⁴⁶

SHAREHOLDER AGREEMENT

[63] Mr. McGregor argues in his material that one of the motivations for his dismissal relates to his failure to sign up to a shareholder agreement. What follows is the evidence relevant to that issue.

Michael McGregor

[64] In his witness statement and other documents, Mr. McGregor explains the circumstances of the shareholder offer that was made to him:

- Around "mid 2024", Mr. Wilks launched an internal Shareholding Offer for Anteo employees. Mr. McGregor expressed interest subject to the advice of his accountant once the contracts and paperwork were available.⁴⁷

- On or about 17th October 2024, a Share and Unit Subscription Agreement became available, and he began to discuss in detail with his accountant.⁴⁸
- Through October and November 2024, Mr. Wilks repeatedly followed up with me regarding my interest in the offer.⁴⁹ In his Form F3, he gives further details of these “follow up” events.⁵⁰
 - 21 October 2024: A meeting with Mr. Wilks concerning the shareholder offer.
 - On 28 October 2024, Mr. McGregor was approached by Mr. Wilks requesting an update on the Shareholding agreement. Mr. McGregor raised questions on the offer that has been flagged by his accountant. One issue which his accountant raised was the proposed “bad leaver” clause in the offer which would have prevented Mr. McGregor from cashing out of the shareholding in the event he was dismissed for misconduct.
- On 1 November 2024, after Mr. McGregor advised that he was still waiting on his accountant’s feedback, Mr. Wilks texted to say he would “park the opportunity.”
- On 7 November, Mr. Wilks confirmed he was proceeding with others in the business. In the following week, Mr. Wilks spoke with Mr. McGregor again saying he could “get back me whenever you like” and that he would keep the offer open but “wouldn’t chase [him] on it again”.

Anthony Wilks

[65] In his oral evidence, Mr. Wilks gave his version of the conversations about Mr. McGregor (and other staff) entering into a shareholding agreement.⁵¹

COMMISSIONER: Then the 28th, he says you approached him, requesting an update on the shareholding offer, and he raised a number of questions which had been raised with his accountant, and that was the bad leaver bit? —

WILKS: He sent me – he came to my office pod. He asked me whether I'd be willing to remove the 'bad leaver' clause from the shareholding agreement. I asked him – well, I stated, 'No, we wouldn't be willing to do that.' He shared with me an email which he hasn't put in this digital handbook, which was from his accountant stating that provided the triggering events of bad leaver clause were not affected, then there was no issues with him proceeding with the agreement.

...

So he said, 'I don't want to proceed with it at this time'?---He was just going through the process and it had gone on for three months, and we had three other people who were wanting to participate so I just found it strange that he wanted to have that removed.

...

I'd consulted with other people in the business around that particular matter as well, and - - -

COMMISSIONER: He says that you sent him a text message stating you would park the opportunity?

WILKS: I texted him to let him know that we should park it until he's ready to readdress it, and we spoke about that as well....-But I accepted that he wasn't in a position to commit to it

due to his limitations or perceived limitations, and I left it in his court to come back to me when he was ready.

TERMINATION PROCESS

20 November 2024 Meeting and Following Correspondence

Michael McGregor

[66] In his witness statement received into evidence, he states the following:⁵²

On 20 November 2024, I attended a meeting with Mr. Wilks at café. He started by saying “This is a difficult conversation” then stated there was a “conflict of interest” related to coaching. I challenged him and asked how I had disclosed my coaching business to him numerous times, including in March 2024. Despite this he insisted he had no knowledge of the work.

At the conclusion of the meeting he asked me to go home and send him an e-mail regarding what role I saw in Anteo’s growth, what success would need to look like to me, whether I wanted to be an employee or shareholder he followed up with a text to the same effect that night.

[67] Mr. McGregor gave further details of the 20 November meeting in his oral evidence:⁵³

- I had a text from Anthony at 9.30 that morning to meet at Axil Café in Cremorne, ... and he was sitting, as you enter, on the far right at the back end, and I sat next to him ...the first thing that he said was, 'This will be', or, 'This is a difficult conversation.'
- [Mr. Wilks said] “my coaching was a conflict of interest and, therefore, if it continued I wouldn't be able to maintain my employment. I said back to him, 'But you have known about this since March', and he said, 'I haven't known about it until now', and I pointed to the seat Suzie, he and I had sat in in March and said: We sat there and I told you both and you said - you asked me about coaching with clients and I confirmed it.
- I think from there, he rang Suzie... I heard him ask whoever was on the other end of the phone the question, 'Have you ever heard of Mike doing any coaching?' something like professionally or something like that, and he put the phone down and then I said, 'Well, what did she say?' and he said, 'She doesn't remember.'
- ... I did try and respond a little bit like around, 'You already knew', but he - there was no room to do that, and at the end he did ask me to go away and reflect. He said, 'Go home and reflect on' - he gave me three areas that were in a text that he sent later. So there was one around the shareholding. There was one around my role definition, and off the top of my head, like medium to long-term plans, and come back to him via email with thoughts on those three areas.
- [Mr. Wilks then asked Mr. McGregor] 'These are the three areas I want you to consider.

[68] Later that day, Mr. McGregor sent an e-mail at 2:56 PM which sought to address the matters which Mr. Wilks asked for in the meeting. It included a table with three columns covering his “Role at Anteo”, “MM/AW Working Together” (which I take to be Mr. McGregor and Mr. Wilks working together), and “Roles outside of Anteo.” The last of which dealt with his part time coaching and counselling.⁵⁴

[69] This e-mail included the following introductory words:

As I wrote this, I realised there were bits I've locked away gradually that probably does build up and take joy away. *I guess some of the fear is gone as you've already talked about ending employment*, so here's how I see things. Warts and all, here's what I need.... **(emphasis added)**

[70] Later that evening at about 8:00 PM, Mr. Wilks sent a text which essentially asked him to reflect on Anteo's business and strategy document, the role he saw for himself at Anteo in the short, medium and long term, what would "success need to look like for him" and what capacity would Mr. McGregor like to be in either as an employee or shareholder.⁵⁵

Anthony Wilks

[71] Mr. Wilks deals with the lead up to the 20 November meeting as well as the meeting itself in this witness statement:⁵⁶

On 8–11 November 2024, I learned of his coaching via LinkedIn drafts ...listing a role since March 2024. I queried his intent, and he implied it benefited Anteo, but I requested further discussion, not approval.

On 20 November 2024, I had viewed his Instagram... and met him at Axil café. I raised concerns about conflict questioning the business's scope, resource use, and solicitation. He confirmed operating it, intended to continue, and proposed integrating it into Anteo, which I rejected as misaligned with our recruitment focus. I called Suzie Wilks, with the Applicant present, who denied knowledge of his commercial coaching, communicated to him in real time.

[72] Mr. Wilks elaborated on his witness statement in his oral evidence and stated:⁵⁷

The meeting itself

- "They went through [Mr. McGregor's] coaching business and was asked what he was intending to do with it. He said that "he was coaching and he was passionate about his coaching. He said that he felt that it was his purpose to fulfil long-term, that he was, you know, not loving his role in recruitment and, you know, open to doing it on a short-term arrangement but not really looking at doing it long term. He did explain to me where his coaching would provide value to Anteo." -I couldn't really see, apart from him fulfilling his role as a manager with our own team, where we would be able to take advantage of that."

Discussion about the coaching and counselling

- "He did confirm at that time that he was doing sessions which he stated was outside of work and not during work hours...which was the first that I'd learned of it, and I accepted him on those merits, that he was doing it. I asked him whether or not these were paid. He said they were. I said to him on the walk back to the office, 'If this is something that you're passionate about, why is it that you need to get a paid service for it?' I shared a personal experience of catching up with people, myself, outside of work on a weekend, just to help them out with a resume. He'd mentioned that the clients would not take the service seriously unless it was paid for. I asked him whether or not he was providing the coaching/counselling to any Anteo clients or candidates. He said that he wasn't and that he didn't intend to. ... Mike had raised that organically clients or candidates of Anteo might come across him, and I asked him how he would manage and handle that situation. And we talked about the potential liabilities because Mike and I had a personal relationship enough to know his own faith and position and those sorts of things. I was identifying some potential risks associated with the types of methods that might be included in those catch-ups, which was where Mike had confirmed to me that he needs to be very careful around those interactions because they can come back,

depending on, you know, what might eventuate with a client, which could be outside of his control.

- “When I advised him that I was not aware of him doing a coaching/counselling business, he said that I was. He said that both Suzie and I were. He is correct in saying that he stated that he had caught up with Suzie and I – my wife, who does work in the business – and that it had been discussed...I told him that I didn't recall that, and as far as I know that didn't happen... and then I said to him, 'Well, I'll just give Suzie a call and I'll ask her.' It was the first time that I'd heard of this particular thing. So, I called Suzie and I said – and I didn't tell her that I was sitting down with Mike. I said, 'Are you aware that Michael is running a coaching business?' And her answer was, 'No.' And I ended the phone call.”

Discussion about Mr. McGregor's future in the business

- “... We talked about what role that he's seeing with us, what role that he's seeing with us long-term. You know, he shared with me challenges that he was having with me, challenges that he was having in his role in recruitment, where he's seen the coaching going long-term. I gave him feedback on – a lot of it was not really making much sense because Mike and I would meet weekly, if not every other day for coffee and go through everything, so it didn't really stack up for me as to some of the things that he was saying and which he put through on email as well. And we are not in a position to provide these types of services to our clients.”

Mr. McGregor's Instagram page

- “I got home that evening. I asked her to show – Michael had said to me after that phone call that Suzie was aware because Suzie was following Mike on Instagram and that she would have been familiar with all of his posts and materials. I went home and I asked her if she was. She said, 'No'. I asked her to give me her device because I don't have an Instagram account, and I went to the pages and I could see excessive amounts of posts, including coaching, including counselling, including different types of practices, which came as a shock and came as a great concern.”
- “It was heavy because the – we had gone through our own period of building a new website, a new application. We were going down a path with our own content strategy. We knew how long it would take to produce material and articles and marketing materials, and I'm looking at an Instagram page that was extensively. Updated and I couldn't work out for me how someone could produce as much material and hold down a full-time job. -So, I had concerns that he was using his time on company time because we had given some flexibility around where Mike would work, if it was from home, if it was from the office. And I had great reason to believe – and concern, that this was coming as a detriment to Anteo, especially considering the financial loss that we'd incurred, and a key client loss which has made a massive impact.”

Ms. Wilks' phone call during the 20 November meeting

[73] In her oral evidence, Ms. Wilks remembered Mr. Wilks contacted her during the 20 November meeting. She was working from home and received a phone call from Mr. Wilks. Mr. Wilks had asked her, “Do you follow Mike on Instagram” to which she answered: “I think so” and then asked her, “Were you aware that Mike was running a coaching and counselling business” and she said “No”. She could not recall being asked about the March meeting.⁵⁸

21 NOVEMBER MEETING

Michael McGregor

[74] Mr. McGregor summarises this meeting in his witness statement:⁵⁹

On 21st November 2024, I met Anthony again at another café. He spoke continuously for 90 minutes about his business vision and the reasons I should become a shareholder. We did not discuss my email. At the end he asked me if I wanted to invest in the business. I said “no” and he stated: “You’re done then.” I responded, “You terminated me yesterday.” He replied, “Yes I did.” He then asked me to return my equipment, which I did.

[75] In his oral evidence, he said:⁶⁰

- So he text me again the night prior, I think approximately 8 pm, with the list of the items and to meet the next morning at - I think that was also 10 am at a different café. He mentioned a café that he knows I like closer to my home.
- So we met there, sat down, and I usually let him speak because he's always got things that he wants to say and he - I didn't know where the conversation was going, but it was a 90-minute pitch, essentially, to invest in the business. There was no reference to the email, to the details of the conversation the day before.”[Mr. Wilks explained] where [Anteo] is going and why I would be a part of it, and at the end he said something to the effect of, 'Do you want to be a part of it?' and at this point my answer was really clear, which was no, so I said that.
- He pointed his finger at me, the way Trump does, and said, 'You're done', and then we had the exchanges here, which is, 'You already terminated me yesterday.' He said, 'That's right.' In there I did say that I didn't resign, because I wanted to protect myself and not have somehow this classified as a resignation, which it wasn't. And he said, 'That's right. Yes, I did', and he said, 'Give me your phone. Give me your keys.' I handed my phone over and then I said, 'Do you want me to put the PIN number in', and he's like - he grabbed it off me and said, 'No, don't touch it.'

Anthony Wilks

[76] Mr. Wilks’ written evidence of the meeting was:⁶¹

On 21 November 2024, we met again. I reiterated the conflict and solicitation concerns, asking if he’d cease coaching. He refused, became hostile, and tossed his work equipment (phone, keys) across the table, leaving abruptly before returning with additional equipment (e.g., laptop). I notified Carlisle Homes to outlining the discovery of the coaching and counselling business and the aim to fulfil and uphold our partnership.

[77] He elaborated on this in his oral evidence:⁶²

I did not pitch him my business for 90 minutes. That's just simply incorrect. That didn't happen. When we met on the 21st, we probably spoke for 45 minutes or so about the conference day that Mike had attended at Carlisle Homes, which was in Melbourne, and the activity around the Formula 1 theme and those types of things. And he became agitated ... the conversation didn't go in the direction that I wanted, and he said to me that he would be refusing to resign from his role. And I said to him that we would be unable to continue the employment. The meeting wasn't there to talk about Carlisle. It was, if you like, a bit of an icebreaker to try and, you know, remove the tension from the meeting...I asked him if he's had time to reflect on our conversation from

the day before, and how he's seen his role here at Anteo and moving forward. His position did not change, and I asked him where he's seen it from here.

[78] Mr. Wilks continued:

He just wanted to do coaching and counselling. He didn't want to work in his role in recruitment. He stated that he was begrudgingly doing the role and that if he was doing it over any more than six months, then he'd be basically out. He'd resigned a year prior. I did everything I could to keep him at that time. I know he received a generous offer from another company which I wasn't aware of, and I told him I'd do what I can to keep him, that he's important to our business and our organisation, which he was. And, you know, we were sitting down again - - - He basically said to me that, 'I'm not going to resign from my role.' And I said to him that he won't need to resign from his role, and that, if necessary, that I'll terminate his employment due to serious misconduct. That set him off. He obviously was upset by that. He was just agitated. He was obviously frustrated, which I could understand, as I was – it's not a comfortable setting to be in. And I asked him to hand me his keys and his phone, which he had, and he virtually threw them at me across the table. He stormed out of the café straight away. I picked up the bill, and he returned to the office later.

TEXT EXCHANGE ON 21 NOVEMBER 2025

[79] Following the meeting, Mr. Wilks sent Mr. McGregor a text message asking “if required will you be willing to serve out the notice period? This would mean remaining full accessible and available to Anteo as required. This will help determine the official end date, final pay and terms of termination.” Mr. McGregor responded, “Yes that is fine” to which Mr. Wilks responded, “I’ll send you an e-mail summarising everything.”⁶³

COLLECTION OF INFORMATION ON THE PAID COACHING AND COUNSELLING INCLUDING THE “AUDIT” OF THE WORK PHONE AND LAPTOP

[80] In the “Factual Chronology” which was part of Anteo’s outline of argument, it noted that after the 20 November 2024 meeting a “subsequent audit was conducted” which “uncovered” coaching notes, client bookings during work hours and SMS solicitation of Anteo candidates/clients.⁶⁴

[81] Mr. McGregor argues the documents which were discovered through the audit were “created and discovered” after he had been dismissed and are therefore not relevant to the determination whether Mr. Wilks “believed on reasonable grounds” that Mr. McGregor was guilty of serious misconduct or whether he was dismissed for a valid reason.

Mr. Wilks

[82] Mr. Wilks gave evidence from the time he sent the LinkedIn profile that mentioned both his job at Anteo and his coaching and counselling business he began searching for information about it.

[83] He referred to this process by which he gathered information in cross examination by Mr. McGregor. He said he discovered Mr. McGregor had registered an ABN following Mr. McGregor sending him his e-book in September 2024. He went on:⁶⁵

...And then you notified me on 8 to 11 November in regard to the LinkedIn profile drafts which was the first time that I'd learned of your external business, and we met to discuss it and go through it, which we did. We discussed your Instagram page that you mentioned on 20 November. You said that Suzie was following you and that she was aware of it. I called her. She wasn't. I went home. I looked at the Instagram and it was clear – the activity levels and types. All of these things are – audit and subsequent audit both before, during and after, including the steps that we've had to take with the Commission in terms of putting forward the material on the specific dates.

We met on the 21st and I asked you to return your phone, and I had mentioned to you that I would get back to you on a final pay and in terms of termination, and I went through your phone and we went through the work email at the time of us establishing what was going to be the grounds for dismissal for serious misconduct. That was something that I did personally, and I asked for Denzel's assistance with as well.

Denzel Fuller

[84] In his written statement, he confirms he was involved in the audit:⁶⁶

Up to 20 November 2024 I had no knowledge Michael McGregor was running any coaching or counselling business. He never raised it with me, and I never saw any reference to such a venture.

After Anthony Wilks alerted me to an Instagram account promoting Mike's coaching services, I audited Mike's work phone and e-mail. The audit showed Mike had registered an ABN on 27 July 2023 and engaged a marketing consultant to build a website. E-mails revealed he was booking consultations during office hours, sending coaching notes from his Anteo laptop to a private address, and even asking Anteo candidates for favours in return for help through his new business. He was clearly using company time and equipment to set up, operate and promote the venture.

[85] Mr. McGregor cross examined Mr. Fuller about his involvement in the audit:⁶⁷

- He confirmed he performed an audit which included an examination of the ABN register and Mr. McGregor's business came up.
- He audited his phone and laptop. He went through his mobile phone and Outlook account. After he had done these searches, he showed Mr. Wilks screenshots, saved outlook items, e-mails "and stuff".
- He confirmed he performed the audit "around the 20th November".
- He based his written claim that Mr. McGregor was using company time and equipment to set up, operation and promote a venture" on the basis of the dates of the e-mails which were "lining up to work hours".
- When asked by Mr. McGregor whether there was another explanation for the that he was using company time and equipment to run a business he said, "There was also the text messages to candidates and clients on the company mobile device that were clearly during company hours as well."

[86] The documents in evidence which Anteo claim prove a conflict of interest and a serious breach of his contract during his employment include the following documents.

Instagram page and Website⁶⁸

[87] Mr. Wilks gave oral evidence in relation to Mr. McGregor's Instagram Account which he first saw when he discussed it with Ms. Wilks on the evening of 20 November 2024. Mr. Wilks said in his oral evidence "I went to the pages, and I could see excessive amounts of posts, including coaching, including counselling, including different types of practices".⁶⁹

[88] Unhelpfully Anteo has not included screenshots of his Instagram Account or his personal website *prior* to the termination of his employment on 18 December. The material in evidence includes posts up to April 2025, months after his termination.⁷⁰

October 2024 SMS exchange with "Cat"⁷¹

[89] There is in evidence an SMS exchange with "Cat" from 19 October 2024 at 4:45 PM. It commences with the following post. Following this post there is a discussion about resume services

Mike, thank you for your time just now! It has me thinking... I went and found some of the resumes I received that are aesthetically pleasing and this may be a bit stretched but is there any particular colour palettes that are favourable to use? Cheers Cat

[90] The two concluding posts are as follows:

Cat

I was thinking about what you said where you were thinking if you would do resume service but I would definitely pay for service for a HR recruiter to do that aspect with resume. It's a drain and takes so much time so I'd definitely outsource it. You could have a meeting to understand what client wants to include / how to market and go from there :)

McGregor

Agree it's a drain! For me too, I don't want to do it – it's more of an old thought when I didn't know what I wanted to do.

I'm focusing on counselling & coaching people at points of transition / transformation. Accessing Inner guidance, emotional release and then the actions, structure, loving confrontation to move forward.

[91] "Cat" was not a client or associated with Anteo.⁷² In his evidence, Mr. Wilks explained his reason for including this text exchange:

"She was asking Mike to provide her assistance on her resume which is a service that we do provide, and I noted that because I explained to Mike that we don't do psychology or some of the practices that he participates in, but we absolutely provide candidates with recruitment services which include generating a resume or generating a public professional profile. Mike's role was to help us achieve revenue targets quarterly and that included providing those types of services. Mike's text message to that person says that he's not interested in doing that anymore and that he wants to do coaching and counselling and it was done during company time on a company device which is not the reputation or the profile that we want to have in market".⁷³

27 March 2024 at 4:24 PM to 19 July 2025 7:21 PM SMS Exchange with “Elona”

[92] This SMS material involved Elona who was a Sales Consultant with Mahercorp Pty Ltd which trades as Eight Homes who Mr. McGregor conceded had been a recruitment candidate with Anteo.⁷⁴ In cross examination from Mr. McGregor, he said “so my understanding is she's a sales consultant. This is a candidate which Oscar was working with at the time, so I'll refer to him later on...”⁷⁵

[93] The first SMS involves Elona and Mr. McGregor setting up a meeting. It commences as follows:

Thank you again for the phone call, was lovely speaking to you. Also I appreciated all the information and insights you shared.

Just wanted to say, regarding our meeting next Wednesday, that I actually could do even maybe 9.30 -10 am, if that works with your schedule.

Please feel free to contact me if you need.

Looking forward to meeting you next week.

Thank you

Elona

[94] There are a series of text messages following until April 2024. The last three SMS messages in the exchange are as follows:

McGregor

Thanks Elona, and for coming all the way over. This week has been quite extreme with a lot of business challenges, I'm a co-owner of the agency, so have been pushed for time.

I wasn't sure what we were meeting for, but as I've always enjoyed when we chat and my work is all about meeting people I was, and am happy to. Now that I've had a moment to collect my thoughts important to share that I'm very happy to stay in touch professionally, but in the personal side I'm working through a bit and just know that I need to do that I am not open.

I totally hear you on intuition guidance, I rely on it also, I find the tricky part interpreting the 'reason'. My best guess, but only you can know, is maybe there is something in my work outside of recruitment for you. Not necessarily suggesting working together, just maybe something just in the message I have for the world. I Don't know, but happy to share a little if that calls to you at all.



Elona

Thanks Mike. Yes absolutely, I'd be happy to hear more about what you do and whatever I can learn from your experience.

I don't feel like there was one specific reason that pulled me towards reaching out to you ... but definitely the energy that I've always felt from you from our conversations was a major part.

I understand the not feeling ready to open up part, I'm on the same place. And even when I'll feel more ready, I don't feel that I would want anything serious.

But I'm open to build some new friendships, hopefully with like minded people. 😊

McGregor

Thanks Elona. Well it's definitely nice to connect with you. When we were recruiting it was interesting, I got to your name on LinkedIn and said to Mairead – 'we need to call her'. I don't know why exactly either but it was absolutely crystal clean and precise. So we called you. :)

Here's my website with some content, also on Instagram – there's a link on website within the menu. I have a short free E-book I am releasing next week after months/years of work – if I had to guess there might be something in that.

Elona

Oh wow congratulations! That's a great achievement, you must be so proud 🍷

McGregor



SMS Exchange with “Kelly” on Wednesday 24 July 2024 and following

[95] The last SMS messages in evidence are between Kelly Douglas and Mr. McGregor. Kelly is a HR Officer who I understand works for Carlisle Homes which is a client of Anteo. In performing his role, Mr. McGregor worked from Carlisle's Office “two or three days a week”.⁷⁶

McGregor

Hey Kel, here's Sarah Blondin's work - it's via a free meditation app called insight timer. You could probably find her stuff somewhere else if you don't want a new app, but the app is really good for all sorts of free meditations etc.

She's got me through ALOT ALOT ALOT over the years. I hope her words ease and support you also.

- Mike :)

Kelly

Thank you so so much Mike, I really appreciate this. Keen to immerse myself back into the meditation world because I know how beneficial it was for me in the past.

Have a great day!

Kelly 😊

McGregor

Hey Kel

Ok, spoke to my friend and she's happy for me to pass you her details. I haven't told her anything, that's all between the two of you.

<https://www.healingfortheilluminatedsoul.-com.au/>

[NAME AND E-MAIL REDACTED]

Can text her to setup a time if you wish to.

Kelly

Thank you so much!!! 😊

McGregor
Very welcome!

[96] Mr. McGregor contextualised this exchange as follows:⁷⁷

I had come into the office. She was in the kitchen crying and she started telling me about her son who had a brain condition and the stress on her, and I think we spoke for maybe 20 minutes, and in that I suggested, you know, 'Maybe I can send you a meditation, a free meditation if that helps', because she talked about what she was trying to do to manage the anxiety. She asked me if I knew of anyone that maybe she could talk to and I proposed a contact for her there.

E-mails from work e-mail to personal e-mail

[97] There are a series of e-mails from Mr. McGregor's work e-mail to his personal e-mail:

9 September 2024 at 10:51 AM

[98] The text of this e-mail is:

- Review – E book
- Marketing Posts – Podcast, Retreat, Course
- Create Models
- Create Style Guide
- SEO – Keywords
- Daniel \$60 per hour

[99] This clearly relates to his counselling and coaching business. Mr. McGregor says “this e-mail contains brief, planning notes, drafted during my entitled lunch break”.⁷⁸

10 September 2024 e-mail sent at 2:34 PM

[100] This e-mail contained the following text:

“Marketing – differentiation positioning

Who: those who want to reach full potential. Already operating moderate success, want to reach more. Coaches, health practitioners.

Be clear about pain point fulfilling. How doing it and why doing it.

Proposition not clear. What is the method, what is it I do that's really different.

Scepticism what does a coach actually do.

Start with objectives. What does success look like? Not 40 clients per week, download, automations (how commercialise) Product and Service ladder

Consumer Pain point – make tangible”

[101] Mr. McGregor says “this was a short private note created during my entitled lunch break”.

28 September e-mail

[102] The e-mail is dated 28 September 2024 at 1:36 PM. The subject of the e-mail was “coaching call”. It has a stream of consciousness narrative under three headings which I assume are names of individuals “TIFF COACHING, SIG COACHING and MIKE COACHING. An example of the entries under Mike Coaching is: “left for me to do no respect. Past: tit for tat, since child, exhausted being a mum, hw’s it fell to be a um, always felt I was a single mum – felt like I was doing it myself. Trigg by wound -inherited...”

[103] Mr. McGregor says these are notes taken between 5:00 AM and 6:00 AM on 27 September 2024 before working hours while completing a course. The e-mail was sent as a reminder to archive to notes from the work laptop on my personal account.⁷⁹

[104] There is an e-mail chain in evidence between Mr. McGregor, Sigrid Peters and Tiffany Stone.⁸⁰ Basically, it is to set up a Zoom meeting at 5:00 AM on 27 September 2024. In one exchange, Ms. Peters writes “I’m really excited to be on this course”.⁸¹

9 October 2024 at 10:24 AM from work to personal e-mail

[105] This e-mail was entitled “Counselling Workshop Notes”. It had a series of headings and dot points including the following “Assignment 1 ideas for developing personal and professional self-awareness” with dot points: “emotional intelligence, self-care, trait theory, wellness wheel”.⁸²

[106] Mr. McGregor says that these are notes from a counselling workshop, taken on approved annual leave. He also states “the time stamp reflects when I forwarded the notes, not when they were created”.⁸³

DID ANTEO COMPLY WITH THE SMALL BUSINESS CODE?

[107] It is not contested that at the time of the termination of Mr. McGregor, Anteo employed fewer than fifteen persons. In order that I may be satisfied that his dismissal is unfair I must determine whether the dismissal was consistent with the Small Business Fair Dismissal Code (the Code).

[108] The Code states the following:

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 SUMMARY DISMISSAL LIMB OF THE CODE

[109] Mr. McGregor was dismissed on 18 December 2024 after four weeks' notice which he worked on gardening leave. It is arguable that a dismissal with notice cannot be a summary dismissal under the first limb of the Code.

[110] The decision of Commissioner Cambridge in *Zotti v. Hall Industries Australia Pty Ltd*⁸⁴ involved the termination of an employee for failing to follow lawful orders. Mr. Zotti was advised his employment was terminated for serious misconduct, paid out two weeks in lieu of notice, and left the employment that day.

[111] In the course of his decision, Cambridge C found (with emphasis added):⁸⁵

In this instance, upon termination of employment, the employer paid the applicant an amount equivalent to two weeks' notice. *However, apart from this payment, the dismissal contained all of the elements usually associated with a summary dismissal. In particular, the reasons for the dismissal involved serious misconduct and the implementation of the dismissal was summary in nature.* That is, the applicant was advised of his dismissal without there being any contemplation of further explanation or defence by way of a show cause process. ...

...

A dismissal which is for reason of serious misconduct, and which might appropriately justify termination without notice or warning, should still be properly assessed as a summary dismissal notwithstanding that an employer, for whatever reason, decided to make payment of an amount in respect to a putative period of notice. Broadly speaking, the SBF Code establishes requirements for dismissal without notice or warning which represent a less stringent evidentiary basis upon which any serious misconduct is established when compared to the evidentiary basis that applies for a medium/large business. Similarly, the SBF Code sets out less stringent requirements for other dismissals than those which apply to a medium/large business.

That part of the SBF Code which deals with summary dismissal is concerned with the evidentiary basis upon which a small business employer establishes serious misconduct. While the other dismissals part of the SBF Code introduces a less stringent set of procedural requirements than applies to a medium/large business. The requirements that are mentioned in the SBF Code as being relevant to cases of other than summary dismissal will invariably have little or no relevance to circumstances where a dismissal is made without notice or warning and is based upon serious misconduct. It would be contrary to the spirit and intent of the SBF Code if, when a small business employer decided to pay an amount in lieu of notice in respect to a dismissal for serious misconduct, it was required to satisfy the procedural requirements of the other dismissals part of the SBF Code.

Therefore, although the dismissal of the applicant was not, in a strict legal sense, a summary dismissal because an amount was paid in lieu of notice, in all other respects the dismissal was manifestly in the character of a summary dismissal. In particular the dismissal was, in the employer's view, for reasons of serious misconduct justifying the immediate termination of employment invoked at the earliest opportunity. Consequently, it is appropriate to apply that

part of the SBFD Code which relates to summary dismissal to the circumstances of the dismissal of the applicant.

[112] This case can be differentiated from *Zotti*. *Zotti* was immediately dismissed and left employment on that day with a payment in lieu of notice of two weeks. Cambridge C concluded that “in all other respects the dismissal was manifestly in the character of a summary dismissal” Mr. *Zotti*’s employment was over that day. The same cannot be said in this case.

[113] Termination of Mr. McGregor’s employment was not “invoked at the earliest opportunity”. Anteo dismissed Mr. McGregor on four weeks’ notice to be worked out on gardening leave for breaches of contract which included breach of the “serious misconduct” provision of the contract. After Mr. McGregor was informed he was terminated on 21 November 2024, there was a text interchange where Mr. Wilks asked “if required will you be willing to serve out the notice period” to which he responded “that’s fine”.

[114] The termination e-mail formally confirmed the termination of Mr. McGregor’s employment “effective on 18 December 2024 (inclusive of four weeks’ notice)”. During the notice period, he was expected to comply with the terms of his employment contract. The termination e-mail went on “any breach of your employment agreement and gardening leave terms during this period will result in summarily dismissal”.

[115] Anteo itself has differentiated the dismissal from a summary dismissal by retaining its right to summarily terminate him during the notice period. An employer cannot summarily terminate an employee twice. In my view, an immediate dismissal with a payment in lieu should be distinguished from a dismissal where an employee was terminated on the basis that they will work out the notice period. To use Cambridge C’s phrase, such a termination does not manifestly contain all of the elements usually associated with a summary dismissal.

[116] I therefore find the summary dismissal limb of the Code does not apply to the circumstances of this case.

THE DISMISSAL LIMB OF THE CODE

[117] The “crucial considerations” of “Other Dismissal” limb of the Code are whether the employer:

- Gave the employee a valid reason why he or she was at risk of being dismissed.
- Warned the employee of the risk of being dismissed if there was no improvement.
- Gave the employee an opportunity to respond to the warning.
- Gave the employee a reasonable chance to rectify the problem.⁸⁶

[118] It should be noted here although the Code states an employee can have a support person present in meetings where dismissal is possible, it does not require a support person to be present or that the employee be made aware of this “right”.⁸⁷

[119] The plain language of the other dismissal limb “appears to require a prior warning, for an opportunity that dismissal is a possibility, an opportunity to respond to the warning, for an opportunity to rectify the problem and for a valid reason for dismissal based on conduct or

capacity”.⁸⁸ The second limb of the Code “renders mandatory several matters that are only considerations in the setting of s 387”.⁸⁹

WAS THERE A VALID REASON UNDER THE CODE?

[120] It is well established that when considering valid reason under the Code, the employer is stuck with the reason given to the employee before the dismissal and cannot rely on another reason which may not have been known at the time of the dismissal. This is contrasted with consideration of valid reason under s 387(a).⁹⁰

What are the reasons for the dismissal?

[121] The evidence on the discussion at the 20 November meeting is contested. Mr. McGregor says his employment was terminated on that day, a proposition which Mr. Wilks denies. In the e-mail Mr. McGregor sent to Mr. Wilks following that meeting, he wrote “I guess the fear is gone as you have already talked about ending employment”. What was discussed at the 21 November meeting is also contested. In the text exchange between Mr. Wilks and Mr. McGregor, Mr. McGregor agreed to serve out his notice period.

[122] On 25 November 2024, Mr. Wilks sent an e-mail by which Mr. McGregor was dismissed on four weeks’ notice until 18 December 2024 which was to be worked on gardening leave. It also articulated the reasons why his employment was terminated. The reasons articulated in that e-mail are the reasons relied on by the employer for the dismissal. It follows that these are the reasons I must assess for the purposes of the Code.

[123] Essentially the reason given in the termination e-mail were “breaches of Mr. McGregor’s employment contract” due to:

- Starting and registering a business without the agreement and approval of Anteo or it’s director.
- Operating the business venture concurrently during your employment with Anteo, inclusive of:
 - Creating a website and social accounts dedicated to promoting and selling coaching and counselling services, courses, and materials.
 - Creating a direct conflict of interest with ongoing employment responsibilities, time and focus at Anteo.

This conduct has resulted in a breach of the employment contract for the following:

6. Conflict of Interest:
 - Clause 3.4.5 explicitly requires the employee to avoid all conflicts of interest and refrain from acting in a way contrary to the company's interests. By starting a private business, promoting it, and dedicating time to it, it has created a direct conflict with role and duties at Anteo.
7. Obligation of Full Attention:
 - Clause 3.4.3 mandates the employee to devote their full time, attention, and abilities exclusively to the business of the company. Running a private business constitutes a diversion of time and focus, breaching this clause.

8. Prohibited Outside Business:
 - Clause 3.5.1 prohibits the employee from undertaking any other business or profession that competes with or creates a conflict of interest with the employer. Operating and promoting a private business without full disclosure or approval creates a direct conflict of interest and breaches this clause.
9. Potential Harm to Company Reputation:
 - Clause 3.9.2 prohibits employees from engaging in activities that may harm Anteo's reputation. The coaching business and its branding jeopardises Anteo's professional image with key clientele creating a breach of this clause.
10. Serious Misconduct:
 - Clause 1.1.22 outlines "serious misconduct," including consistent breaches of duties and conduct likely to harm the company's reputation or interests, resulting in a summarily dismissal.

[124] It is noteworthy the termination e-mail only refers to starting and operating a business, including creating a website and social media accounts promoting and selling coaching and counselling services, courses and materials and creating a direct conflict with ongoing employment. It does not refer to any reason related to the documents deriving from the audit which alleged that Mr. McGregor sent e-mails relating to his business during ordinary business hours or the texts on which Anteo now rely.

[125] An employer has a valid reason to dismiss an employee if it is sound, defensible and well founded on an objective analysis of the facts.⁹¹ A reason is not valid if it capricious, fanciful, spiteful, or prejudiced.⁹²

DID UNDERTAKING THE COACHING AND COUNSELLING BUSINESS BREACH HIS CONTRACT OF EMPLOYMENT?

[126] Under clause 3.5.1 of the Agreement, Mr. McGregor was prohibited from undertaking a business which competes with the Anteo or for which Mr. McGregor's involvement or participation would create a conflict of interest, *actual or potential*. Under clause 3.4.4, Mr. McGregor agreed to *avoid* all conflicts and to refrain from acting contrary to the interests of Anteo.

[127] The common law duty of fidelity owed by an employee sets limits on the ability of an employee to plan or operate a business while still employed. This is described by the learned authors in *Macken*:

The implied term does not prohibit the employee during the employment in his or her spare time making some preliminary preparations for setting up a competing business when the employment ends. This will be a matter of degree. There will be a clear breach where the employee during normal working hours, using the employer's resources, establishes a new competing business or starts working for a competitor. The decisions in this area are particularly "fact sensitive". But generally, there is no breach for preparatory steps not involving breaches of the duty of confidence, solicitation of customers or diversion of business opportunities. Making inquiries, developing a business plan¹² and incorporating a company¹³ in the employee's own time are unlikely to be sufficient. But the next steps, financing, renting and

equipping premises, and recruiting employees may move beyond preparatory steps and may constitute a breach.⁹³

[128] The contractual prohibition binding Mr. McGregor from undertaking a business which would create an *actual or potential* conflict of interest together with his obligation to *avoid* conflict are much broader than the common law duty of fidelity. Any undertaking of a business outside of his employment with Anteo has, at least, the potential to lead to a conflict of interest between his pursuit of that undertaking and his duties as an employee. If operating a business while he was employed by Anteo *could* create a conflict, then he had an obligation to avoid that situation.

[129] This is reinforced by his contractual duty in clause 3.4 to devote the whole of his time, attention, and abilities exclusively to the business of Anteo. It is arguable this obligation was not limited to ordinary business hours. Schedule 1 Item 6 prescribes his set hours which were 9:00 AM to 5:00 PM Monday to Friday with a one hour lunch break. The hours of work in the Schedule *are not* called up into the body of the Agreement by the exclusive attention clause 3.4 (or anywhere else). By contrast, other provisions of the Schedule are directly called up in the body of the Contract (for example: non-salary benefits in Item 1 Schedule 1 is called up in clause 7.2.1, period of notice in Item 9 Schedule 1 is called up in clause 10.2.1, or the provision for possessing a licence and vehicle use in Item 8 Schedule 1 is called up in clause 8).

[130] It is at least arguable the exclusive attention obligation extended beyond normal business hours, particularly for a management employee. The obligation to give the whole of his time, attention and abilities exclusively to Anteo would not require him to work 24 hours a day for Anteo. It would require that he not be distracted from giving his whole-time attention and abilities exclusively to Anteo by activities which he undertook outside normal working hours.

[131] At the time of the termination e-mail, Mr. Wilks was aware of the following documents in relation to Mr. McGregor’s coaching and counselling business:

- Mr. McGregor telling him at the 20 November 2024 meeting that he was taking paid clients in his business (I will deal with the condonation argument separately).
- The existence of his ABN.
- His proposed LinkedIn page which referenced both his employment at Anteo and his “part time” undertaking as a coach and counsellor.
- His e-book with references to his many social media platforms devoted to coaching and counselling namely: podcasts, his website, his Instagram page, his YouTube content and the invitation to “book a discovery call with me”.
- His Instagram page entries in relation to coaching and counselling (which Mr. Wilks says he discovered on the evening of 20 November).
- Mr. McGregor’s web site devoted to his coaching and counselling business.

[132] The reason given in the termination e-mail related to “starting a business, creating a website and social media accounts associated with that business and creating a direct conflict with is employment responsibilities.” Although a coaching and counselling business does not directly compete with the recruitment business of Anteo it is, at its lowest, adjacent to recruitment activities of his employer. It has the potential to conflict with his employer’s business.

[133] The material produced by Mr. McGregor to support his parallel business in the form of a website, podcasts, Instagram posts, YouTube videos, and the production of an e-book implies a great deal of his time and attention was diverted to his coaching and counselling business. During his oral evidence, Mr. Wilks said this about his reaction to his examination of Mr. McGregor's Instagram page on 20 November:

...went to the pages and I could see excessive amounts of posts, including coaching, including counselling, including different types of practices, which came as a shock and came as a great concern... We were going down a path with our own content strategy. We knew how long it would take to produce material and articles and marketing materials, and I'm looking at an Instagram page that was extensively. Updated and I couldn't work out for me how someone could produce as much material and hold down a full-time job. -So, I had concerns that he was using his time on company time because we had given some flexibility around where Mike would work, if it was from home, if it was from the office. And I had great reason to believe – and concern, that this was coming as a detriment to Anteo, especially considering the financial loss that we'd incurred, and a key client loss which has made a massive impact.⁹⁴

[134] He continued on this theme in his closing argument:

I think on review of the material, he did an excellent job, and I say that wholeheartedly, in producing the amount of content that he did for his business, something which we've discussed internally is almost impossible to document. If we go through the Instagram profile and the materials, it's really extensive. These are things which include video, they include photo, they include content. It includes a website.⁹⁵

[135] I have no reason to disbelieve Mr. McGregor's evidence that he only consulted with clients after hours, however, in circumstances where he was contractually obligated to *avoid* conflicts and prohibited from starting a business with the *potential* to conflict with his employment conduct (subject to his condonation argument), there seems to be sufficient evidence to support a conclusion that undertaking the business breached his employment contract.

[136] I consider that without more,⁹⁶ operating a coaching and counselling business while he was still employed by Anteo breached his obligations to:

- Give his full attention exclusively to Anteo;
- Avoid conflicts; and
- The prohibition not to start a business that had the potential to lead to a conflict of interest between his personal business and his employment at Anteo.

[137] Leaving aside the question of condonation (which I will consider below), it is not contested that Mr. McGregor started taking paid clients in his coaching and counselling business in March 2024. The operation of the business can be argued to amount to serious misconduct under the clause 1.1.22.2 because the breach was “persistent” in that it continued from March until November 2024.

[138] Mr. McGregor gives two reasons why, if there was any breach of contract, it could not be a valid reason for dismissal:

- Anteo was aware of his coaching business from March 2024 and therefore the any breach of contract was condoned and therefore waived.

- The real reason for his dismissal related to his refusal to sign a shareholder agreement for shares in Anteo on advice from his accountant.

THE CONDONATION ARGUMENT

[139] The elements of condonation sufficient to waive a breach of an employment contract were summarised by Gillard J of the Supreme Court of Victoria in *Rankin v. Marine Power International*⁹⁷ (the emphasis is added):

Consistent with the authorities, the plaintiff who relies upon condonation... would have to prove

- (i) ...the employer had *full knowledge of the employee's misconduct*
- (ii) ...with that knowledge, the employer retains the employee in his service
- (iii) Having made the election, he deliberately abandons his right to summarily dismiss the employee.

[140] I will now examine the evidence on the various circumstances Mr. McGregor says he informed Anteo of his coaching and counselling business.

March 2024 meeting with Mr. and Ms. Wilks

[141] Mr. McGregor's evidence was that in March 2024, he informed Mr. and Ms. Wilks that he was coaching one client a month and that he had coaching work coming up for a private client which he had met through a coaching course. According to Mr. McGregor, Mr. Wilks then said, 'You're working with clients' and made no further response.

[142] Mr. Wilks categorically denies that Mr. McGregor disclosed paid coaching in March 2024 in his written and oral evidence. He says generally that Mr. McGregor's communication referred to counselling that he had received, retreats, acupuncture, and spiritual exercises.

[143] Ms. Wilks says generally that she knew Mr. McGregor took leave "for mental health retreats". In her oral evidence, she says that the March 2024 disclosure that Mr. McGregor was taking paid clients "never happened" and she could not recall any conversation in March 2024 where coaching and counselling was brought up.

[144] Mr. McGregor argues I should treat the corroborating evidence of Mr. and Ms. Wilks as suspect because they are husband and wife. My observation of their disposition in the witness box, including under cross examination, was that they appeared to be telling the truth. It follows the balance of evidence supports a finding that he did not raise his coaching and counselling business on that occasion.

12 July 2024 LinkedIn post

[145] Mr. McGregor's evidence is he posted that he received coaching certification from the International Coaching Federation on his LinkedIn profile. According to Mr. McGregor, Mr. Wilks asked about this credential. Mr. McGregor explained it supported his professional credibility. Mr. Wilks could not recall this conversation.

[146] Knowledge of a professional qualification is not knowledge of the business of coaching. This cannot support a condonation argument.

Discussion of coaching at team meetings and other work interactions from March to November 2024

[147] Mr. McGregor says that at weekly team meetings he would “openly share” updates on his coaching activities including general discussions about new clients. This included one on one discussions with Mr. Wilks where he did not express concern. According to Mr. McGregor, Mr. Wilks had stated that he saw the coaching as complimentary to his work at Anteo.

[148] Mr. McGregor called Ms. Ramilo, who left Anteo in June 2024, to give evidence on his behalf about the team meetings she attended between March and July 2024. She noted in her written statement that she knew about Mr. McGregor’s coaching because he “regularly spoke about it in the office”.

[149] She said in her oral evidence that Mr. McGregor was very proud that he was “commencing his studies and put down actually a big payment to start your studies”. Mr. McGregor took her to her written statement and she said, “we would go around the whole team and share what we were achieving personally and professionally, and we would go around the table and share you know, what we have been doing.”

[150] Mr. McGregor then asked a leading question: “and was it clear to you that was related to clients as opposed to just purely study?” She said yes. After I noted the leading nature of the question, Mr. McGregor reformulated it and she answered “You would talk about your studies, but also how you were applying your studies to your sessions with clients.”

[151] In an answer to cross examination questions from Mr. Wilks, Ms. Ramilo conflated Mr. McGregor’s studies for his own personal wellbeing and his business. Ms. Ramilo said that “he would have meetings in the evenings with a number of clients that he was working... I know for a fact he was doing breath work, yoga and had a network of clientele through there that he was networking with and coaching through”. When asked by Mr. Wilks whether he “was providing yoga and breath work as part of his business”, she responded “I mean as a holistic overview of wellbeing, and I believe that’s a lot of what Mike’s business is about”. In answer to the question whether Mr. McGregor’s business was providing yoga and breathwork or was he attending those for his own personal wellbeing, Ms. Ramilo said “he was attending those for his own personal wellbeing. That’s where he had a network”.

[152] Mr. Wilks said in his witness statement that Mr. McGregor never disclosed paid coaching, only personal counselling for his own business not coaching” and “his communications referred to personal wellbeing and support”.

[153] Ms. Wilks gave evidence that she could not remember “a years’ worth of team meetings”, but “I think I would be aware if he said he was running it” [meaning coaching and counselling as a business]. She explained she would remember it because “someone would have picked it up if it happened”. She did recall Mr. McGregor discuss studying and exams coming up.

[154] Mr. Fuller gave evidence that “he did not recall any occasion at team meetings where the coaching and counselling meetings came up and there were not discussions about coaching and counselling at all ... other than his studies”.

[155] In his witness statement, Mr. Duddridge said he had no idea that Mr. McGregor was running or planning a coaching and counselling business and said the “he never mentioned it at work, and he never saw anything about in in e-mails or chats”. In answer to a question I asked, Mr. Duddridge said Mr. McGregor discussed coaching and counselling “for the purposes of study”.

[156] Mr. McGregor and Ms. Ramilo (in her written statement) give evidence that Mr. McGregor frequently raised his coaching and counselling activities in team meetings. Ms. Ramilo’s oral evidence is more equivocal, and outside a response brought about by a leading question, her evidence conflated his coaching studies and the network he had established through that study and his paid coaching.

[157] All other witnesses who attended team meetings: Mr. Wilks, Ms. Wilks, Mr. Fuller and Mr. Duddridge all give evidence that he frequently discussed his coaching studies, but not his coaching and counselling business. Mr. McGregor says I should disregard their evidence because all these witnesses have a relationship with Mr. Wilks. I observed each of those witnesses in the witness box and I have no reason to disbelieve their evidence on the team meetings.

[158] There is a contrast between the written statement of Ms. Ramilo and her oral evidence. In her oral evidence, there was some conflation between the network which Mr. McGregor had with other students in his coaching course and paid coaching. It may be that other participants in the meetings were left with the impression that Mr. McGregor was engaging in coaching as part of his coaching course rather than as a separate paid business.

[159] Four of the six witnesses gave evidence that he discussed his coaching course and not his coaching business. Ms. Ramilo’s oral evidence of what Mr. McGregor discussed at the team meetings suggests it may not have been clear whether he was discussing paid coaching or coaching exercises as part of the coaching course. That leaves the evidence of Mr. McGregor to establish that he discussed his paid coaching business. This is an infirm basis to find that the employer had full knowledge of his coaching business.

Discussion About E-Book At a September Team Meeting

[160] Mr. McGregor gave evidence that at a September team meeting, he raised that he had just completed an e-book which took him a year to write and Mr. Wilks stated that he saw it as complementary.

[161] Mr. Wilks did not recall this discussion, nor did he recall saying that he thought the e-book would be complementary to his work at Anteo. He did recall telling Mr. McGregor that his coaching study was complementary. Ms. Wilks could only give limited evidence on this topic because she worked from home other than on Monday and Friday. She did not recall a discussion at a team meeting about an e-book. Mr. Fuller, in answer to a question about Mr.

McGregor mentioning the e-book and Mr. Wilks saying the e-book was complementary, said that it “did not happen”.

[162] Informing your employer that you wrote an e-book is not informing it of a coaching and counselling business. Also, a recognition by Mr. Wilks that an e-book is complimentary to Anteo’s business (which is contested) is not a concession that he regarded the coaching and counselling business as complementary. This information is of low weight to an assessment of a condonation claim.

8 September e-mail of the e-book to Mr. Wilks

[163] It is not contested that on 8 September 2025 Mr. McGregor sent a complete copy of his e-book to Mr. Wilks. Mr. McGregor styles himself “Human Potentialist, Coach and Counsellor” on its cover. It also had references to social media links to his Instagram page, his website, his YouTube Channel, his podcast, and to “book a discovery with me”.

[164] The e-mail to which the e-book was attached expressly stated he was sharing it *without* an expectation that Mr. Wilks would read it and that he was open to comments about it from an Anteo business point of view. Mr. Wilks responded “congrats on releasing it. I’ll read it”.

[165] In his oral evidence, Mr. Wilks confirmed he did not read the e-book.⁹⁸ If Mr. Wilks had read the book he would have got a hint that Mr. McGregor was touting himself as a coach and counsellor. The e-book was attached to an e-mail which said that “there was no expectation of any sort e.g. read it at all.”

[166] At its highest, an examination of the book may have implied the secondary career Mr. McGregor was pursuing. It falls short of clear evidence that Mr. Wilks knew of the coaching business particularly when the e-book was attached to an e-mail which essentially said that he did not have to read it.

October and November exchange concerning LinkedIn profile.

[167] In his evidence, Mr. McGregor says that in October he consulted Mr. Wilks about proposed amendments to his LinkedIn profile which included reference to his coaching and counselling business. He alleges that Mr. Wilks approved a version which focused on coaching and requesting the removal of references to counselling.

[168] There is an e-mail trail relevant to this in evidence:

- Mr. McGregor forwarded a draft LinkedIn profile to Mr. Wilks on 8 November 2024 that basically referred to two occupations, one as Talent Manager for Anteo the other as “Executive, Counsellor and Coach” for his review.
- Mr. Wilks then sent an e-mail asking Mr. McGregor what he wanted to achieve with this new profile.
- Mr. McGregor explained it was an update on his personal skill and offers value and credibility he offers clients and candidates “*in the world of recruitment*”.
- Mr. Wilks responded “Understand. Definitely an opportunity there to compliment that value prop at Anteo. Can you update your LinkedIn at Anteo. Give a full view so we can review it for completeness.”

- Mr. McGregor responded “sounds great”.
- Mr. McGregor sent a longer e-mail where he indicated he would develop [the profile] a little further as a team. He also addressed the “coaching and counselling gig” directing Mr. Wilks to his website noting he had “developed the message since the e-book”

[169] Mr. Wilks says that when he received the updates, some of the profile was consistent with recruitment but there was also material that was outside work. Mr. Wilks saw the outside work component as conflicting with Mr. McGregor’s job at Anteo and he and was not comfortable with it. He asked Mr. McGregor what he was trying to achieve. They agreed to “catch up”. Mr. Wilks asked him around the timeline and the urgency. Mr. Wilks denied Mr. McGregor’s claim that an amended version of the LinkedIn page focusing on coaching not counselling was approved. Mr. Wilks said, “There was absolutely no approval to put coaching and counselling in any LinkedIn profile.”

[170] Mr. McGregor sought to amend his LinkedIn page including a reference to his coaching and counselling business and forwarded a draft profile page to Mr. Wilks. Nothing in the e-mails suggests that approval had been reached as to the form of the profile. They agreed to work on the profile ‘as a team’ and Mr. McGregor pitched it to Mr. Wilks on the basis that it added value and credibility “in the world of recruitment”. The e-mails support the evidence of Mr. Wilks that no agreed form of profile had been reached.

[171] Evidence of a *draft* LinkedIn profile, which referred to a separate part time occupation as a coach and counsellor, presented to Mr. Wilks for approval, is not evidence that Mr. Wilks had full knowledge that Mr. McGregor had commenced a part time business concurrently with his employment with Anteo and taking private clients.

CONSIDERATION OF THE CONDONATION EVIDENCE

[172] Condonation requires evidence the employer had full knowledge of the existence of Mr. McGregor’s part time coaching and counselling business. I will now summarise my findings on the evidence of the incidents on which Mr. McGregor relies to support his condonation argument.

- Mr. and Ms. Wilks deny they were told in March that he had begun a program of life coaching. On my assessment of the evidence, and of the disposition of the witnesses, I accept the evidence of Mr. and Ms. Wilks.
- The 12 July LinkedIn post merely stated Mr. McGregor had been certified as a coach by the International Coaching Federation. It does not inform anyone that Mr. McGregor had embarked on a coaching business.
- On my assessment of the witnesses present at the team meetings I cannot be satisfied that Mr. McGregor clearly articulated that he was conducting a coaching and counselling business. Four of the six witnesses gave evidence that he discussed his coaching course rather than a coaching business.
- Even if Mr. McGregor’s evidence that he mentioned the imminent publication of an e-book at September team meeting is accepted (three witnesses say they cannot remember it; one says it did not happen) this cannot support an argument for condonation. Publishing a book on coaching and counselling is not information about a coaching and counselling business.

- On his e-mail of the e-book to Mr. Wilks, it is true that an examination of the book may have hinted at the career Mr. McGregor was pursuing. However, sending the e-book, falls short of clear evidence that Mr. Wilks knew of the coaching business. Particularly when the e-book was attached to an e-mail which essentially said that Mr. Wilks did not have to read it.
- On my assessment of the evidence, on the October/November discussions concerning the LinkedIn profile, particularly the e-mail exchange relating to the draft LinkedIn profile, no agreement was reached as to the form of that profile. The fact the draft profile referred to his part time occupation as a coach and counsellor hints at his conduct of the business, it falls short of evidence that Anteo had full knowledge of the coaching and counselling business.

[173] On the evidence, I am not satisfied the employer had full knowledge of his part time paid coaching and counselling or that Anteo continued to employ him despite having full knowledge of his business.

[174] In this case, Mr. McGregor is seeking to establish full knowledge on the basis of contested evidence of conversations and implications from documents which do not squarely establish Mr. Wilks, or anyone else at Anteo, knew. For the reasons I outline above, I have found against him on the incidents he says support the condonation argument.

DID THE CONTINUED EMPLOYMENT OF MR. MCGREGOR DURING THE NOTICE PERIOD AMOUNT TO CONDONATION?

[175] The last element to which Gillard J refers in *Rankin* is “having made the election he deliberately abandons his right to summarily dismiss the employee”. The enquiry here is whether allowing him to work out his notice period, when Anteo was aware he was conducting a coaching and counselling business, amounted to condonation.

[176] Anteo put Mr. McGregor on gardening leave. He was prohibited from contacting any Anteo client or candidate and from posting content related to Anteo or engaging in any activity that conflicts with Anteo’s interests or reputation. In the course of the proceeding, Mr. Wilks indicated the reason they continued to employ him was that Mr. McGregor was involved in a financial recruitment assignment at the time.⁹⁹

[177] This is on all fours with the facts in *Rankin* where the employer did not elect to dismiss an employee summarily. The employee was permitted to remain in employment for three months to carry out his duties under close supervision. The reason the employer gave for allowing him to work out his notice period was “to enable him to finalise a project of which he had intimate knowledge”. Based on these circumstances, Gillard J found that “there is no suggestion that by sending the employee on 120 days paid leave, the employer had lost the right to dismiss the employee”.¹⁰⁰

[178] On the logic of the decision in *Rankin*, I find that by placing Mr. McGregor on restrictions and working out his notice period on gardening leave, Anteo did not lose its right to dismiss Mr. McGregor.

CONCLUSION ON CONDONATION

[179] By commencing a counselling and coaching business while employed by Anteo, Mr. McGregor breached his contract of employment. For the reasons I have indicated, I am not satisfied that Anteo waived its rights to terminate his employment for breach by condoning the conduct. On the evidence, I cannot find that Anteo had full knowledge of his misconduct and therefore could not have condoned it.

WAS THE REASON FOR THE DISMISSAL MR. MCGREGOR'S REFUSAL TO ENTER INTO A SHAREHOLDING AGREEMENT WITH ANTEO?

[180] In his application, Mr. McGregor claims that one of the reasons for his dismissal was "opting not to purchase share in Anteo's business."

[181] It is uncontested that:

- In or about 17 October 2024, a Shareholding and Unit Subscription Agreement was sent to Mr. McGregor.
- Mr. McGregor forwarded it to his accountant and sought advice. Mr. Wilks followed up on the offer on a number of occasions.
- Mr. McGregor and Mr. Wilks met to discuss the offer on 21 and 28 October 2024. In the 28 October meeting, Mr. McGregor indicated that he had advice from his accountant to query the "bad leaver" clause in the Shareholder Agreement.
- On 1 November 2024, Mr. McGregor advised Mr. Wilks he was still waiting on his accountant's feedback and Mr. Wilks texted him and said he would "park the opportunity."
- On 7 November, Mr. Wilks confirmed that he was proceeding with the shareholding with all other employees and asked Mr. McGregor to "get back to him whenever he liked".

[182] It is also not contested one of the issues Mr. Wilks asked Mr. McGregor at the 20 November meeting (which he followed up in the text that evening) was whether he wanted to proceed as shareholder or employee.

[183] It is contested whether Mr. Wilks raised the issue of the shareholding offer on the 21 November meeting. Mr. McGregor's evidence was that Mr. Wilks gave him a "90 minute pitch" to invest in the business. He asked Mr. McGregor whether he "wanted to be part of it" and Mr. McGregor said "No", to which Mr. Wilks "Pointed his finger at him" and said, "you're done". In his oral evidence, Mr. Wilks denied pitching his business for 90 minutes. He said "That's just simply incorrect. That didn't happen". He also gave evidence that the shareholding agreement did not come up at all in the 21 November meeting.¹⁰¹

[184] Mr. McGregor alleges the failure to take up the shareholding agreement was at least an active reason why he was terminated. He has the practical onus of establishing that it was a motivation for his termination. He relies on the temporal proximity of the correspondence and meetings with Mr. Wilks concerning the offer and his termination. He also relies on his directly contested evidence that Mr. Wilks said he was "done" after Mr. McGregor had indicated he did not want to participate.

[185] This is a thin gruel on which to base a finding the refusal of the shareholding agreement was the motivating factor for the termination. If anything, the evidence of what transpired on the 20 November meeting (and the subsequent text) where Mr. McGregor was asked to map out his medium- and long-term plans as an employee of Anteo would suggest that the shareholding alone was not a determinative factor in the termination.

[186] On the basis of the paucity of supporting evidence, I cannot find that Mr. McGregor refusing the shareholder offer was a determinative reason for the termination.

CONCLUSION ON VALID REASON UNDER THE CODE

[187] I have found the conduct of a parallel coaching and counselling business amounted to a breach of his employment contract. I have found this breach was not condoned by his employer and that there is insufficient evidence to support a finding that the “real” reason for his termination was his refusal of the Shareholding agreement. On that basis, the reasons articulated in the termination e-mail were valid reasons for the dismissal.

[188] There is an ambiguity in the evidence of when the text messages and e-mails now relied on by Anteo were discovered. In any event, there is no reference in the termination e-mail of those documents and they therefore form no part of my assessment of valid reason for the purposes of the Code.

WAS MR. MCGREGOR GIVEN A WARNING ABOUT HIS COACHING AND COUNSELLING BUSINESS?

[189] The evidence about the meeting on 20 November is contested but there is some commonality between the accounts of Mr. McGregor and Mr. Wilks. Mr. Wilks informed Mr. McGregor that his coaching was a conflict of interest. Mr. McGregor responded that Mr. and Ms. Wilks had known about it since March. Mr. Wilks rang Ms. Wilks about his assertion that they knew about it. There was a discussion about what his medium- and long-term plans were in his role at Anteo.

[190] Mr. McGregor says that at the 20 November meeting, Mr. Wilks said to him the coaching was a conflict of interest and if it continued, Mr. McGregor would not “maintain” his employment. Mr. Wilks did not confirm either in his written or oral evidence that he had warned him at this meeting.

[191] In the subsequent e-mail Mr. McGregor sent in response to the request to outline his medium- and long-term plans, it does not mention any demand or warning concerning the operation of his coaching business. It does, however, state that “ending employment” was discussed.

[192] The requirement for a warning is a mandatory requirement of the Code. Anteo has the practical onus of establishing that a warning was given. The contested evidence on whether Mr. Wilks warned that if the coaching business continued then Mr. McGregor’s employment would be terminated is not a sufficient basis for a finding that a warning was given, particularly when Mr. Wilks does not confirm this in his evidence. Further, the inference from an e-mail sent after

the meeting that termination of employment was discussed is insufficient for a finding that Mr. McGregor was warned at this meeting.

[193] There is no dispute that Mr. McGregor was informed that he was dismissed at the meeting on the following day. The process of dismissal by notice was agreed in a later text exchange between Mr. McGregor and Mr. Wilks, which was confirmed in the termination e-mail.

DID MR. MCGREGOR HAVE AN OPPORTUNITY TO RESPOND TO A WARNING?

[194] There is no clear evidence that Mr. McGregor was warned on the 20 November meeting. The e-mail Mr. McGregor sent cannot constitute a response to a warning as, other than a reference to “ending employment”, it is not clear whether that e-mail was responsive to a demand or warning. The gravamen of the e-mail which Mr. McGregor sent was an elaboration of his medium- and long-term plans at Anteo.

DID MR. MCGREGOR HAVE A REASONABLE OPPORTUNITY TO RECTIFY THE PROBLEM?

[195] Taking the most generous approach to the evidence of Mr. Wilks on the meetings of the 20 and 21 November, it is unclear whether Mr. McGregor was told to cease his coaching business. Even if Mr. McGregor was warned (which on the evidence I cannot find), two meetings on consecutive days cannot be regarded as a reasonable opportunity to rectify the problem.

CONCLUSION ON COMPLIANCE WITH THE CODE

[196] The warning requirements of “other dismissals” under the Code are mandatory. On the directly contested evidence about whether or not Mr. McGregor was warned, I cannot find that he was warned either verbally or in writing that he risked being dismissed, nor was he provided with an opportunity to respond to a warning, or to rectify the conflict between his employment and his coaching and counselling business.

[197] I therefore find the dismissal of Mr. McGregor was not consistent with the Code under 385(c). This leads to a consideration of whether his dismissal was harsh, unjust or unreasonable.

WAS THE DISMISSAL OF MR. MCGREGOR HARSH, UNJUST OR UNREASONABLE?

[198] What follows is my assessment of the various elements I am required to take into account under s 387.

SECTION 387(a): VALID REASON

[199] I adopt my analysis and reasoning on reason in paragraphs [120] to [188] above, including my consideration of the condonation and the refusal of the shareholder agreement arguments of Mr. McGregor for my assessment of valid reason under s 387.

[200] If anything, my conclusion on valid reason is reinforced under s 387. Under the Code, the Commission is limited by the reason relied on by the employer. There is no such limitation in a consideration of valid reason under s 387. It is well settled an employee can have regard to a fact which existed at the time of the dismissal that come to light after the dismissal in an assessment of whether the dismissal was harsh, unjust or unreasonable.¹⁰²

[201] It is clear Anteo relied on a “direct conflict between his responsibilities, time and focus” in the termination e-mail. It did not expressly refer to the e-mails and text messages that were revealed through Anteo’s audit. Mr. Fuller says he performed the audit around 20 November, although there is some ambiguity when they were discovered relative to the date of the termination e-mail. There is little doubt the texts and e-mails relied on by Anteo related to the period of Mr. McGregor’s employment.

Text exchange with Cat

[202] The text exchange between “Cat” and Mr. McGregor occurred on or around 19 October. It involved a discussion about the format of curriculum vitae she received. Mr. McGregor says that curriculum vitae services was something he “did not want to do” and that he was “focussing on counselling and coaching people”.

[203] Cat was not a customer of Anteo; however, Anteo offers a curriculum vitae service. One would expect an employee during work hours would point a potential client in the direction of service provided by his employer. Instead, he discusses his coaching and counselling business. Although Cat was not a paid client of Mr. McGregor, this e-mail supports the argument that his coaching and counselling business had the potential to conflict with his employer’s business.

Text exchange with Elona

[204] In the text exchange with Elona, there is a discussion about a meeting that occurred in which he texts “...maybe there is something in my work outside recruitment for you. Not necessarily suggesting working together, just maybe something just in the message I have for the world. I don’t know but happy to share a little if that calls to you at all”. He directs her to his website with some content, also on Instagram – “there’s a link on the website within the menu. I have a short free e book I am releasing next week after months/years of work –if I had to guess there might be something in that.”

[205] It is not contested Elona was a sales consultant with Mahercorp Pty Ltd who had been a recruitment candidate for Anteo. Mr. McGregor conceded that he met her through his work for Anteo.¹⁰³

[206] Although she may not have been a paid customer of his coaching and counselling business, he is engaging with someone who was a client of Anteo and directing her to social media sites relevant to his coaching and counselling and his e-book. This demonstrates an actual or, at its lowest, potential conflict between his coaching and counselling business and the business which employed him.

The e-mails of 9 and 10 September from work to personal e-mail

[207] The text of these e-mails related to planning for his business which he said he drafted during my entitled lunch break. They include a plan to prepare some “marketing posts”, “create models” and a “style guide”. They include an entry “marketing – differentiation positioning” “Already operating moderate success, want to reach more, coaches help practitioners” “What does success look like? Not 40 clients per week, download, automations, (how commercialise)”.

[208] Mr. McGregor’s argument that these e-mails were “short private note created during my lunch break” is no answer to what they reveal. His coaching was not a hobby. He was planning to expand the business and market it for growth. He was planning to “commercialise” aspects of his social media presence.

[209] The texts reveal either a potential or actual conflict between his coaching and counselling business and the business of Anteo. The e-mails demonstrate he had ambitions to grow his coaching and counselling business which appeared to be his consuming passion. This supports the argument that his pursuit of the business while he was employed breached his obligations of full attention, to avoid conflicts, and not to undertake a business that had the potential to conflict with the interests of his employer.

CONCLUSION ON VALID REASON UNDER 387(a)

[210] On the basis of my earlier analysis of the evidence for valid reason under the Code, supplemented by the evidence of the e-mails and text messages created while he was employed by Anteo, I consider Anteo’s reasons for termination were sound, defensible and well founded and therefore valid.

SECTION 387(b): WAS MR. MCGREGOR NOTIFIED OF THE REASON?

[211] The termination e-mail notified Mr. McGregor of the reasons for his dismissal. In summary the reasons given were operating a business, creating a website and social account promoting and selling coaching and counselling services and creating a conflict with his responsibilities time and focus at Anteo.

[212] The fact the termination e-mail did not refer to the e-mails and texts revealed through the audit cannot be regarded as a failure to notify because they can be said to demonstrate the reasons generally described in the termination e-mail.

SECTION 387(c): WAS MR. MCGREGOR GIVEN AN OPPORTUNITY TO RESPOND?

[213] The evidence on the 20 November meeting is contested, but it is clear that there was some discussion about his coaching and counselling work and a discussion about whether Mr. Wilks knew about it and that Mr. Wilks regarded it as a conflict of interest. Neither Mr. Wilks or Mr. McGregor gives any evidence that the issue of the alleged conflict was discussed further. There is a conflict in the evidence as to whether Mr. Wilks demanded Mr. McGregor to cease his coaching and counselling business.

[214] The fact the discussion at that meeting did not facilitate an opportunity to respond is demonstrated by the e-mail Mr. McGregor sent and by the text Mr. Wilks sent after that

meeting. They both addressed the role Mr. McGregor saw for himself at Anteo in the short, medium and long term. Although there was a column devoted to his coaching and counselling activity in Mr. McGregor's e-mail, this was more of a statement of where he saw himself in terms of Anteo's business rather than a response to allegations put to him.

[215] There is a direct conflict between the evidence of Mr. McGregor and that of Mr. Wilks as to what happened at the 21 November meeting. Mr. McGregor's evidence is that after Mr. Wilks said "do you want to be part of it", he replied "no". Mr. Wilks said "you are gone".

[216] Mr. Wilks' evidence is that Mr. McGregor indicated he wanted to do coaching and counselling. He did not want to work in his role and that if "he was doing it over any more than six months; he'd basically be out". Mr. McGregor said, "I'm not going to resign from my role." Mr. Wilks replied "[you] won't need to resign from [your] role, and, if necessary, I'll terminate [your] employment due to serious misconduct." Mr. McGregor was upset by that. Mr. Wilks asked him to hand over his keys and phone and he "virtually threw them at me across the table".

[217] On my observation of both Mr. Wilks and Mr. McGregor giving evidence, I am not able to establish on the balance of probabilities which version is to be preferred. Neither version satisfies me that a conversation occurred before Mr. McGregor was terminated that gave him an opportunity to respond to an allegation of conflicts of interest between his employment and his business and how they might be ameliorated or managed.

SECTION 387(d): ANY UNREASONABLE REFUSAL BY THE ANTEO TO ALLOW THE PERSON TO HAVE A SUPPORT PERSON PRESENT

[218] This factor is predicated on a request for a support person which is refused. There is no positive obligation on an employer to offer an employee the opportunity to have a support person present.¹⁰⁴ There is no evidence before me that Mr. McGregor requested a support person at the meetings of 20 or 21 November.

SECTION 387(e): WARNING ABOUT UNSATISFACTORY PERFORMANCE

[219] Warnings are relevant when an employee is dismissed for unsatisfactory performance. Unsatisfactory performance is related to the employee's capacity to do the job rather than their conduct. The reasons for dismissal here did not relate to unsatisfactory performance but to Mr. McGregor's conduct in commencing paid coaching and counselling while still employed.

[220] This factor is not relevant in these circumstances.

SECTIONS 387(f) AND (g): DEGREE IN WHICH THE SIZE OF ANTEO AND THE ABSENCE OF HUMAN RESOURCES MANAGEMENT SPECIALIST WOULD LIKELY IMPACT ON THE PROCEDURES FOLLOWED IN EFFECTING THE DISMISSAL

[221] Anteo is a "small family business".¹⁰⁵ The evidence establishes the number of employees was reduced to four at the time of Mr. McGregor's dismissal.¹⁰⁶ Anteo had just lost seven employees.¹⁰⁷ Mr. Wilks said in his evidence that around the time of the termination of Mr. McGregor he was "the office cleaner, the recruitment consultant, the receptionist and the

accounts person”.¹⁰⁸ There are deficiencies in the process of termination here. The evidence is unclear whether he was given an opportunity to respond to the claim of conflict between his business and that of Anteo. Given the circumstances, the deficiencies may be explained by the size of the business and the lack of human resources function at Anteo.

SECTION 387(h): ANY OTHER MATTERS THE COMMISSION CONSIDERS APPROPRIATE

[222] Mr. McGregor submits I should take into account his previously unblemished record at Anteo as a consideration relevant to the assessment of harsh, unjust or unreasonable.

FINDING ON HARSH, UNJUST OR UNREASONABLE¹⁰⁹ AND DISPOSITION

[223] There was a valid reason to dismiss Mr. McGregor related to his undertaking a coaching and counselling business for paying clients while employed by Anteo.

[224] His employment contract required him to avoid all conflicts, prohibited him from undertaking a business where his participation could create an actual or potential conflict, and required him to give his full attention to Anteo. On the evidence, I am satisfied he breached these terms. I have also found Anteo did not have full knowledge of his coaching and counselling business and therefore his breach of contract was not waived or condoned.

[225] It is arguable the breaches of his employment contract amounted to “serious misconduct” under clause 1.1.22 because the definition includes a “persistent breach of the provisions.” As he conducted the business from March 2024, it could be regarded as “persistent”. I accept Mr. McGregor did not see clients during working hours and there is no evidence he directly poached clients from Anteo. There is some doubt whether the conduct reached the repudiatory level required of the definition of serious misconduct in Regulation 1.09 of the *Fair Work Regulations 2009*. Given he was dismissed with notice, I do not need to decide that question.

[226] In so far as the conduct amounted to a breach of contract, the decision to terminate him on notice for that conduct cannot be regarded as unjust. The coaching and counselling business had the potential to, and probably did, conflict with his duties for Anteo. Mr. Wilks discovered Mr. McGregor was taking paying clients at the 20 November meeting. Given the potential for conflict between his personal interest and his contractual duties, it was reasonable for Mr. Wilks to dismiss him following the working out of notice on gardening leave consistent with his contract.

[227] I do not consider the procedural defect in not giving Mr. McGregor an adequate opportunity to respond to the reasons his job was in jeopardy deprives the dismissal of fairness. The small size of the business of Anteo, the predicament in which Anteo found itself, and the lack of a specialist human resource function explain the defect in the process of the dismissal. Further, given the nature of the misconduct and the managerial position held by Mr. McGregor, the act of dismissing him on notice was justified.

[228] Mr. McGregor argues his previous unblemished record is a factor supporting a finding of unfairness. He held a management position supervising others and was engaged in conduct

that breached his employment contract for months. In those circumstances, any unfairness arising out of his unblemished record is displaced.

[229] Taking into account all the s 387 factors, I am not satisfied the dismissal of Mr. McGregor was harsh, unjust or unreasonable. I therefore order his application is dismissed.



COMMISSIONER

Appearances:

Michael McGregor, the Applicant, for himself.
Anthony Wilks on behalf of the Respondent.

Hearing details:

10 June 2025
Melbourne

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¹ Digital Commission Book (DCB at) at pages 33 to 56.

² This is subject to a qualifier “except in the case of ill health, incapacity, accident or approved leave”.

³ DCB at 96-97: Applicant’s outline of arguments on the merits.

⁴ DCB at 127, the Statement of Mr. McGregor was received into evidence as “A1”.

⁵ PN135-142.

⁶ DCB at 349: Mr. Wilks witness statement was accepted into evidence as “R1”.

⁷ DCB at 345: The Statement of Ms. Wilks was received into evidence as “R3”.

⁸ PN1092-1095.

⁹ DCB at 127.

¹⁰ PN148.

¹¹ PN149.

¹² DCB at 127.

¹³ PN152.

¹⁴ PN158.

¹⁵ DCB at 129.

¹⁶ PN522.

¹⁷ PN523.

¹⁸ PN524.

¹⁹ PN530.

²⁰ PN534-537.

²¹ PN620-626.

²² DCB at 394 from paragraphs 2.1 and 2.3 of the *Anthony Wilks witness statement*.

²³ PN533.

²⁴ Ibid.

²⁵ PN1125-1126.

²⁶ DCB at 352.

²⁷ PN1001-1002.

²⁸ DCB at 353.

²⁹ PN1236-1240.

³⁰ DCB at 163 to 246.

³¹ PN160.

³² PN748 to 751.

³³ PN1116 to 1122.

³⁴ PN1000.

³⁵ PN1238.

³⁶ PN1223.

³⁷ In the DCB the e-book takes up pages 163 to 246.

³⁸ DCB at 162.

³⁹ DCB at 127-128.

⁴⁰ DCB at 259-260.

⁴¹ DCB at 250 – the whole of this exchange is on this page of the DCB.

⁴² DCB at 259.

⁴³ DCB at 257-258.

⁴⁴ PN782-785.

⁴⁵ PN786.

⁴⁶ PN790.

⁴⁷ DCB at 127.

⁴⁸ Ibid.

⁴⁹ DCB at 127-128.

⁵⁰ DCB at 12-13.

⁵² DCB at 128.

⁵³ PN179-192.

⁵⁴ DCB at 263-267.

⁵⁵ DCB at 261.

⁵⁶ DCB at 349-350.

⁵⁷ PN797-807.

- ⁵⁸ PN1129.
- ⁵⁹ DCB at 128.
- ⁶⁰ PN194-199.
- ⁶¹ DCB at 349-350.
- ⁶² PN823-826.
- ⁶³ DCB at 268.
- ⁶⁴ DCB at 529.
- ⁶⁵ PN871-872.
- ⁶⁶ DCB at 352.
- ⁶⁷ PN1043-1053.
- ⁶⁸ DCB at 406-438.
- ⁶⁹ PN804.
- ⁷⁰ DCB at 97: A point made by Mr. McGregor in his submissions in relation to these documents.
- ⁷¹ DCB at 446.
- ⁷² PN928: Cross examination of Mr. Wilks.
- ⁷³ Ibid.
- ⁷⁴ PN934.
- ⁷⁵ Ibid.
- ⁷⁶ PN234.
- ⁷⁷ PN236.
- ⁷⁸ DCB at 98.
- ⁷⁹ DCB at 97-98.
- ⁸⁰ DCB at 312 to 342.
- ⁸¹ DCB at 317.
- ⁸² DCB at 466-467.
- ⁸³ DCB at 98.
- ⁸⁴ [\[2018\] FWC 5620](#).
- ⁸⁵ *Zotti* at paragraphs [53] to [55].
- ⁸⁶ *Lloyd & Co Pty Ltd v. Suttie* [\[2016\] FWCFB 144](#), [19].
- ⁸⁷ *Law v. Lineham Enterprises Pty Ltd* [\[2018\] FWC 57](#).
- ⁸⁸ *Hart v. Forex 1 Pty Ltd ATF Trading Rental Trust* [\[2018\] FWC 942](#).
- ⁸⁹ *Catherine Pope v. Bacchus Marsh Realty Pty Ltd* [\[2022\] FWC 619](#).
- ⁹⁰ [\[2013\] FWC 4744](#), [15].
- ⁹¹ *Selvachandran* (1995) 62 IR 371, 373.
- ⁹² *RMIT v. Asher* [\[2010\] FWAFB 1200](#), [26].
- ⁹³ Carolyn Sapideen and others, *Macken's Law of Employment* (9th Edition) (Lawbook Co 2022) at p 250-251.
- ⁹⁴ PN804-805.
- ⁹⁵ PN1395.
- ⁹⁶ Subject of course to a consideration of Mr. McGregor's condonation arguments and his argument that his refusal of the share agreement with Anteo was the actual reason for his dismissal.
- ⁹⁷ 107 IR 117 at paragraph 357.
- ⁹⁸ PN363.
- ⁹⁹ PN84.
- ¹⁰⁰ *Rankin* (2001) 107 IR 117 at pp 154 to 156.

¹⁰¹ PN830.

¹⁰² *Australia Meat Holdings Pty Ltd v. McLauchlin (1998) 84 IR 1.*

¹⁰³ PN943.

¹⁰⁴ See the Explanatory Memorandum to the Fair Work Bill 2008 at para 1542.

¹⁰⁵ PN1386.

¹⁰⁶ PN72.

¹⁰⁷ PN1522.

¹⁰⁸ PN903.

¹⁰⁹ For reasons I have explained I do not consider there was an unreasonable refusal to allow a support person under s 387(c), and as the dismissal was for conduct rather than for unsatisfactory performance s 397(e) is not relevant.