



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Sam Murray

v

The Trustee for SDM Trust

(U2025/20251)

COMMISSIONER REDFORD

MELBOURNE, 24 MARCH 2026

Application for an unfair dismissal remedy; whether dismissal consistent with the Small Business Fair Dismissal Code; dismissal consistent with the Code; application dismissed

Background

[1] On 22 December 2025, Mr Sam Murray filed an application pursuant to s 394 of the *Fair Work Act 2009* (Cth) (**the Act**) seeking a remedy in relation to unfair dismissal with respect to his former employer, The Trustee for SDM Trust (**SDM Roofing**).

[2] The application was the subject of a hearing conducted via video on 19 March 2026. Mr Murray represented himself at the hearing and gave evidence. He was assisted by his father. SDM Roofing was represented by its owner and manager, Mr Sebastian Musik, who also gave evidence. SDM Roofing called evidence from two of its other employees, Mr Jordan and Mr Mennell, and one of its clients, Mr Bournais. The hearing was conducted somewhat informally, and it was necessary for me to be more interventionist than I would normally be, given both parties were self-represented. All of the witnesses presented for cross examination and some were asked questions by the other party, and by the Commission.

[3] Both parties filed an Outline of Submissions, but these documents bore more similarity to Statements of Evidence than Submissions. It appears likely that Mr Murray's Outline was prepared by his father, even though it contained a number of factual assertions seemingly made by Mr Murray himself. I took Mr Murray through each of these assertions orally, and asked him to confirm them under oath, which he did. I also took SDM Roofing's Outline as Mr Musik's Statement of Evidence, which he confirmed under oath.

[4] It is not in dispute that SDM Roofing is a small business employer within the meaning of s 23 of the Act. However, SDM Roofing did not object to Mr Murray's application on the basis it said the dismissal was consistent with the Small Business Fair Dismissal Code (**the Code**). Section 385 of the Act provides that a person has been unfairly dismissed if the Commission is satisfied that they have been dismissed, that the dismissal was harsh, unjust or unreasonable, that the dismissal was not consistent with the Code (if it applies), and the

dismissal was not a case of genuine redundancy. At a case management hearing conducted early in the proceeding, I alerted parties to the fact that even though SDM Roofing had not indicated it objected to the application in its Form R3 response with reference to the Code, it was still necessary for me to be satisfied the dismissal was not consistent with the Code, such that I might have power under the Act to consider the merits of the case and grant Mr Murray a remedy¹. Both parties agreed that this was the case and made submissions about whether the Code was complied with in this matter.

[5] I deal with the issue of compliance with the Code below. There was no other reason as to why it might be said Mr Murray is not a person protected by unfair dismissal or why the Commission might not consider the merits of his application and I find this to be so.

A summary of the evidence

[6] Mr Murray was engaged to work with SDM Roofing, on 19 July 2024, as an apprentice. He was a minor at the time, and so his father signed his employment contract. A training provider was involved in the apprenticeship called Mas National.

[7] Mr Murray conceded that during his employment, he used his personal mobile phone on numerous occasions at work in circumstances where he shouldn't have. He also conceded he had been spoken to by people supervising or managing him on numerous occasions about his inappropriate phone use. He conceded that early in his employment, Mr Musik and Mr Jordan had sat him down and spoken to him about their expectations of him, and about what was and wasn't appropriate phone use at work. In late 2024, he started leaving his phone in his tool bag, as a way of trying to deal with his otherwise inappropriate phone use, but had to stop doing this because it was necessary for him to receive work calls at times. Mr Jordan, Mr Bournais, and Mr Mennen each gave examples of circumstances in which Mr Murray had used his phone at work at inappropriate times. It appeared to a large extent that this evidence was uncontested, although Mr Murray did take issue with Mr Mennen's suggestion that on one occasion, he had used his phone while "hiding" behind a chimney. I do not consider anything significant turns on whether Mr Murray was or was not hiding behind a chimney using his phone on the occasion Mr Mennen described. It is clear Mr Murray was on his phone on numerous occasions when he should have been working whether on this occasion or not.

[8] On 7 May 2025, Mr Murray was issued with a warning by Mr Musik. It is described as a "final warning" regarding Mr Murray's "behaviour on site". It related an incident in which Mr Bournais, a client of the business, had told Mr Jordan that he had observed Mr Murray on his phone "over and over again" and "hiding and bludging". It said there was "zero grey area from here on in" and that if anyone in the team or a client saw him "bludging again his employment would be over. It said that "we are all willing to help you become a successful tradesman, even if it is a slow process ...".

[9] Ultimately, the evidence shows that over the course of a period of about eighteen months employment, Mr Murray had often used his phone at work at inappropriate times and had been observed doing so in a manner in which it appeared that Mr Murray was using the phone instead of doing his work. He was spoken to about this being inappropriate on numerous occasions and was provided with a formal warning about it.

[10] On or around 3 December 2025, Mr Murray was directed by his foreman, Mr Jordan, to “chase” a chimney (prepare it for flashing). At a point when Mr Jordan looked to check on Mr Murray’s progress on this job, he noticed he was absent and observed him walk up a street with his phone in his hand, towards his Ute. Mr Jordan said about five minutes later he saw him walking back to the work-site, still with his phone in his hand. Mr Jordan said when Mr Murray saw him observing him, he looked up and put his phone away and said “sorry”. Mr Jordan said he told Mr Murray to pack his tools up and go home. Mr Jordan said he then rang Mr Musik and told him what had happened.

[11] Later that day, Mr Musik sent Mr Murray an email in which he said that he had just heard Mr Jordan had sent him home because he was found hiding in his car or behind his car again on his phone while he was meant to be working. It also said Mr Murray had been asked the previous Friday to fix chase flashings on a chimney that he had not done properly the day before, and that a job that should have taken 2 hours maximum, took 5 hours. It also referred to previous occasions on which it was said Mr Murray had been observed on his phone. The email said that Mr Musik could not continue Mr Murray’s employment and it was terminated.

[12] Mr Murray sent a reply to this email on 7 December 2026. He said he wasn’t hiding behind his car – he had gone to the car to put his pipe gear away and was on his phone on his way back to the job site. He said, “you didn’t really give me a chance at all to defend myself”.

[13] On 8 December 2026, Mr Musik sent Mr Murray a reply to this email, saying that he did not know exactly what occurred at each event, only what he had been told. It said the issue with Mr Murray being on the phone during work hours was a continuous issue. It said, “let’s catch up in person and have a proper chat about what happened here”. Mr Musik said that Mr Murray did not reply to this email.

The Code

[14] Section 388 of the Act provides as follows:

388 The Small Business Fair Dismissal Code

(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.

(2) A person’s dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person’s employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[15] The SBFDC, provides as follows:

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

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

Summary dismissal

[16] Neither party asserted that the termination of Mr Murray's employment was a case of summary dismissal. The first part of the Code – which deals with summary dismissal – is not relevant in this matter.

Other dismissal

[17] If the part of the Code which deals with summary dismissal is not relevant, then a number of elements must be fulfilled in order for a small business to dismiss an employee in compliance with the Code². I consider each of these below.

A reason that the employee is at risk of being dismissed which is valid, based on the employee's conduct or capacity to do the job.

[18] To comply with the Code, a small business employer must give the employee a reason why he or she is at risk of being dismissed, which is a valid reason based on the employee's conduct or capacity to do the job.

[19] Mr Murray displayed a significant level of maturity in the way he presented his case, assisted by his father. He had the integrity to concede that the reason he was given as to the risk that his employment would be dismissed, and ultimately was terminated, was "valid". I doubt Mr Murray made this concession with regard to the meaning of "valid reason" in a legal sense but I do consider that by making this concession he accepts that the reason he was given by Mr Musik in May 2025 that his employment was at risk of termination, and the reason for which his employment was terminated, was not unjustified.

[20] In my view, having regard to Mr Murray's concession and the evidence, I consider the reason he was told his employment was at risk, and the reason he was given for his termination of employment was valid. The evidence leaves no room for doubt that the allegation that Mr Murray had on many occasions been using his mobile phone when he should have been working had a sound and defensible basis. Repeated conduct of this kind over an extended period of time is a valid reason for the termination of an employee's employment.

[21] This part of the Code has been complied with.

[22] Mr Murray's father, who assisted him at hearing, said that the reason the termination was unfair related to procedural matters, in particular, Mr Musik's failure to inform him of concerns with Mr Murray's work performance and conduct, his failure to properly advise Mr Murray (senior) of the termination, and the failure to advise the training provider, Mas National. In a more general sense, I also took Mr Murray (senior) to have submitted that Mr Murray (junior), who has a learning difficulty, was not provided with sufficient support by SDM Roofing.

[23] Generally, I consider the evidence indicates that SDM Roofing provided Mr Murray with a supportive and tolerant environment in which to learn his trade. I do not accept the proposition that Mr Murray was provide with insufficient training or support in his work.

[24] I also do not consider that if Mr Musik failed to inform Mr Murray (senior) of concerns with his son's conduct or performance at work or did not properly communicate with him at or around the time of dismissal, this invalidates the validity of the reason for dismissal. Nor do I consider any failure to advise Mas National of these matters bears on the question of whether

the reason for the dismissal was valid or not. I was not taken to any particular source of obligation which may exist that SDM Roofing was required to inform either Mr Murray (senior) or Mas National about these issues.

A warning, verbally or preferably in writing that there is a risk of dismissal if there is no improvement and a reasonable chance to respond to it.

[25] Compliance with the Code also requires that the employee be warned verbally or preferably in writing that they risk being dismissed if there is no improvement and be given an opportunity to respond to the warning.

[26] Mr Murray also conceded that he was provided with a warning about the matters which ultimately gave rise to the termination of his employment and that he risked being dismissed if there was no improvement.

[27] It was appropriate that he did so, because he was provided with a warning on 7 May 2025 about his inappropriate mobile phone use and advised that his conduct had to improve, or he would lose his job.

[28] I asked Mr Murray whether he had been given a chance to respond to the warning. He said in answer that “he did” respond to the warning, and I consider he was provided with a chance to respond to it.

[29] This part of the Code has also been complied with.

A reasonable chance to rectify the problem, having regard to the employee’s response to the warning.

[30] To comply with the Code, the small business employer must also give the employee a reasonable opportunity to rectify the problem, which might involve providing additional training and ensuring the employee knows the employer’s job expectations.

[31] Mr Murray conceded that he was given a chance to rectify the problem of his inappropriate mobile phone use. This was also an appropriate concession, because it is clear that between May and December 2025, after having been warned that his continued use of his phone while he should have been working could result in him losing his job, there were a number of instances in which he continued to engage in this conduct. Often, he was counselled about this by his superiors and the conduct continued to be tolerated in such a way as he was allowed a chance to rectify it. In my view, the evidence indicates that Mr Murray knew full well that his continued use of his phone was a problem, that he shouldn’t be doing it, and that if he kept doing it, he might lose his job.

[32] The termination of employment itself was abrupt, and, as Mr Murray later said to Mr Musik in an email, he was not given “a chance to defend himself”. In my view, the way SDM Roofing gave effect to the termination of Mr Murray’s employment was a less than satisfactory

way to end the employment of a young apprentice – an email from the boss with a second-hand account of an incident apparently accepted as fact without giving Mr Murray a chance to respond or explain the situation. I note Mr Musik made some attempt to rectify this later by asking Mr Murray to come and visit him to discuss the matter – an effort that in the circumstances came too late.

[33] However, this does not alter the fact that Mr Murray was given a reasonable chance to rectify the problem that had been raised with him formally in the warning in May 2025 and on other numerous occasions, that he should not be on his phone when he should be working, and might lose his job if he did so. The manner in which SDM Roofing ended Mr Murray’s employment was, whilst abrupt and somewhat brusque was not inconsistent with the Code in circumstances where for some months Mr Murray had been provided with a reasonable opportunity to rectify his conduct, having been formally warned about it previously.

[34] I also consider SDM Roofing complied with this part of the Code.

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist.

[35] Mr Murray’s father also submitted that his son’s termination of employment was unfair because he was not able to have a support person present at discussions regarding the possibility of his dismissal. In this regard, I do not understand it to have been argued that Mr Murray was *prevented* from having a support person present – rather that he wasn’t offered this opportunity and probably didn’t know that he was entitled to have someone present in the relevant discussions, to support him. In this regard, Mr Murray (senior) took particular umbrage that he himself was not informed by Mr Musik that there were problems.

[36] It is perhaps unfortunate that Mr Musik did not reach out to Mr Murray’s father before he decided to terminate his employment. But there may be various reasons for this – including not wanting to embarrass the young man – and in any event, Mr Musik was not obliged to do so. He was also not obliged, by the Code, to actively facilitate or arrange a support person to be present in the discussions he had with Mr Murray about his work performance and conduct³.

[37] The Code provides that in discussions with an employee in circumstances where dismissal is possible, the employee *can* have another person present to assist. There is no evidence that Mr Murray *could not* have another person to assist him in any such discussion, save that as a young person he may not have been aware he could. However, he was not prevented from doing so. These circumstances do not mean that the Code was not complied with.

Conclusion

[38] The termination of Mr Murray’s employment by SDM Roofing, a small business employer, was consistent with the Small Business Fair Dismissal Code. This means the dismissal cannot be an unfair dismissal, and the application must be dismissed. An Order⁴ will be issued to this effect.



COMMISSIONER

Appearances:

2026
Online via Microsoft Teams
Thursday 19 March

Hearing details:

Mr Sam Murray for himself, assisted by *Mr Peter Murray*

Mr Sebastian Musik on behalf of the Respondent

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¹ See *Fair Work Act 2009* s 396(c) and *TIOBE Pty Ltd v Chen* [2018] FWCFCB 5726

² *Law v Linehan Enterprises Pty Ltd (t/as Service Assist)* [2018] FWC 57 [42] – [43]

³ See *Hart v Forex 1 Pty Ltd* [2018] FWC 942 [108]; *Grigonis v Adelaide Coffee Company Pty Ltd* [2011] FWC 1586 [78]

⁴ [PR797774](#)