

[2024] FWC 1656

The attached document replaces the document previously issued with the above code on 27 June 2024.

A typographical error at paragraph [32] of that document has been corrected so that the word 'also' now correctly reads as 'allow'.

Associate to Deputy President Anderson

Dated 28 June 2024





# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Ms Tamara Rimland**

**v**

**Baldwin's Plumbing & Gas (SA) Pty Ltd**

(U2024/3911)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 27 JUNE 2024

*Application for an unfair dismissal remedy – alleged misconduct – small business – whether dismissal Code compliant – offensive communication with business owner out of hours – warning – reasonable belief formed of serious misconduct – dismissal not unfair – application dismissed*

[1] On 5 April 2024 Tamara Rimland (the applicant or Ms Rimland) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy.

[2] Ms Rimland claims her dismissal on 2 April 2024 was harsh, unjust or unreasonable. She seeks compensation.

[3] The respondent is Baldwins Plumbing and Gas (Baldwins, the employer or the respondent).

[4] Baldwins oppose the application. It says that the dismissal was not unfair because it was a small business employer which complied with the Small Business Fair Dismissal Code (Code). In the alternative, it submits that the dismissal was not otherwise unfair, and no issue of remedy applies.

[5] Conciliation was conducted on 13 May 2024, but the matter did not resolve.

[6] I issued directions on 28 May 2024.

[7] In advance of the hearing, I received materials from Ms Rimland and Baldwins.

[8] I heard all issues (whether dismissal Code compliant, whether dismissal otherwise unfair, and remedy) in a determinative conference by video on 21 June 2024. Both parties were self-represented.

[9] I received evidence from the following persons:

- Tamara Rimland (applicant)<sup>1</sup>;
- Gregory Kennedy (business owner)<sup>2</sup>; and
- Craig Calvert (business owner)<sup>3</sup>.

[10] I have redacted certain content from the published version of this decision where there is potential prejudice to third parties or no public interest in publishing the content. The parties have been provided an unredacted version.

## **Facts**

[11] The facts are largely not in dispute. I make the following findings.

### *Baldwins*

[12] Baldwins is a plumbing business based in Port Lincoln in regional South Australia. It has operated for approximately ten years and is owned by two business partners, plumbers and friends Greg Kennedy and Craig Calvert.

[13] It is a small business employer. At the time of dismissal, Baldwins engaged one other person (Ms Rimland) apart from the two business owners.

### *Ms Rimland*

[14] Ms Rimland is a local of Port Lincoln. After a lengthy period of unemployment, she was employed as a full-time administrative officer on 30 August 2022.

[15] For approximately the first three months of employment Ms Rimland was trained by an outgoing administrative officer. Thereafter she was responsible for administrative matters, reporting to both owners but dealing regularly with Mr Kennedy who commonly oversaw that side of the business.

[16] According to Ms Rimland's evidence, she is on the autism spectrum and sometimes easily takes a dislike to being around some people. No evidence of the condition or its impact or severity was led.

[17] Baldwins was aware of the condition in general terms as, shortly after being employed, it received a government subsidy for engaging Ms Rimland under a disability support programme.

### *Relationship between Ms Rimland and the owners*

[18] Being a small group of three in a regional town, the relationship between Ms Rimland and both Mr Kennedy and Mr Calvert was work-related only but friendly. Ms Rimland did not socialise with the owners out of work nor vice versa.

[19] As each were frequently in the office together, it was not uncommon that Ms Rimland and Mr Kennedy (in particular) would, during a workday, speak occasionally about personal matters or express personal opinions about people. By and large these conversations were unremarkable.

*Communication with Mr Kennedy about his personal life*

[20] As the work relationship progressed into 2023 Mr Kennedy noticed and became discomfited by an increasing tendency by Ms Rimland to send him emails and texts often late at night which he considered of a personal nature or commenting on his personal affairs.

[21] Some of these emails and texts are in evidence. They include comments and opinions about Mr Kennedy's parents and former parents-in-law and about his former wife. For example, on 7 March 2023 Ms Rimland told Mr Kennedy that [REDACTED]

<sup>4</sup>.

[22] Ms Rimland did not contest that she occasionally sent such emails and texts but, according to her evidence, some were sent late at night after she had drunk too much, the directness of some was a product of her autism, and others were sent because she (an older person in her 50's) wanted to look out for Mr Kennedy's best interests (a younger person). Usually, nothing was said by Ms Rimland or Mr Kennedy about the messages the next day. Work would proceed as normal.

[23] However, into the second half of 2023 Mr Kennedy became concerned that the late night and personal messaging had crossed acceptable boundaries. From time to time, he spoke to his business partner Mr Calvert and let him know this was happening. Mr Calvert observed that Mr Kennedy was upset and distracted by the fact that Ms Rimland was communicating this way.

[24] Mr Kennedy decided to speak to Ms Rimland. He did so from time to time informally, advising her that he didn't appreciate what had been said though sometimes still letting it pass not to create a fuss.

*Warning 23 December 2023*

[25] Things came to a head on 22 December 2023. At 10.58pm that evening Ms Rimland sent Mr Kennedy an email:<sup>5</sup>

“ [REDACTED]

[REDACTED]

Why do you want to do this. That is so sad. Anyway I thought more of you than that. None of my business lol.

See you next year. Just don't touch me hehehehehehe!”

[26] Mr Kennedy considered that [REDACTED] gone too far. Although he wanted a harmonious work environment he decided, supported by Mr Calvert, to issue a formal warning. He did so in writing the next day 23 December 2023:

“Hi Tamara

There have been more than one occasion where you have sent personally offensive emails or messages to me.

In particular the email [REDACTED]

Then Secondly last night when you [REDACTED]

If you have mistaken my treating you kindly in the past as giving you signals that I have any interest in you which goes beyond friendship and trying to create a friendly supportive environment then you are mistaken.

If you can't understand where the line has been crossed here then you should perhaps look for employment elsewhere.

Hopefully you realise that this behaviour is not acceptable. This kind of harassment is unnecessary and puts me in an uncomfortable position.

This is a formal warning.

Greg Kennedy”

*Email 28 March 2024*

[27] During the workday of 28 March 2024, the day before Easter, Ms Rimland and Mr Kennedy were in the office.

[28] In general conversation with Ms Rimland, Mr Kennedy let it be known that he was dating a particular person and disclosed her name. [REDACTED]

[29] At 9.22pm that evening (28 March) Ms Rimland sent Mr Kennedy the following email:<sup>6</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[30] In her evidence Ms Rimland stated that she had not been drinking when this email was sent. She said that the email was sent with good intent to provide guidance to Mr Kennedy [REDACTED].

[31] Upon reading this email Mr Kennedy was deeply upset. [REDACTED].

[32] The following morning (Good Friday) Mr Kennedy spoke to Mr Calvert about the email. Mr Kennedy remained upset. Mr Calvert advised him that this had gone on long enough, that Ms Rimland had been warned, and that in his (Mr Calvert's) view a red line had again been crossed, that this was misconduct and Ms Rimland should be dismissed. It was agreed between the two that Mr Kennedy should consider the options over the long weekend, and that they would again discuss the situation on the Tuesday following Easter. They agreed that this would allow them to see if Ms Rimland, in the light of day, withdrew or apologised during the Easter break.

[33] Ms Rimland made no contact with Mr Kennedy over Easter, nor Mr Kennedy with Ms Rimland. Mr Kennedy remained distracted and upset.

*Dismissal 2 April 2024*

[34] On the morning of Tuesday 2 April 2024 Mr Kennedy and Mr Calvert spoke. After ascertaining that no retraction had been made by Ms Rimland, Mr Calvert repeated his view that she should be dismissed. Mr Kennedy agreed that he probably had to do so but felt troubled by the thought. Mr Calvert stated that he would support whatever decision Mr Kennedy made but felt immediate dismissal was the only way to stop personal boundaries being crossed.

[35] Mr Kennedy agreed that he would have to confront the issue and dismiss Ms Rimland. He remained upset and was inwardly angry but knew he would have to try to remain calm.

[36] At 10.30am Mr Kennedy approached Ms Rimland in the office. A short conversation ensued. Mr Kennedy told her that she had to leave. When she asked why he told her to check her emails. Moments later, annoyed that Ms Rimland had not appeared to understand what he was referring to, Mr Kennedy became more direct, and angrily approached her desk and said words to the effect:

“I trusted you, Tamara. Pack your shit and leave now.”

[37] In saying “I trusted you Tamara” Mr Kennedy was referring to the trust he placed in confiding to Ms Rimland about his relationship the previous Thursday. In telling her to “pack your shit and leave now” he was instantly dismissing her.

[38] Ms Rimland was shocked at being dismissed and by Mr Kennedy's angry tone. She left the business shortly thereafter.

[39] One hour later, at 11.34am, Mr Kennedy sent Ms Rimland a formal email of termination. It read:<sup>7</sup>

“Hi Tamara

Please accept this letter notifying you of your dismissal from Baldwins Plumbing. We appreciate the involvement in the business and the hard work you have put in over the last approximate 18 months.

Unfortunately as you have been warned in the past and have continued to send offensive personal emails to myself late at night.

Both Craig and I deem this as workplace harassment.

We can no longer tolerate this behaviour and you seem unable to contain it.

We wish you all the best in the future.

Regards

Greg Kennedy”

[40] Ms Rimland was summarily dismissed. No notice was given or paid in lieu. Entitlements were paid to 2 April 2024.

[41] The day following the dismissal Ms Rimland responded in writing to Mr Kennedy:<sup>8</sup>

“I never workplace harassed you, that is a direct lie. You brought up your own personal issues as you saw fit in the workplace times, on your own accord. When you confronted me and pushed upon the desk aggressively and started talking, I only heard ‘I trusted you’... and then my fear took over that you were going to hurt me. My fear brought me to stand still, I was scared of you, I didn’t know what you were going to do. When you were at the door I still couldn’t hear what you said.

I emailed you after work, after hours, about issues you brought up to me directly ‘during work times’. This issue is with me I take these things home and dwell about them.

Then I consider a conclusion for you and I put them forth. I try and fix everyone, it’s a bad thing about me. I told you im weird. But some things that people tell me I mull over and then try to give solutions for that. I really do care about people firstly.

My late at night angry self is because I have had to much wine. I apologise for that – its my own traumas that I have gone through is a bitch. I’m sorry for that. I just don’t remember that side.

But thanks for taking me on. I never really wanted the job in the first place :) I’m happy by myself.”

[42] Mr Kennedy did not reply.

#### *Events since dismissal*

[43] Ms Rimland made this unfair dismissal application on 5 April 2024, three days after dismissal. She seeks compensation.



[44] Ms Rimland sought and was provided by Baldwins an Employment Separation Certificate to access unemployment benefits. This was sent by Mr Kennedy on 11 April 2024. In the certificate Mr Kennedy stated that employment ended because of “unsuitability for this type of work”.<sup>9</sup> In his evidence Mr Kennedy stated that he ticked this box rather than “misconduct as an employee” not to make it harder for Ms Rimland to get another job.

[45] Ms Rimland applied for eight jobs in the Port Lincoln area since dismissal but has not yet secured fresh employment.

[46] Ms Rimland booked an overseas holiday on 5 March 2024 for October 2024. She still plans to travel even though she is now less financially secure.<sup>10</sup>

## **Submissions**

### *Ms Rimland*

[47] Ms Rimland submits that the Small Business Fair Dismissal Code (Code) was not complied with because Baldwins could not have believed on reasonable grounds that she had engaged in serious misconduct warranting immediate dismissal, because her conduct was not, when seen in context, misconduct let alone serious misconduct.

[48] The context Ms Rimland relies on is that:

- Mr Kennedy volunteered personal information to which she was simply responding;
- Mr Kennedy from time to time spoke crudely about the personal affairs of others to Ms Rimland including whilst at work;
- Ms Rimland’s emails and texts now complained about, including the email of 28 March 2024, were sent out of hours in her own time and were not work related. She should not lose her job over non work-related matters;
- Ms Rimland was acting in a motherly manner out of concern and good intent for Mr Kennedy; and
- Ms Rimland’s bluntness and interest in personal issues could in part be explained by her autism of which the employer was generally aware.

[49] Ms Rimland also submits that the Code was not complied with because Baldwins did not go to the police.

[50] Ms Rimland submits that the dismissal was unfair for the aforementioned reasons, and because she was not given warning or notice in lieu.

[51] Ms Rimland submits that she should be paid for all lost income since being dismissed which, at the date of hearing was approximately eleven weeks.

*Baldwins*

[52] Baldwins submit that the dismissal was not unfair because it was a small business employer which complied with the Code.

[53] It says that the dismissal was consistent with the Code because Mr Kennedy and Mr Calvert believed on reasonable grounds that Ms Rimland had engaged in serious misconduct warranting immediate dismissal.

[54] In particular, Baldwins submit that:

- The conduct is not in dispute and was known by the business owners;
- The conduct was serious and the owners reasonably believed that it destroyed the trust and confidence necessary to continue the employment relationship including because one of the business owners Mr Kennedy was the object of the conduct;
- The conduct was repeated and thereby a form of harassment;
- The conduct did not cease despite informal counselling and then a formal warning;
- The conduct was offensive, intrusive and unwelcome;
- The effect of the conduct was to cause distress to Mr Kennedy and compromise his ability to work in a productive and healthy manner; and
- Mr Kennedy tried to remain calm when dismissing Ms Rimland, but his emotion got the better of him because he was the object of the conduct and its personal nature.

[55] In the alternative, for the aforementioned reasons, Baldwins submit that the dismissal was not unfair.

[56] No issue of remedy arises. The application should be dismissed.

**Consideration**

[57] I am satisfied that Ms Rimland was a person protected from unfair dismissal within the meaning of s 382 of the FW Act. She served the required minimum employment period (s 382(a)). Her annual rate of earnings did not exceed the high-income threshold (s 382(b)(iii)). Her employer was a “national system employer” within the meaning of the FW Act.

[58] It is not in dispute that Ms Rimland was employed by a small business employer.

[59] There are no jurisdictional issues arising.

[60] The matter in issue is whether the dismissal was unfair. In this respect two issues arise:

- was the dismissal consistent with the Small Business Fair Dismissal Code? If so, the dismissal cannot be an unfair dismissal (s 385(c)); and
- if (but only if) the dismissal was not Code compliant, was the dismissal harsh, unjust or unreasonable. If so, the dismissal was an unfair dismissal (s 385(b)).

**[61]** Only if the dismissal was an unfair dismissal am I required to consider what (if any) remedy should be ordered.

#### *Small Business Fair Dismissal Code*

**[62]** Section 388 provides:

#### **“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.”

**[63]** The Code provides:

#### **“The Code**

#### **Summary Dismissal**

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

#### **Other Dismissal**

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

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

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

### **Procedural Matters**

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity. A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.”

[64] It is not in dispute that Ms Rimland was dismissed summarily, and that the dismissal took effect on 2 April 2024.

[65] The issue then is whether the provisions of the Code dealing with “Summary Dismissal” were complied with.

[66] The approach to applying these provisions of the Code has been set out by a Full Bench of the Commission:<sup>11</sup>

“[29] ... There are two steps in the process of determining whether this aspect of the Small Business Fair Dismissal Code is satisfied. First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.”

[67] The evidence clearly establishes that Baldwins held a belief at the time of dismissal (2 April 2024) that Ms Rimland had engaged in conduct that was sufficiently serious to justify immediate dismissal. The conduct it relies upon is a pattern of behaviour associated with sending texts or emails to one of the owners, Mr Kennedy, about personal matters culminating in the email of 28 March 2024. There is no dispute that Mr Kennedy knew of the conduct and the earlier warning, as he was the object of the conduct and had given the warning.

[68] Was Baldwins belief based on reasonable grounds?

[69] In *Pinawin* it was stated by the Full Bench:

[30] “Acting reasonably does not require a single course of action. Different employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned.”

[70] The issue that falls to be decided is whether Baldwins reasonably believed that the conduct was sufficiently serious to justify immediate dismissal.

[71] Though “conduct” for the purposes of this part of the Code is not necessarily limited to the definition of “serious misconduct” in s 12 and the FW Regulations, that definition is a useful reference point. Regulation 1.07 includes:

“wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment.”

[72] This encompasses conduct which has the effect of fundamentally undermining the trust and confidence necessary to an employment relationship. Baldwin’s believed that the conduct was of that character at the time of its decision to dismiss.

[73] For the following reasons I conclude that the employer’s belief was based on reasonable grounds.

[74] Firstly, the email of 28 March 2024 was not an isolated instance. It was the culmination of a pattern of behaviour that had occurred over the preceding year.

[75] Secondly, the email occurred in the wake of earlier informal counselling and then a formal warning that such communication crossed personal boundaries, had become unwelcome and that Ms Rimland should desist.

[76] Thirdly, Mr Kennedy did not invite the email of 28 March 2024 nor was it part of an exchange in which he was, late at night, sharing personal information. Nor was there a second-thought or retraction of the email in the days that followed.

[77] Fourthly, the email concerned matters personal to one of the owners of the business. Ms Rimland knew that Mr Kennedy was a business owner that employed her. The 28 March 2024 email was offensive in content in that

[REDACTED]. It was not sent under the influence of alcohol; it was sent knowingly and purposefully.

[78] I do not accept Ms Rimland’s submission that in context the email and her pattern of behaviour was not sufficiently serious to warrant immediate dismissal. I deal with each of the reasons advanced by Ms Rimland.

**[79]** Ms Rimland submits that Mr Kennedy volunteered personal information to which she was simply responding. I have found that during the workday on 28 March 2024 Mr Kennedy volunteered to Ms Rimland some limited information about his personal life in casual conversation whilst in the office. I do not however find that the information was said other than in ordinary terms. It was not peppered with salacious detail, nor did Mr Kennedy invite a response let alone late-night commentary. I do not consider that Mr Kennedy provoked the response he received that evening.

**[80]** Ms Rimland submits that Mr Kennedy from time to time spoke crudely in the office about the personal affairs of others. I take this into account. There is some evidence to support a finding that Mr Kennedy occasionally himself crossed the line of personal commentary in discussions with Ms Rimland. At least once he made her feel uncomfortable when he distorted a customer's surname and mimicked an act of male masturbation and at another time, he accentuated a *double entendre* in a customer surname. However, there is no evidence that Mr Kennedy routinely engaged in unwelcome personal discussion with Ms Rimland. Nor does the evidence support a finding that Mr Kennedy did so out of hours or that this was the overall character of their working relationship. Whilst I find that Mr Kennedy himself occasionally blurred the line between acceptable and unacceptable personal discussion of others whilst in the office, I do not find that it materially rendered less serious the conduct by Ms Rimland on 28 March.

**[81]** Ms Rimland submits that the emails and texts now complained about, including her email of 28 March 2024, were sent in her own time and were not work related. I do not agree that the fact Ms Rimland's texts and emails were sent late at night mitigates their seriousness, nor that they were irrelevant to the employment relationship simply because they were sent out of hours. Out of hours conduct can, depending on the circumstances, have a sufficient connection to the employment relationship to constitute misconduct.<sup>12</sup> In this matter, it clearly did so. The emails were sent to the business owner about personal matters, and they were unsolicited. Moreover, a formal warning had been issued by the employer about that very conduct.

**[82]** Ms Rimland submits that she was acting in a motherly manner out of concern and good intent. This submission is misguided. Whatever subjective intent was held, it ought to have been readily apparent to Ms Rimland from the time of the informal counselling and then the formal warning that sending late night emails to Mr Kennedy about his personal life had crossed the boundary of reasonableness and was unwelcome. The emails were not, for example, a continuation of social discourse between two employees who were close friends following an evening together. Ms Rimland was not a social acquaintance nor engaged to be a counsellor. She was an office administrator with whom the owners sought a friendly yet largely professional relationship in a small workplace context in a regional town.

**[83]** Ms Rimland submits that her bluntness and interest in personal issues could in part be explained by her autism of which the employer was generally aware. I take this into account. The employer was generally aware around the time Ms Rimland was first employed of the condition. Autism is a condition that can manifest itself in social awkwardness or bluntness in written or oral communication due to the lack of an adequate social filter or sensor. However, the difficulty with apportioning some mitigation against seriousness on this account is twofold. Firstly, I simply have Ms Rimland's self-assessment of her condition and no evidence from a

health professional about the condition generally or its likely impact on her conduct. Secondly, the 23 December 2023 warning made it clear that this type of communication was unwelcome and needed to stop or else Ms Rimland should “look for employment elsewhere”. From that point on at least, Ms Rimland had an obligation to better manage her condition such that the conduct was not repeated lest she put her employment at risk.

**[84]** Ms Rimland submits that the dismissal was not consistent with the Code because Baldwins did not go to the police. This submission is a misapplication of the Code. The Code does not require an employer to report to the police each act of misconduct on which instant dismissal is founded. The reference to police reporting is illustrative but not mandated (the Code states “though not essential”).

**[85]** Considered overall, I conclude that the email of 28 March 2024 in the context of the pattern of behaviour that preceded it was sufficiently serious to justify immediate dismissal in that it undermined the trust necessary for the employment relationship to continue. It was:

- Gratuitous and humiliating;
- Unwelcome;
- Repeated;
- The subject of a recent warning; and
- Directed at an owner of the business who had asked for it to stop.

**[86]** In assessing seriousness I take into account that no evidence exists that late night messaging was repeated after the 23 December 2023 warning until 28 March 2024. This was a gap of three months. In this sense the conduct that triggered the dismissal re-emerged rather than a constant in the preceding weeks. However, in the context of the formal warning and its terms (“this behaviour is not acceptable” and “if you can’t understand where the line has been crossed here then you should perhaps look for employment elsewhere”) its repetition coupled with the offensive content of what was said on 28 March 2024 tells against its seriousness being discounted by reference to this time gap.

**[87]** Ms Rimland submits that even if dismissal was warranted notice should have been given or paid in lieu because her conduct was not sufficiently serious to justify immediate dismissal. Just as not all conduct is misconduct, not all misconduct is sufficiently serious to justify summary dismissal or for a reasonable belief to be formed to that effect. That this is so is apparent from the use of the phrase “sufficiently serious” in the Code. Determining whether the misconduct was “sufficiently serious” requires characterisation of the conduct in the context of the reasonableness of the employer’s belief that it met this threshold.

**[88]** Whilst noting that different persons including small business employers may approach the matter differently and form different conclusions, I find that Baldwin’s belief that the misconduct was sufficiently serious to justify immediate dismissal to have been based on reasonable grounds. In light of its repeated nature and the prior formal warning, Baldwins reasonably formed the view that it could no longer have confidence that Ms Rimland would stop communicating in personally offensive terms to Mr Kennedy and desist from late night harassment of him by text or email. The communication with Mr Kennedy was not an exchange between employees. It was by an employee to a co-owner. Being a small business of three persons, respectful communication between the office administrator and the owners and

compliance with a direction to desist was essential to a viable employment relationship continuing between Baldwins and Ms Rimland.

[89] For these reasons, the dismissal was consistent with the Code. Accordingly, the dismissal was not unfair.

[90] It is therefore unnecessary to consider whether the dismissal was unfair on other grounds.

[91] Should I have been required to do so, I would have found the conduct of 28 March 2024 to have been a valid reason and the dismissal not unfair given the formal warning to Ms Rimland to desist from such conduct. I would have found and taken into account that the dismissal was communicated orally in an unprofessional and rude manner by Mr Kennedy but that this deficiency in process, whilst entirely unbecoming of the employer, did not characterise the dismissal as a whole as unfair given the valid reason, the seriousness of the conduct and its personal character and the fact that a non-emotive letter of dismissal setting out the reasons was sent an hour later.

[92] Accordingly, no issue of remedy arises.

[93] Ms Rimland submits that her dismissal was unfair because she was not paid two weeks' notice. As the dismissal was Code compliant, I need not deal further with this submission other than to observe that notice is not required to be paid where a person is dismissed on account of misconduct that warrants summary dismissal.

[94] I also note that Ms Rimland contends that annual leave entitlements paid out on termination were not correctly calculated. I express no view on that question. Unfair dismissal proceedings are not forums to advance underpayment claims.

## Conclusion

[95] I have found that the dismissal of Ms Rimland by Baldwins was consistent with the Small Business Fair Dismissal Code and therefore not unfair.

[96] I have observed that if the Code had not been complied with the dismissal was not harsh, unjust or unreasonable given the misconduct and the formal warning which had been given.

[97] As the dismissal was not unfair, the application must be dismissed. An order giving effect to this decision is issued in conjunction with its publication.<sup>13</sup>





DEPUTY PRESIDENT

*Appearances:*

Ms T. Rimland, *on her own behalf*

Mr G. Kennedy *of and on behalf of Baldwin's Plumbing & Gas (SA) Pty Ltd*

*Hearing details:*

2024

Adelaide (Video)

21 June

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<sup>1</sup> Statements A1 and A4

<sup>2</sup> Statements R1 and R8

<sup>3</sup> Statement R13

<sup>4</sup> R5 (pages 59 and 61 court book)

<sup>5</sup> R10

<sup>6</sup> R11

<sup>7</sup> A6 and R12

<sup>8</sup> R12

<sup>9</sup> A5

<sup>10</sup> A8

<sup>11</sup> *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* (2012) 219 IR 128 (Pinawin); see also *Ryman v Thrash Pty Ltd T/A Wishart's Automotive Services* [2015] FWCFB 5264, [41]

<sup>12</sup> *Rose v Telstra Corporation Limited* [1998] AIRC 1592; *McManus v Scott-Charlton* [1996] FCA 1820, 56

<sup>13</sup> [PR776370](#)