



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Daniel Thomas

v

Bin Boy Environmental Pty Ltd

(U2025/18386)

COMMISSIONER TRAN

MELBOURNE, 23 MARCH 2026

Application for an unfair dismissal remedy – Valid reasons for dismissal – Applicant not notified of reasons – Applicant not given opportunity to respond – Dismissal unfair – Reinstatement not appropriate – Compensation ordered

[1] On 20 November 2025, Mr Daniel **Thomas** applied under section 394 of the Fair Work Act 2009 (Cth) for an unfair dismissal remedy in relation to the termination of his employment with **Bin Boy** Environmental Pty Ltd.

[2] I conducted a determinative conference in this matter on 10 March 2026. Mr Thomas had filed materials in accordance with my directions, but they were not fulsome. Bin Boy indicated in correspondence to my chambers that it wished to rely only on the material it initially filed with its response and that it did not wish to file any further material, witness statements or evidence. An owner/manager of Bin Boy attended the determinative conference and sought to give evidence. In the interests of procedural fairness, I considered that it was not appropriate to allow them to do so. Bin Boy had been provided with opportunity and guidance to file materials, including witness statements. It chose not to. Doing so at the hearing would have placed the applicant at a disadvantage.

[3] I granted permission for Bin Boy's external payroll and HR support officer to represent it, to answer my questions on the material it had filed and to make closing submissions.

[4] Directions for the filing of materials assists the Commission to deal with a matter as efficiently as possible. The Commission conducts itself less formally than a court, has fewer procedural rules and is not bound by the rules of evidence, but procedural fairness is the very touchstone of what the Commission does. As will become obvious in this decision, Bin Boy's relaxed approach to procedural fairness – because it believes it is doing the right thing – is unacceptable.

[5] In general terms, the respondent's representative could only provide hearsay evidence. I rely on the documentary material and where evidence conflicted, I preferred Mr Thomas' evidence. His answers were frequently that he did not recollect events, but he also made admissions contrary to his interests.

Initial Matters

[6] I am satisfied of the following **preliminary matters**.

[7] The application was **made within the time** required by s 394 of the Act: s 396(a) of the Act. There is no dispute that Bin Boy dismissed Mr Thomas on 13 November 2025 on the grounds of serious misconduct, and the dismissal took effect immediately.

[8] There is no dispute that Mr Thomas' is a person **protected from unfair dismissal** as required by s 396(b) of the Act. His employment was covered by the *Waste Management Award 2020* and his earnings were less than the high-income threshold. He has completed at least 6 months of service, which is the minimum period required under s 382 of the Act as Bin Boy is not a small business employer. Bin Boy say they employed 29 people at the time Mr Thomas' employment ended. Bin Boy agreed that Mr Thomas was first employed in February 2023, but he resigned in May 2024 and was re-employed shortly after. Mr Thomas confirmed that he had resigned and been re-employed in May 2024. Whichever start date is correct, Mr Thomas would have completed the minimum employment period. I find that Mr Thomas' continuous period of employment with Bin Boy started in May 2024. The resignation ended his first period of service; he was paid his entitlements due on termination of employment and when he was re-employed, there was no discussion nor recognition of his prior service.

[9] The Small Business Fair Dismissal **Code is not relevant**: s 396(c) of the Act.

[10] The dismissal was **not a case of genuine redundancy**: s396(d) of the Act.

Issues to be determined

[11] Therefore, the issue for me to determine is whether the dismissal was unfair, harsh, unjust or unreasonable, taking into account the factors in s 387 of the Act.

[12] As summarised by Ross VP (as he then was) in *Stewart v University of Melbourne* [2000] AIRC 779: a dismissal can be unfair by being:

- *Harsh*: because of its consequences for the employee (personal and economic) or because dismissal was a disproportionate response to the gravity of the conduct or behaviour;
- *Unjust*: because the employee did not engage in the conduct or behaviour;
- *Unreasonable*: because it was decided on inferences that could not reasonably have been drawn from the material before the employer.

Valid Reason

[13] A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced: see *Austin v Sandgate Taphouse Pty Ltd T/A Sandgate Post Office Hotel* [2024] FWCFB 323 at [52].

[14] Where the dismissal relates to conduct, the Commission must be satisfied that the conduct occurred and that it justified termination. In *King v Freshmore (Vic) Pty Ltd* [2000] AIRC 1019 at [24], a Full Bench of the predecessor body to the Commission said:

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.

[15] Where there are allegations of misconduct, the standard of proof is the balance of probabilities.

[16] Bin Boy terminated Mr Thomas' employment by letter dated 13 November 2025. Relevantly, the letter said:

This letter is to formally notify you that your employment with Bin Boy Environmental Pty Ltd is terminated effective immediately.

Following a review of recent incidents and your conduct, we have determined that your actions constitute serious misconduct. These matters include behaviour that is not in the best interests of the business and has raised significant concerns regarding workplace safety, compliance with company policies, and overall professionalism.

The nature of this conduct has resulted in a loss of trust and confidence in your ability to perform your role safely and appropriately. As such, the business has determined that your employment cannot continue.

[17] In its F3, Bin Boy set out 5 reasons. I deal with each reason in turn.

(1) Unsafe Hard Waste Placement (22 July 2025)

[18] Bin Boy filed a written warning issued to Mr Thomas for leaving rubbish in an inappropriate location. Mr Thomas says he never received it. But he admitted to the incident that was the subject of that written warning. Mr Thomas says, and I believe, that he was not formally spoken to about this incident except that Mr Matthew **Barton**, managing director of Bin Boy, sent him a photograph of the hard waste and told him to clean it up. Mr Thomas says that he then cleaned it up.

(2) Pornographic materials in staff area (10 March 2025)

[19] Bin Boy filed a formal written warning addressed to Mr Thomas for an incident in which he left pornographic materials in individual drivers' trays in a staff area. The letter noted that this behaviour is a "direct breach of the Company's Sexual Harassment Policy." Mr Thomas says he never received the written warning. But he confirmed that he had placed pornographic materials in the staff area, which he removed after Mr Barton told him to via text message. This occurred around early March 2025.

[20] Bin Boy filed its workplace behaviour and social media policy, which it implemented in July 2025 after a WorkSafe Victoria audit. Mr Thomas said that he had seen it because he had been sent it to read. The document provided to me included an electronic signature showing his name but Mr Thomas said that he did not sign it, including that he had not signed it electronically. Ultimately, the policy is not relevant to the above incident because the evidence of the respondent is that the policy came into existence after the above incident occurred.

(3) Driving infringements

[21] Mr Thomas was under an extended demerit point period that started on 7 August 2025 and would end on 6 August 2026. During this period, if Mr Thomas got any demerit points or his licence was suspended or cancelled for a driving offence, his licence would be suspended for 6 months. Mr Thomas confirmed that he was under an extended demerit point period.

[22] Mr Thomas incurred 2 speeding fines driving company vehicles while under the 12-month good behaviour requirement.

[23] Bin Boy received infringement notices on 20 and 2 October 2025 for their vehicles speeding on 6 and 27 September 2025, respectively. On both occasions they nominated Mr Thomas as the driver of the vehicle (on 31 and 28 October respectively). Mr Thomas confirmed that the incidents occurred.

(4) Texting while driving

[24] On 11 October 2025, Bin Boy sent Mr Thomas a photo of him texting while driving which said:

Don't text and drive.

[25] Mr Thomas replied:

What are you gonna do sack me

[26] Mr Thomas confirmed that the incident occurred.

(5) That he was dismissive of a safety message

[27] On 13 November 2025 (the date of his termination) and in reply to a work group chat on WhatsApp messaging service, Mr Thomas posted:

Another group chat why so many this is getting a bit beyond a joke naw

[28] The group chat was headed IMPORTANT SAFETY IN-- [the rest of the title of the group is cut off].

[29] Mr Thomas said his complaint was because there were 50 other work group chats. Mr Thomas provided a list of WhatsApp groups to show that there were 50 chats related to Bin Boy. Not all appear to be clearly related to Bin Boy and some to seem to be one-to-one chats with individuals, but a large proportion of the 50 groups appear to be Bin Boy related work group chats.

[30] The respondent said that Mr Thomas' message followed a message about a safety incident that had occurred at another workplace and was a reminder about the importance of health and safety in the workplace. The respondent said that this was an escalation of Mr Thomas' behaviour and demonstrated a poor attitude towards safety, which was extremely important to the respondent.

Other reasons raised at the determinative conference

[31] The respondent's representative also raised at the determinative conference that Mr Thomas' communications with her, about what he perceived to be errors in his pay, were reasons that justified Mr Thomas' dismissal. The respondent provided me with screenshots of the text messages. Mr Thomas does not dispute that he sent the text messages.

Conclusion re valid reason

[32] I am satisfied that the conduct in each of the above matters occurred. I am satisfied that the incidents of placing pornographic materials in a staff area, texting while driving and speeding in the work vehicle are matters that would be valid reasons for dismissal.

[33] Placing pornographic materials, particularly in the way that was alleged, is unacceptable and inappropriate in the workplace. I do not consider that awareness of policy is required.

[34] Texting while driving and speeding are offenses. Where it occurs during employment, as it does here, it is inappropriate workplace behaviour.

[35] Whether there are mitigating factors may be relevant. I address that further below.

[36] I am not satisfied that the other matters are valid reasons for dismissal. I accept that Mr Thomas' conduct may have been poor in relation to the placement of the hard waste, but it was not of such gravity as to be a valid reason for dismissal. That Mr Thomas was under an extended demerit period was not necessarily related to his employment (other than that he was employed as a driver and so having a license would have been required for his employment). His comment in response to a WhatsApp group chat was insensitive and inappropriate, but not a valid reason for dismissal. Last, his communications with the respondent's representative about his pay does not do him credit but do not rise to threatening or intimidatory. They do demonstrate a poor attitude; this is not of itself a valid reason for dismissal.

Procedural Matters – s387(b), (d) & (e)

[37] Bin Boy never warned Mr Thomas that it proposed to dismiss him for any of the above reasons, and so he was not notified of the reasons and did not have any opportunity to respond to or provide explanations about them. On 13 November 2025, Mr Barton called Mr Thomas into a meeting after his work for the day was completed. He was handed the letter of termination and asked to read it. Mr Thomas was then asked to return his key, which he did, and he left the workplace.

[38] I am not satisfied that Mr Thomas received the written warnings dated 10 March 2025 (relating to pornographic materials in the staff room) or 22 July 2025 (relating to leaving the hard waste in an inappropriate location). Mr Thomas' clear evidence is that he had never seen the warnings prior to seeing the respondent's materials. He otherwise confirmed that the conduct that was the subject of the warnings occurred and that he received text messages about them. Those text messages did not inform him that the behaviours were inappropriate and that he was issued with a disciplinary outcome as a result; they simply required him to fix the issue, which he did.

[39] I am troubled by the possibility that the employer fabricated the warnings, which Mr Thomas says he saw for the first time when the employer responded to his application. The 10 March 2025 warning refers to Mr Thomas signing the Workplace Behaviour policy three days prior. However, the employer was clear that the policy did not exist until after a WorkSafe Victoria audit in July 2025. The employer was on notice that Mr Thomas' argument about why his dismissal was unfair was that he had never received any warnings about conduct or performance. They chose to supply warnings with their response materials but chose not to file any witness statements, and the named signatory on the warnings and termination letter did not attend the determinative conference. I do not give the warnings any weight.

[40] If Mr Thomas had received the warnings, and particularly the warning dated 10 March 2025 relating to pornographic materials in the staff room, I would be of the view that the employer could not rely upon that incident as a valid reason for dismissal. If the employer's version regarding the warning is accurate, the disciplinary action it chose to take was to issue Mr Thomas with a formal written warning. As far as the facts can be taken, it does not appear that Mr Thomas repeated the conduct for which he was warned, or otherwise took into work or displayed at work pornographic materials after the warning.

[41] Section 387(e) is not relevant to this matter as the dismissal did not relate to unsatisfactory performance.

Size of Employer & HR expertise – s387(f) & (g)

[42] Bin Boy employed 29 people at the time of Mr Thomas' dismissal. They engaged Ms Papadopolous as external payroll and HR support. It is not clear that they used that support or if they did, that it was effective. I take into account that Bin Boy are not a large business. But they employ a reasonable number of people. Their procedural failings are not minor and unacceptable.

Any other matters

[43] Bin Boy did not summarily dismiss Mr Thomas; they paid him 2 weeks' payment in lieu of notice.

Conclusion about harsh, unjust and unreasonable

[44] Taking all the above factors into account, I am of the view that while there were some valid reasons for Mr Thomas' dismissal, it was procedurally unfair. The employer is large enough that it should not be exonerated from its procedural failings.

Remedy

[45] As I have found Mr Thomas' dismissal to be unfair, I may order a remedy.

[46] I am of the view that reinstatement would not be appropriate in this case. Mr Thomas did not seek reinstatement, and gave evidence that he obtained new employment which started one month after his employment with Bin Boy ended. In these circumstances, reinstatement would not be appropriate.

[47] As I have found that reinstatement is not appropriate, I must now consider whether an order for compensation is appropriate under s 390(3)(b). The Full Bench has noted that the question of whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one: *Nguyen v Vietnamese Community in Australia* [2014] FWCFCB 7198 at [9] and whether an applicant has suffered financial loss may be a relevant consideration: *Vennix v Mayfield Childcare Limited* [2020] FWCFCB 550 at [20].

[48] I am of the view that in all the circumstances of this case that it is appropriate to order compensation. My reasons and assessment of the amount are set out below.

[49] The long-established approach to assessing compensation in unfair dismissal matters was set out in *Sprigg v Paul Licensed Festival Supermarket* (1988) 88 IR 21, which the Full Bench of this Commission has since applied under the current Act: see *ERGT Australia Pty Ltd v Govender* [2021] FWCFB 4508 at [35].

[50] I summarise the *Sprigg* formula as follows:

- Estimate the remuneration that employee would have received if the employer had not terminated the employment;
- Deduct monies earned since termination;
- Discount the remaining amount for contingencies;
- Calculate the impact of taxation

[51] While *Sprigg* sets out the method, I must nevertheless take account of all the circumstances of the case and the specific criteria listed in s 392: *Elefantis v The Trustee for Timber Ridge Unit Trust* [2022] FWCFB 43 at [67]. The overall consideration is that the level of compensation must nevertheless be appropriate (that is, neither clearly excessive or clearly inadequate) having regard to all the circumstances of the case: *McCulloch v Calvary Health Care Adelaide* [2015] FWCFB 873 at [29].

[52] Despite my directions, neither party provided me with detailed submissions or evidence in relation to the considerations under s 392. No submissions were made about the impact of any compensation on the viability of the business. I do not consider that Mr Thomas' period of service was lengthy. Mr Thomas mitigated his loss by obtaining employment shortly after his employment with Bin Boy ended. He started that new employment around one month after his employment with Bin Boy ended.

[53] In relation to the period that he would have remained employed with Bin Boy, I am of the view that had the employer taken appropriate procedural steps to warn Mr Thomas that his conduct was unsatisfactory and needed to improve, he would have remained in employment for a further 4 weeks. I also take into account that Bin Boy made a payment in lieu of notice to Mr Thomas.

[54] Mr Thomas' conduct certainly did contribute to his dismissal but this does not outweigh the significant procedural failings such that an order for compensation should not be made. I have taken it into consideration but do not make any deduction for it in this matter.

[55] I am of the view that an appropriate award of compensation is a further 4 weeks' pay, from which payment in lieu of notice must be deducted. My calculations are set out in the following table.

<u>Step 1 - 392(2)(c) - Remuneration if employee had not been dismissed</u>	
> Weeks wages per week	2,692.00
> Projected further weeks of employment	4.00
Sub-total	10,768.00
Employer superannuation - 11% from 1 July 2025	1,292.16
Total Remuneration	12,060.16
<u>Step 2 - Discounts</u>	
Payment in lieu of notice (2 weeks' pay)	5,384.00
392(2)(Mitigation of Loss (money earned since termination))	Not relevant
392(3) Deduction for Misconduct	None
Discount other contingencies	None
Total after deductions	6,676.16
<u>Step 4 – Taxation</u>	
To be taxed according to law	
<u>Step 5 - 392(5) - Apply compensation cap</u>	
> 26 weeks of wages	69,992.00
> Half the amount of the high income threshold	91,550.00

[56] I order a payment of **\$6,676.16**, gross (before tax) and inclusive of superannuation.

Order

[57] Under section 392 and 393 of the *Fair Work Act 2009* (Cth), the Fair Work Commission orders that Bin Boy Environmental Pty Ltd pay Mr Thomas compensation in the amount of \$6,676.16 on or before 21 days of the date of this decision, being 13 April 2026.



COMMISSIONER

Appearances:

Mr D Thomas, on his own behalf.

Ms L Papadopoulos, of JJP Consulting, with permission, on behalf of the Respondent.

Determinative conference details:

2026

Melbourne

10 March

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