DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Brayden Dale-Mc Cormick
v
SLEEPEEZEE BEDDING AUSTRALIA PTY. LTD.
(U2025/8710)

COMMISSIONER CLARKE MELBOURNE, 9 FEBRUARY 2026

Application for an unfair dismissal remedy - dismissal harsh and unreasonable – compensation ordered.

[1] Mr Dale-McCormick (Applicant) has made an application pursuant to section 394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy. The application was brought against his former employer, Sleepeezee Bedding Australia Pty Ltd (Respondent), in respect of a dismissal that was notified to him and took effect on 13 May 2025. The application was brought on 20 May 2025.

[2] The summary dismissal that the Applicant was subject to came about as a consequence of returning a positive result for cannabis on a preliminary roadside test. The roadside test was administered during working hours on a Wednesday, while the Applicant was working in his role as a heavy combination truck driver for the Respondent. The Applicant promptly admitted to the Respondent that he had smoked cannabis over the weekend, prior to resuming work on Monday evening.

[3] The matter proceeded before me by way of oral hearing on 8 September 2025, wherein neither party was represented. The Applicant gave evidence and relied on a number of documents. The Respondent relied on two witnesses, Mr Jesse Ross, the National Operations Manager, and Mr Victor Prawdiuk, its Chief Financial Officer. The Respondent also tendered a number of documents. The material provided by both parties dealt not only with the circumstances of the dismissal, but also with a dispute concerning the appropriate entitlements in respect of work that had been performed during the employment.

Preliminary matters

[4] Section 396 of the Act requires that I give consideration to the following matters before considering the merits of the application before me:

(a) Whether the application was made within the period required in subsection 394(2);
(b) Whether the person was protected from unfair dismissal;
(c) Whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) Whether the dismissal was a case of genuine redundancy.

I state my findings as to these matters briefly below.

Was the application made within time?

[5] Section 394(2) provides that an application for an unfair dismissal remedy must ordinarily be brought within 21 days of the date the dismissal took effect. There is no dispute that that the application was brought promptly, 7 days after the dismissal took effect. There is also no dispute that what occurred here was a termination of employment at the employer's initiative.

Was the applicant protected from unfair dismissal?

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

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:
  (i) a modern award covers the person;
  (ii) an enterprise agreement applies to the person in relation to the employment;
  (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[7] It is not in dispute that the Applicant commenced his employment with the Respondent in July of 2024. The Respondent did not dispute the Applicant's view that he was employed on a full time basis.[1] The Respondent stated in its Form F3 that it had 143 employees at the time of the Applicant's dismissal. Accordingly, the minimum employment period of 6 months is satisfied.

[8] The Applicant estimated his earnings at a little under $90,000 (based on 6 months at $44,720), which was in accordance with the Respondent's estimate.[2] This is well below the high-income threshold of $175,000 that applied at the relevant time. The parties have additionally progressed the dispute in relation to outstanding entitlements on the basis that the *Road Transport (Long Distance Operations) Award 2020* covered the employment.[3]

[9] In the circumstances, there is no dispute that the Applicant was protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code

[10] As noted above, the Respondent stated in its Form F3 that it had 143 employees at the time of the Applicant's dismissal. The Respondent thus does not qualify as a "small business employer", so this requirement is of no relevance to the matter.

Was the dismissal a case of genuine redundancy?

[11] The dismissal was a dismissal without notice based on the conduct of the employee. It was not contended by any party that the dismissal was brought about by a redundancy situation or that there was redundancy, genuine or otherwise.

Harsh, unjust or unreasonable?

[12] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

[13] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[4] I now turn to consider the relevant facts.

Key events and issues

[14] The Applicant says in his witness statement that on Saturday, 3 May 2025 he consumed cannabis socially while off duty, and that he was not a regular user of cannabis. There was no challenge to the proposition that he was not a regular user of cannabis. There is however some inconsistency in the evidence as to the date the cannabis was consumed. Mr Prawdiuk says the Applicant said during a meeting on 13 May that he consumed the cannabis on Sunday night.[5] This evidence of Mr Prawdiuk was given by reference to notes provided by Mr Ross[6] - there was no evidence that Mr Prawdiuk in fact attended the meeting. For reasons that will be explained, I do not regard the notes as an entirely accurate record of what transpired during the meeting. Mr Prawdiuk himself did not discuss with the Applicant when the cannabis was consumed.[7] Further, I prefer the evidence of the Applicant as to when it was he consumed the

cannabis. In some correspondence tendered by the Applicant, which he authored after the dismissal, he admits to having told the Respondent that he consumed a joint of cannabis on Sunday, but clarifies that it could have been Saturday night or Sunday morning by the time he did so.[8]

[15] In his witness Statement, Mr Ross said that the notes were prepared after the meeting on 13 May, and were described as "a written record outlining the facts of our discussion and the key points raised".[9] However, Mr Ross retreated from that position somewhat during his oral evidence. Relevantly, Mr Ross said that the reference to having a joint on *Sunday* night occurred during a prior phone call, and not during the meeting on 13 May. Mr Ross did not remember the Applicant saying that he had consumed the cannabis on Saturday during the meeting on 13 May,[10] but does recall him saying that he thought the cannabis use would not be a problem because he assumed it was only detectable for 24 hours after use.[11] If the Applicant made that statement during the meeting (and he doesn't agree that he did[12]), it is consistent with the position that the cannabis was consumed late on Saturday night or in the early hours of Sunday morning – being hours notorious for the making of poor judgements. The Applicant is not sure whether he made the admission about using cannabis during the phone call with Mr Ross or during the meeting on the 13th, but believes he first said he consumed it on a Sunday because he was "frazzled" and later advised that it was in fact the Saturday night, which he said was a clarification made during the meeting on 13 May.[13] I believe the clarification was made during the meeting on 13 May and consider that it was likely made in connection with a comment concerning a 24 hour period. In any event, Mr Ross ought to have understood that the Applicant was telling him that he consumed cannabis more than 24 hours before commencing work.

[16] The event that prompted the making of the phone call, and the holding of the meeting referred to above, was the Applicant being stopped by NSW Police on Wednesday, 7 May 2025. This occurred following the Applicant returning to work from his weekend at 6:30PM on Monday 5 May. The Applicant says the roadside stop was not motivated by anything he had done (e.g. driving erratically) and there is nothing to indicate otherwise. During the roadside stop, the Applicant's oral fluid was tested and was found to be positive for a prohibited substance. There was no evidence available until the hearing as to what particular substance was detected in that roadside test. As a consequence of the roadside test, the Applicant was issued with a notice prohibiting him from driving any motor vehicle for 24 hours. The notice was tendered[14] and states that it was issued at 9:58 AM and covered the period from 9:15 AM on the day until 9:15AM on the following day. I infer from that that there was some delay between the Applicant being stopped and the notice being issued. In a contemporaneous text message exchange between the Applicant and Mr Ross, the Applicant states that the test occurred as part of a compliance test.[15] In the text exchange, the Applicant provided a photograph of the notice he had been issued with and also advised that he would be prohibited from driving until 9:15AM the following day. He advised also that the sample needed to be sent off to a laboratory for testing. Mr Ross asked whether there were "any drugs you know of that could affect things if results come back?".[16] The Applicant elected not to answer that question. However, he said in his oral evidence that there was "a phone call that was made by Jesse [Mr Ross] while I was still in the truck on the side of the freeway"[17] and it may have been during that call that he said he had used cannabis and incorrectly said that this occurred on the Sunday rather than the Saturday. I digress to note that as at the date of termination, there was no confirmatory laboratory test result to indicate which (if any) prohibited substance was found or

what level of such substance was found. Nor had the Applicant been charged with any offence as at that time.

[17] The text messages provided by the Applicant further indicate that he contacted Mr Ross the next day, a couple of hours before the prohibition period ended, to inquire as to what would be happening that day and was informed that his next journey had been re-allocated.

[18] 9 May 2025 was of significance for two reasons. Firstly, it was the date appearing on the letter informing the Applicant of his termination, which did not occur until several days later. Secondly it was a date on which the Applicant said the Respondent posted an online advertisement for a Medium Rigid/ Heavy Rigid truck driver.[18] The Applicant relies on both of those matters as suggesting that his dismissal had be pre-determined.

[19] On Monday 12 May, the Applicant was asked by Mr Ross to meet with him, notwithstanding that there was no work for him to perform that afternoon, on the basis that "you broke the law and we need to discuss it".[19] However there were no allegations as such put to the Applicant. Rather, the Applicant's response to this message was "In other words you're firing me…just be direct and honest with me as I have been with you". The Applicant's message was met with the response "I need you to come in and have a discussion on what happened before we make any decisions".[20] It was ultimately agreed that the meeting would occur the following day.

[20] The Applicant describes the meeting on 13 May in the following way: "I was informed of the result and dismissed almost immediately, without a proper meeting to present my side or explain the circumstances".[21] With the exception of what was referred to in paragraph [15] above, there is very little evidence of what was actually discussed in the meeting, and Mr Ross said in his oral evidence that the only issue that was discussed at that meeting was the "drug and alcohol offence".[22] There is no evidence of an alcohol issue, nor had the Applicant been charged with an offence at the time the meeting occurred.

[21] During a break in the meeting, Mr Ross consulted with Mr Prawdiuk and Mr Borg (the State Manger for Victoria) and concluded that "we could not continue to employ a HC driver who posed a safety risk on the road due to substance use".[23] He then provided the Applicant with a letter advising of the termination of his employment.

[22] The letter, as noted above, was dated 9 May.[24] It was not signed but bore Mr Ross' name. Mr Prawdiuk's evidence was that the letter was written by him, not Mr Ross, and that it was written before the meeting at Mr Ross' suggestion.[25] According to Mr Prawdiuk, the plan was that:

> "The decision as to whether to terminate or not would be made after the meeting and it was dependent on his responses to questions raised by Mr Ross. After considering the applicant's responses, if Mr Ross was satisfied with the responses, termination would not occur. However, if not satisfied, the termination letter would be given to the applicant, post meeting after having considered what the applicant stated at the meeting.
>
> It was decided to have a termination ready, as I might have been unavailable, to draft a letter post meeting due to my commitments and the fact that an exact time had not been

> set for a meeting at that stage. The company did not want to drag the process out unnecessarily until I was available to draft a letter."[26]

[23] The evidence of Mr Ross is consistent with what Mr Prawdiuk said:

> "In preparation for the meeting, we prepared a termination letter…this was a precautionary measure and was to be issued only if the outcome of the meeting justified termination. The company maintains a willingness to work with employees in circumstances where an incident is either explainable or does not breach policy in a serious way"[27]

[24] In oral evidence, Mr Prawdiuk said that the contents of the letter as presented to the Applicant were no different to the contents that he had drafted in advance of the meeting, and that it was "a fairly generic sort of draft I thought".[28]

[25] The Applicant says that immediately after being provided with the letter of termination, he asked for a copy of the drug and alcohol policy from Mr Ross – being a policy that was referenced in the letter of termination. Mr Ross does not recall that request. It was also requested numerous times in writing following the termination.

[26] There have also been exchanges of correspondence between the parties concerning a dispute as to entitlements that were payable during the employment, however as at the date of hearing the parties were agreed that the average gross earnings of the Applicant, based on his usual schedule of work, was $1,720 per week.[29]

[27] The Applicant's evidence at the hearing was that he remained unemployed, but was actively seeking work and had upgraded his license to a multi-combination licence (road train) to assist in that endeavour.

[28] There was some dispute between the parties concerning the circumstances of the Respondent seeking to recruit new drivers via a job advertisement on 9 May 2025 - after the Applicant had informed them of the roadside stop but before the meeting of 13 May 2025. The Applicant was concerned that the Respondent's hiring decisions were based on a pre-determined outcome that he would be dismissed. In particular, his understanding was that another employee had been moved into to his position, and that the job advertisement was to fill the role hitherto performed by that person. Mr Ross accepted that the other employee had filled in for the Applicant, but maintained that the advertisement related to a separate vacancy.[30]

Valid reason

[29] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[31] and should not be "capricious, fanciful, spiteful or prejudiced".[32] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[33]

[30] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[34] "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of

the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination".[35]

[31] In the letter of termination that was provided to the Applicant, it was asserted that the Applicant's conduct was "in direct breach of Sleepeze's drug and alcohol policy" and "caused a serious and imminent risk to the health or safety of other road users".[36] I am not persuaded on the material advanced that those particular reasons have a factual basis and therefore do not constitute valid reasons for dismissal.

[32] Firstly, a risk of serious and imminent risk to the health or safety of other road users cannot be established in the absence of evidence that the Applicant was in fact impaired by whatever substance (which at the point of the dismissal had not been confirmed) was detected in his oral fluid test. The only evidence available at the time of the dismissal was that the Applicant had undergone an oral fluid test "..and the test has indicated that one or more prescribed illicit drugs *may* be present in your oral fluid" (emphasis added).[37] This had occurred on a Wednesday morning, where the Applicant had said that he had consumed cannabis at least a day before commencing work on Monday evening. This falls far short from establishing impairment. This shortcoming was perhaps anticipated in Mr Ross's more nuanced wording in his witness Statement:

> "Given the confirmed positive drug test and the *potential risk* of impairment, I determined that it was unacceptable to permit a driver who *may be* under the influence to operate heavy vehicles on public roads"[38]

[33] For completeness and avoidance of doubt, the results of the laboratory analysis of the roadside sample had not in fact been communicated to the Applicant or been known to the Respondent at the time of the termination. Nor was there any suggestion in the material of a concern, or a basis for a concern, that the Applicant would use drugs in future.

[34] Secondly, the drug and alcohol policy[39] referred to is of a limited scope. The prohibitions in that policy are as follows (excluding those concerned wholly with alcohol):

a) It prohibits the possession, solicitation, selling, distribution, or consumption of illicit or non-prescribed drugs on the Respondent's premises or while performing duties for the Respondent;
b) It prohibits the soliciting, selling or distribution of prescribed drugs on the Respondent's premises, while performing duties on behalf of the Respondent or when operating the Respondent's equipment;
c) It prohibits workers and visitors from being under the influence of any:
    a. Illicit drugs or alcohol whilst on any of the Respondent's premises, operating any of the Respondent's equipment or while performing duties on behalf of the Respondent.
    b. Prescribed or not prescribed drugs to a level where it could cause injury to any person, including the user.

[35] The prohibitions in paragraphs (a) and (b) above are clearly not engaged by the conduct alleged. Under questioning from me, Mr Ross identified that the concern was being "under the

influence" as referred to in paragraph (c).[40] However, the Respondent has not demonstrated that, as a matter of fact, the Applicant *was* under the influence of any drug to any extent. Perhaps some expert evidence might have been sought on this issue, but it was not.

[36] There was a debate as to whether the Applicant was aware or ought to have been aware of the drug and alcohol policy and indeed as to whether the policy was created only after the termination took place. As to the latter, I am satisfied on the basis of Mr Prawdiuk's evidence that the policy did exist from December 2018 and was updated thereafter, but not after the termination or the oral fluid test occurred.[41] It is well established that a failure to comply with a policy can constitute a valid reason for dismissal,[42] however consideration of whether the policy was knowingly breached, or known to employees, or whether the potential consequences of breaches were known to employees are matters that go to the overall assessment of whether a resulting dismissal was harsh, unjust or unreasonable.[43] As I am not satisfied that the policy was breached at all, I need not consider those issues further.

[37] In the notes referred to in paragraphs [14] and [15] above, Mr Ross says that the Applicant's "consistent failure to meet promised timeframes" was a factor in his decision to terminate the Applicant's employment. This is not re-stated in the termination letter, and there is no evidence that it was discussed at the meeting.[44] In oral evidence, Mr Ross said that those issues did not factor into his decision making concerning termination of the Applicant's employment and that, outside of the positive drug test there was no other reason why the Applicant might be facing dismissal.[45]

[38] The above should not be taken to suggest that the Applicant has done nothing wrong. Based on the post termination confirmation of the presence of cannabis in the sample[46] and the lack of any evidence about consumption of cannabis at any other time, his off-duty conduct clearly and materially impacted his employer's interests, in the sense that the 24-hour prohibition on driving meant that the Applicant was unable to complete the work that had been planned for him and the employer had to make alternative arrangements. This was a serious matter that warranted a response, but did not amount to a valid reason for termination.

Notification of the reason

[39] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[47]

[40] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[48] and in explicit[49] and plain and clear terms.[50]

[41] As would be apparent from the discussion of valid reason above, I am not satisfied that the Applicant was notified of a valid reason for his termination prior to the termination occurring, or at all.

Opportunity to respond

[42] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[51]

[43] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.[52] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[53]

[44] In this case, there was certainly a meeting to discuss the employer's concerns. But it was highly unsatisfactory for the employer to have reached a view on 9 May 2025, as articulated in the proposed termination letter it had prepared on that date (which was served on the Applicant unaltered after the 13 May meeting[54]), and then not have put the Applicant squarely on notice that it wanted to discuss compliance with the policy. That would have given the Applicant the opportunity to request the policy in advance of the meeting, and to have his responses to the allegations of breaching the policy fairly considered. Granted this may have led to some delay in the meeting occurring, but that would not have been unreasonable in the circumstances.

Refusal of support person

[45] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. However, there is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[55]

[46] It is apparent that Applicant feels aggrieved by the failure to inform him of a right to bring a support person to the meeting on 13 May 2025.[56] But, as above, that is not the test I am required to apply in taking this consideration into account.

Warning about unsatisfactory performance before the dismissal

[47] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

Size of enterprise

[48] Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.[57] Further, while the FW Act recognises that "small business are genuinely different in nature both organisationally and operationally",[58] it does not follow that such an employer's procedures in effecting a dismissal can be entirely devoid of fairness.

[49] I have not been provided with any material to suggest that the Respondent's handling of the termination of the Applicant's employment was in any way influenced by the size of the enterprise. I suspect that the real difficulty in the Respondent's dealing with this matter was the undue haste with which it responded to the Applicant's circumstances, which marked a substantial departure from the early indication by Mr Ross on the day of the roadside stop on the Wednesday that his next job would most likely be on Monday.[59]

Absence of human resource management expertise

[50] The absence of dedicated human resource management specialists does not relieve an employer of extending an appropriate degree of courtesy to its employees "even when implementing something as difficult and unpleasant as the termination of a person's employment."[60]

[51] The Applicant ought to have been given more notice of an opportunity to meet an allegation that he had not complied with the drug and alcohol policy. Whilst Mr Ross was not a Human Resources expert, he didn't need to be in order to anticipate that it would have been appropriate to provide more notice of the allegations and adequate time to respond to them.

Other relevant matters

[52] I consider that the Respondent proceeded with undue haste toward an outcome in this case, on the basis of insufficient information. That exposed the Applicant to some procedural unfairness, in the sense that he was not informed in sufficient detail of the Respondent's concerns prior to attending the disciplinary meeting, even though the employer had clearly articulated what those concerns were at that time by way of its draft (and in the event, final) letter of termination.

[53] Regrettably, the Applicant was deprived of the opportunity to mount a compelling case that there was no basis to find that he had breached the drug and alcohol policy. The employer also did not give appropriate weight to the Applicant's legitimate protestations that there was no evidence of any impairment.

[54] I also consider it relevant that the Applicant made early admissions concerning the use of cannabis.

Conclusion on merits

[55] Having considered the matters I am required to consider, I find that the Applicant's dismissal was harsh and unreasonable. A valid reason has not been provided, and the Applicant was not given a reasonable opportunity to meet the concerns that the employer knew it wanted to raise with him. The employer was negatively impacted by the Applicant's off-duty poor decision making, but not to an extent that justified termination. The response by the employer was disproportionate.

[56] The response by the Respondent was also not reasonable on the facts known or ascertainable. It ought to have been reasonably apparent to the Respondent that the case it had

mounted against the Applicant in its draft (and ultimately final) termination letter could not be made out on the material it had available to it the time.

[57] I digress to make the obvious point that, had the focus of the meeting on 13 May 2025 been the impact of the Applicant's conduct on the employer, education on the policy, a warning and a requirement that the Applicant submit to a program of testing under that policy for a reasonable period of time, this whole affair could have been avoided.

Remedy

[58] I now turn to consider the appropriate disposition of this matter by way of remedy. Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[59] The remedy sought by the Applicant is compensation. I do not consider that respectful relations could be restored were the Applicant to be reinstated, given the lack of faith the Applicant has in the Respondent's compliance with his entitlements, his suspicion that the drug and alcohol policy was created after the event, and the sense of injustice he (in my view, justifiably) harbours in relation to the sequence of events that led to this matter coming forward, including the repeated refusals on the part of the Respondent to supply him with a copy of the drug and alcohol policy. In all the circumstances, I am satisfied that reinstatement of the Applicant is inappropriate.

[60] Conversely, there is clearly a compensable loss arising from the termination of the Applicant's employment and I consider it is appropriate to order that an amount of compensation be paid in recognition of that.

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

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

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the Commission considers relevant.

[62] The Applicant's length of service was 42 weeks. It was not submitted by either party that this in and of itself ought to act as a factor to inflate or reduce the level of compensation that might otherwise be assessed. However, I do regard it as relevant to the assessment of the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been terminated. The period of employment was a relatively short one, and notwithstanding that concerns had been raised with the Applicant about his timeliness in some respects, these were matters that the Applicant had been improving on in Mr Ross's view.[61] In the circumstances, including the history of disputes concerning entitlements and the Applicant's dissatisfaction about same, I consider it reasonable to expect that the Applicant would have continued in employment for a further 6 months, or 26 weeks. Based on the agreed average wage of $1,720 per week, this equates to $44,720 per week (gross), plus superannuation.

[63] The Commission is required to take into amounts earned or likely to have been earned since the dismissal. The Applicant had, as at the date of the hearing, not succeeded in obtaining alternative employment, notwithstanding his efforts and upgrading his licence. There is no reason to assume that state of affairs has changed. I accordingly make no deductions to the provisional amount specified about on account of the matters I am required to consider pursuant to paragraphs (e) and (f) of subsection 392(2).

[64] I do not consider that, in the circumstances of this case and the relatively short future projected period of employment, that any adjustment needs to be made for contingencies under paragraph (g) of subsection 392(2).

[65] I have considered the impact of taxation. Compensation will be determined as a gross amount, and it will be left to the Respondent to deduct any amount of taxation required by law. There are no other matters that are relevant in determining an amount of compensation apart from those to which I now turn.

[66] There was no evidence provided as to the effect of an order on the viability of the Respondents enterprise. I regard this as neutral in my weighing of the relevant considerations and in assessing the appropriate level of compensation.

[67] I am satisfied that The Applicant made reasonable efforts to mitigate his loss by looking for alternative employment opportunities following his dismissal and by increasing employability by acquiring a licence to drive additional configurations of heavy vehicles. I am satisfied that no discount to the provisional compensation sum ought to be applied.

[68] Subsection (3) of section 392 requires a reduction of the amount of compensation otherwise determined if the Commission is satisfied that an applicant's misconduct contributed to the employer's decision to terminate them. Paragraph (g) of subsection 392(2) requires the Commission to take into account matters considered relevant in the determination of an amount of compensation. The Applicant's conduct clearly did contribute to the decision to dismiss him, however I am not satisfied that his poor judgement to consume cannabis more than a day before getting behind the wheel on Monday evening rose to the level that would appropriately be described as misconduct. There is certainly no evidence that it was done with the intention of causing harm to anybody's safety or to the employer's interests more generally. Nonetheless, it was a careless act with the potential (and actual) consequence of stranding the truck for a period of time, leaving the Applicant unable to perform his duties and forcing the employer to make alternative arrangements. For that reason, a reduction is appropriate pursuant to paragraph (g) of subsection 392(2), notwithstanding that, I do not consider that the conduct is misconduct. I consider an appropriate reduction in the circumstances is a discount factor of 30%. This results in a compensation award of $31,304, plus superannuation. The relevant rate of contribution as at the date of the dismissal was 11.5%, so I assess the value of the superannuation component as $3,600. The proposed compensation is below the compensation cap set by subsections (5) and (6) of section 392 and is of an amount I consider appropriate in all the circumstances of the case.

Conclusion

[69] I have found that the Applicant's dismissal was harsh and unreasonable, such that he is entitled to an unfair dismissal remedy.

[70] The remedy I have determined is compensation. I consider it appropriate to make an order that the Respondent pay the Applicant the amount of $31,304 gross, less taxation as required by law, plus superannuation of $3,600. I will order these amounts to be paid with 28 days of this decision.

[71] The order reflecting this decision is issued separately.[62]

COMMISSIONER

Appearances:

Mr B. Dale-McCormick, Applicant.
Mr V. Prawdiuk, for the Respondent.

Hearing details:

8 September.
2025.

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[1] PN109, Exhibit A1 (Hearing Book page 5), Exhibit A3 (Hearing Book page 33).

[2] Respondent's F3 (Hearing Book page 120), Exhibit A1 (Hearing Book page 5).

[3] Exhibit R15.

[4] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[5] Exhibit R2.

[6] Exhibit R2 at [8], [11], Exhibit R6.

[7] PN429.

[8] Exhibit A3 (Hearing Book page 44).

[9] Exhibit R1 at [10].

[10] PN268-269.

[11] PN291-299.

[12] PN147-150.

[13] PN 137-141.

[14] Exhibit R3.

[15] Exhibit A3 (Hearing Book page 52).

[16] Exhibit A3 (Hearing Book page 53).

[17] PN 137.

[18] Exhibit A4.

[19] Exhibit A3 (Hearing Book page 55).

[20] Exhibit A3 (Hearing Book page 56).

[21] Exhibit A5 (Hearing Book Page 60).

[22] PN256.

[23] Exhibit R6 (Hearing Book page 85).

[24] Exhibit R5.

[25] Exhibit R2 at [6].

[26] Exhibit R2 at [6]-[7].

[27] Exhibit R1 at [8].

[28] PN418,448.

[29] PN109-113, 250-251.

[30] PN341-348.

[31] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[32] *Ibid*.

[33] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[34] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[35] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[36] Exhibit A3 at Hearing Book page 38.

[37] Exhibit R3.

[38] Exhibit R1 at [14].

[39] Exhibit R7.

[40] PN316.

[41] PN409.

[42] *B, C and D v Australian Postal Corporation t/a Australia Post* [2013] FWCFB 6191, [36].

[43] *Ibid.* at [60]-[70].

[44] PN95-96, 256.

[45] PN258-265.

[46] PN71.

[47] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[48] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

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

[50] Ibid.

[51] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[52] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[53] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[54] PN418.

[55] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

[56] PN490, Exhibit A1 at Hearing Book page 10.

[57] *Jetstar v Meetson-Lemkes* [2013] FWCFB 9075, [68].

[58] *Williams v Top Image Hair Design* [2012] FWA 9517, [40].

[59] Exhibit A3 at Hearing Book page 53.

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

[61] PN258.

[62] PR796415.