



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Imran Karim Budhwani**

v

**Infosys Technologies Limited**  
(U2024/222)

COMMISSIONER P RYAN

SYDNEY, 1 JULY 2024

*Application for an unfair dismissal remedy*

## Introduction

[1] Mr Imran Budhwani (**Applicant**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with Infosys Technologies Limited (**Respondent**).

[2] The matter was heard before me on 27 and 28 March 2024. I exercised my discretion to grant permission to the Respondent to be represented by a lawyer, as I was satisfied as to the matters set out in s.596(2)(a) of the FW Act. The Applicant represented himself. The Respondent was represented by Mr S Hardy, solicitor.

[3] The following materials were admitted into evidence:

- Form F2 Attachment (Pages 8-12 of the Hearing Book) (**Exhibit A1**);
- Applicant's Submissions in Chief (Pages 13-15 of the Hearing Book) (**Exhibit A2**);
- Applicant's Submissions in Reply (Pages 161-162 of the Hearing Book) (**Exhibit A3**);
- Document 8 – Email communications (Pages 172-175 of the Hearing Book) (**Exhibit A4**);
- Document 9 – Email communications (Pages 176-178 of the Hearing Book) (**Exhibit A5**);
- Document 1 – Dr Stranger's Notes dated 21 March 2024 (Pages 163-164 of the Hearing Book) (**Exhibit A6**);

- Document 2 – Pathology Request dated 21 March 2024 (Page 165 of the Hearing Book) (**Exhibit A7**);
- Document 3 – Prescription dated 21 March 2024 (Page 166 of the Hearing Book) (**Exhibit A8**);
- Document 4 – Medical Certificate issued by Dr Rehab Elnawwam dated 20 March 2024 (Page 167 of the Hearing Book) (**Exhibit A9**);
- Document 5 – Dr Hytten’s Notes dated 14 March 2024 (Page 168 of the Hearing Book) (**Exhibit A10**);
- Document 6 – Prescription dated 14 March 2024 (Page 169 of the Hearing Book) (**Exhibit A11**);
- Infosys Leave Policy – Australia (**Exhibit R1**);
- Infosys Hardware Allocation History Reports for Asset IDs 150427 and 615194 (**Exhibit R2**);
- Witness statement of Mr Nimshy Osman, employed by the Respondent as Manager – Computers and Communications Division Australia and the Applicant’s Reporting Manager (**Exhibit R3**); and
- Witness statement of Mr Jonathon Dundov, employed by the Respondent as Unit Manager – Business Partner Human Resources (**Exhibit R4**).

[4] The Applicant, Mr Osman and Mr Dundov also gave evidence at the hearing.

[5] For the reasons that follow, I have concluded that the Applicant was not unfairly dismissed. In coming to this decision, I have taken into account all of the evidence and submissions of the parties. The fact that an issue is not mentioned in this decision does not mean that it has not been taken into account.

[6] This decision contains quotes and extracts from various documents that were tendered into evidence. Unless otherwise indicated, those quotes and extracts are in their original form including any typographical, grammatical or other errors.

#### **When can the Commission order a remedy for unfair dismissal?**

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

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

[8] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed. If I am satisfied that the Applicant was so protected, I must then consider whether the Applicant has been unfairly dismissed.

**When is a person protected from unfair dismissal?**

[9] Section 382 of the FW 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.

**When has a person been unfairly dismissed?**

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

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

**Observations on the evidence**

[11] I found the Applicant to be an unsatisfactory witness who gave inconsistent and contradictory evidence and who adopted an evasive approach to answering questions. On several occasions I had to direct the Applicant to answer questions after he initially refused to do so.<sup>1</sup> This caused me to caution the Applicant in relation to the way in which he was giving his evidence and drawing his attention to the offences that are set out under Division 9 of Part 5-1 of the FW Act, a copy of which was provided to him during an adjournment in the proceedings.<sup>2</sup>

[12] Despite that caution, the Applicant continued throughout the course of the proceedings to give inconsistent and contradictory evidence and evidence that he knew to be false or misleading.<sup>3</sup>

[13] Conversely, I found Mr Osman and Mr Dundov to be reliable witnesses who gave their evidence openly and honestly and made concessions where appropriate.

[14] It follows that where the evidence of the Applicant conflicts with the evidence of the Respondent's witnesses, I prefer the evidence of the Respondent's witnesses.

### **Relevant Factual Background**

[15] The Respondent is a company incorporated under the laws of India and is registered as a foreign company under the *Corporations Act 2001* (Cth) and is engaged in the business of information technology consulting.<sup>4</sup>

[16] On 2 October 2018, the Applicant commenced employment with the Respondent as a Senior Systems Engineer – IT Service Management.<sup>5</sup>

[17] The terms and conditions of the Applicant's employment are set out in a written employment agreement which comprises:

- a covering letter;
- the employment agreement and a schedule specifying position details, remuneration and a job description;
- an Employee Confidentiality Deed (Enclosure 1);
- an Infosys Restraint of Trade Agreement (Enclosure 2); and
- a Personal Data Collection Statement (Enclosure 3).<sup>6</sup>

[18] The relevant terms and conditions of the Applicant's employment are as follows:<sup>7</sup>

#### **4. Duties**

*You will perform day to day duties and activities in accordance with the Job Description for your role. An extract of the Job Description is provided for your reference in the Schedule. In addition to those specific day to day duties and activities, you have a number of general duties which you will carry out for the Company. For example, you are required to:*

- a. perform to the best of your abilities and knowledge the duties the Company assigned to you from time to time, whether during or outside normal business hours, at such places as required;*
- b. serve the Company faithfully and diligently to the best of your ability;*
- c. use your best endeavours to promote and enhance the culture, values and interests of the Company;*
- d. familiarize yourself and comply with our policies as amended from time to time (although these do not form part of your employment contract);*
- e. comply with all our directions;*

*f. comply with all laws applicable to your position and the duties assigned to you.*

**5. Location**

*You will initially work at the location set out in the Schedule. You may, however, be required to worker any office of Infosys Limited and/or Infosys Limited’s customer locations, or those of its affiliates, in accordance with the requirements of the Company from time to time, within reason.*

...

**11. Leave**

*All types of leaves shall be governed by the Infosys Australia Leave Policy.*

**11.1 Annual Leave**

*Annual leave accrues at the rate of four weeks (20 working days) per year of service, and is to be taken in accordance with the Company’s Leave Policy.*

**11.2 Personal/Carer’s Leave**

*Personal/Carer’s Leave accrues in line with applicable legislation and must be taken in accordance with the Company’s Leave Policy*

...

**12. Work Health & Safety**

*Both the Company and you are required to comply with the obligations under the Australian Work Health and Safety Act 2012 and applicable state and territory laws with respect to Work Health and Safety. This includes the Company taking all practicable steps to provide you with a healthy and safe working environment. You are required to comply with all directions and instructions from the Company regarding health and safety and shall also take all reasonable steps to ensure you do not undermine your health and safety or the health and safety of any other person during your employment.*

...

**15. Company Policies**

*The Company has various policies and procedures. The Company reserves the right to vary these policies at any time in its absolute discretion with or without notice. While these policies do not form part of your contract of employment, you are required to abide by all applicable policies.*

*The Company's policies and processes and the employee handbook are available on the Company's intranet. You will receive instruction regarding how to access these policies and processes during your induction.*

...

### **Schedule**

#### **1. Position Details**

...

**Base Location:** Sydney

...

#### **3. Job Description**

- *Installing and configuring computer hardware, software, systems, networks, printers and scanners*
- *Monitoring and maintaining computer systems and networks*
- *Responding in a timely manner to service issues and requests*
- *Providing technical support across the company (this may be in person or over the phone)*
- *Repairing and replacing equipment as necessary*
- *L1/L2 support in Windows OS*
- *Laptop/Service Support*
- *Contribute towards building a highly effective team*
- *Work independently and assign tasks and deliver high quality results on time*

...

### **Enclosure 3 Annexure to Employment Agreement Personal Data Collection Statement**

*Your privacy is important to Infosys Ltd ("Company")*

*Throughout the course of your employment with the Company, the Company needs to collect personal data from you and about you. The type of information that may be collected includes (but is not limited to):*

...

- *Personal and emergency contact details;*

...

*The purpose for which the Company collect this data is for use concerning your employment or working relationship with the Company and for various human resources, management and reporting purposes.*

...

*If you do not provide complete and accurate personal data to the Company as and when it is required, there may be potentially serious consequences for you and, depending on the circumstances, your future employment relationship with the Company.*

[19] The Respondent's Leave Policy relevantly provides as follows:<sup>8</sup>

#### **4. Annual Leave**

1. *All employees in the Company have an entitlement to annual leave.*

...

4. *Annual leave can be applied for in blocks of days and the minimum amount that can be availed is half (0.5) day.*

5. *Annual leave must be taken at a time mutually agreed with the Company with a minimum notice period of four (4) weeks.*

6. *Annual leave may be taken, subject to prior approval, and is paid by reference to an employee's base salary.*

...

#### **4.4 Applying for Annual Leave**

1. *Requests for leave should be organised with the employee's Reporting Manager and a leave application submitted in the applicable online leave system of the Company at least four (4) weeks before the requested period of leave.*

...

#### **8.4 Notification of inability to attend work**

1. *All employees working in Australia, must notify their reporting manager That all nominated representative as soon as practicable of his/her inability to attend work. In doing so, the employer should also advise the expected duration of the absence.*

2. *The employee is expected to report regularly to the office, keeping the Reporting Manager informed of his/her condition and anticipated date of return. Employees should not rely on colleagues or others in their work unit to pass on messages.*

[20] There was no dispute that the Applicant had agreed to the terms and conditions set out in his employment agreement.<sup>9</sup> Furthermore, the Applicant accepted that he was required to comply with the Respondent's policies and that he had access to the Respondent's policies, processes and employee handbook which were stored on the Respondent's intranet.<sup>10</sup>

[21] On 27 October 2021, the Respondent implemented a COVID-19 vaccination policy which required any employee working from an Infosys Office in Australia or New Zealand to be fully vaccinated against COVID-19 and provide evidence if requested (**Vaccination Policy**). The Vaccination Policy stated:<sup>11</sup>

***Will people working from required to have the vaccine?***

*We encourage all employees to be vaccinated. Employees who are working from home are not required to be vaccinated. However, we will continue to monitor and manage the COVID-19 risks for all of our employees.*

***What if I want to come into the office?***

*Anyone coming into an Infosys office anywhere in Australia or New Zealand will need to be fully vaccinated. It is your responsibility to ensure you are fully vaccinated. If attending a client site, you must follow that client's policies and directives with respect to COVID vaccination. We will continue to monitor and manage the COVID-19 risks associated with the performance of work and how to best look after the health and wellbeing of our people.*

***What evidence will need to be uploaded to show I've been vaccinated?***

*We will require you to provide evidence to show you've been vaccinated if you come into an Infosys office. Proof of vaccination needs to be in line with the requirements in New Zealand and each state and territory of Australia.*

[22] The Applicant is unvaccinated for COVID-19. Upon the implementation of the Vaccination Policy, the Applicant deliberately lied to the Respondent by stating that he was vaccinated against COVID-19 so that he could continue to attend the office. Under cross examination, the Applicant stated that he was only caught out lying about his vaccination status when he was asked to produce his vaccination certificate.<sup>12</sup>

[23] Notwithstanding the Applicant's dishonesty with respect to his vaccination status, the Respondent agreed to allow him to temporarily work remotely from home whilst he was not permitted to attend the Respondent's offices.<sup>13</sup>

[24] At around this time Mr Osman was appointed to the position of Manager – Computers and Communications Division Australia, which was responsible for managing and supervising the Respondent's IT Support Team in Australia. The IT Support Team comprised seven persons – five based at the Respondent's Melbourne office, and Mr Osman and the Applicant based at the Sydney office.<sup>14</sup>

[25] A consequence of the Respondent allowing the Applicant to temporarily work from home was that he could not perform all the requirements of his role. This required Mr Osman to attend to all matters requiring in person attendance at the Sydney office.<sup>15</sup>



[26] In or around mid-late 2022, Mr Osman made enquiries with the Respondent's human resources department as to whether the Applicant could return to the Sydney office. Mr Osman was informed that despite the easing of public health orders, the Respondent's Vaccination Policy remained in place and unvaccinated persons could not attend the office.<sup>16</sup> Thereafter, Mr Osman continued to seek regular updates on any changes to the Vaccination Policy.<sup>17</sup>

[27] On 2 November 2023, Mr Osman was informed by Mr Andrew Groth, the Respondent's Executive Vice President, Region Head – Australia and New Zealand, that the Vaccination Policy has been relaxed and unvaccinated persons can return to the office.<sup>18</sup>

[28] On 3 November 2023, Mr Osman telephoned the Applicant and informed him that the Vaccination Policy has been relaxed and that he would make arrangements to clean the Applicant's desk so that he can return to the office in the following week.<sup>19</sup>

[29] On 8 November 2023, Mr Osman had a further telephone discussion with the Applicant in which the following matters were discussed:<sup>20</sup>

- Mr Osman advised the Applicant that his desk had been cleaned and that he could return to the office in a few days time;
- The Applicant informed Mr Osman for the first time that he would be unable to attend work in the Sydney office and would require some time to organise his living situation. The Applicant also informed Mr Osman that he was not residing in Sydney (although he refused to provide specific details and Mr Osman assumed he was still residing within New South Wales), and stated that it would be challenging for him to commute every day to the Respondent's Sydney office;
- The Applicant stated that he consulted with doctors "*all around the world*" and that he was taking pain medication. The Applicant also informed Mr Osman that his medical condition had worsened recently and that he could not leave a window open in his home and that he would require some additional time to return to the office to return to the office. The Applicant provided an estimate of returning in February/March 2024 to which Mr Osman responded was "*fine*".

[30] Following that telephone discussion with the Applicant, Mr Osman briefed his immediate manager, Mr Kathiresan who informed Mr Osman that another couple of months would be fine subject to approval by human resources. Mr Osman then discussed the matter with Mr Jonathon Dundov, Unit Manager – Business Partner Human Resources, and was advised that the Applicant is required to return to the office or provide a medical certificate or other documentation supporting any request to continue to work remotely.<sup>21</sup>

[31] On 24 November 2023, Mr Osman sent correspondence by email to the Applicant stating:<sup>22</sup>

*As discussed previously on 3rd November 2023 & 8th November 2023, we now have confirmation that being vaccinated is not a requirement for entry to the Infosys office. This means you can start working from the office.*

*While you have been managing some of the work remotely so far, there are several activities which form part of the inherent requirements of your role. These activities can only be performed from the office and include:*

- *Building laptops and mac books for new and replacement requirements.*
- *Managing asset allocations and the allocations for new users, replacements, and separating users.*
- *Managing the servers in the office as part of your servers management role.*
- *Functioning as a fully available member of the service desk and addressing requests from users in the office as well as remote users who walk in with issues.*
- *The extended CCD Team are currently working from the office, you are expected to be available in the office to provide the above-mentioned support.*

*I expect you to commence attending the office on a daily basis effective from 11th December 2023. If there are any reasons as to why you are unable to return, please provide detailed information and respective documentary evidence.*

[32] On 27 November 2023, the Applicant sent correspondence by email to Mr Osman stating:<sup>23</sup>

*I am glad to see this email. Please see the attached doctors certificate I retrieved a day after our phone call conversation about my medical condition on the 8th of November, 2023. I feel that I have explained more than enough about my medical condition over the phone and do not wish to share any further information about it via email or to anyone else at Infosys (please let me know if this is not okay). I have told you about this as a friend.*

*I am currently working on getting my body back up to a point where I can come to the office and not experience any discomfort. I believe that it will take me up to the end of February, mid- March 2024. I am in touch with a few doctors and will be providing a doctor's certificate for my absence from the office. I would like you to know that I am looking forward to coming back to the office and working with you and the rest of my colleagues. If there is anything else I might be missing, please let me know.*

[33] Attached to that email was a medical certificate issued by Dr Rehab Elnawwam from a medical practice based in Maleny, Queensland. The medical certificate stated:<sup>24</sup>

*Mr Imran Budhwani has a medical condition and will be unfit from work from 09/11/2023 to 07/12/2023 inclusive.*

(Emphasis added)

[34] Mr Osman stated that upon receiving the Applicant's response it was the first time that he became aware that the Applicant was unfit for work and that he may be working from Queensland without approval.<sup>25</sup>

[35] On 30 November 2023, Mr Osman sent correspondence by email to the Applicant stating:<sup>26</sup>

*At the outset, I would like to clarify that you have not provided any details pertaining to your current medical condition when we had discussed over the phone. You have provided a medical certificate which stipulates that you are currently unfit for work between 9th November 2023 and 7th December 2023. As this medical certificate stipulates that you are unfit for work, you are requested to please proceed with applying for leave for the duration of this medical certificate. If you do not have the required sick/personal leave balance for the duration of this medical certificate you will need to apply for annual leave.*

*In addition, we have also noticed that the medical certificate is from a GP in Queensland. Can you please confirm your current location? If you are currently residing and working from Queensland, please provide the approvals that were obtained to relocate and to continue working.*

[36] The Applicant did not provide any response.<sup>27</sup> The Applicant stated that he did not respond as he considered Mr Osman's statement that the Applicant had not provided any details pertaining to his medical condition "hurtful" as he had previously informed Mr Osman of his medical condition during the telephone discussion on 8 November 2024.<sup>28</sup> Under cross examination, Mr Osman accepted that while the Applicant had provided information such as the symptoms he was suffering from and foods that he should avoid, he had not provided the details of any specific condition, nor had the Applicant provided a medical certificate in support of his request to continue to work remotely from home.<sup>29</sup>

[37] At 10:39am on 8 December 2023, Mr Osman resent the correspondence dated 30 November 2023 to the Applicant accompanied by a covering email stating:<sup>30</sup>

*Hi Imran,*

*Please respond. Also, have you applied for leave for 6<sup>th</sup> to 11<sup>th</sup> Dec? Are you taking Annual leave, or sick leave?*

[38] At 10:39am on 8 December 2023, Mr Osman received an automatic reply from the Applicant's email account stating:<sup>31</sup>

*AUTO REPLY*

*Hi,*

*Thank you for your email. Please note that I have taken leave from the 6<sup>th</sup> of Dec to 11<sup>th</sup> of Dec.*

*My team can be reached on [email address redacted].*

*Please make sure to raise any AHD for any laptop.issues you may experience in using the link below.*

*Your first POC for any account related issues is the Global Helpdesk Team. They can be contacted on AU: [contact details and links redacted].*

*Best Regards,*

*ImranKarim.Budhwani.*

(Emphasis added)

[39] Mr Osman stated that he only became aware that the Applicant was on leave for the period of 6 December 2023 to 11 December 2023 upon receiving that automatic reply. Mr Osman stated that the Applicant had not made any request or notification to him, nor had the Applicant submitted a leave request in the Respondent's payroll system.<sup>32</sup> The Applicant does not dispute this and agrees that he did not apply for leave or inform his manager and that he acted contrary to the Respondent's Leave Policy.<sup>33</sup>

[40] On 11 December 2023, Mr Osman had a telephone discussion with the Applicant in which the following matters were discussed:<sup>34</sup>

- The Applicant advised Mr Osman that he went on leave for the period of 6 December to 11 December 2023 and that he had trouble connecting to the Respondent's payroll system to submit his leave request;
- Mr Osman suggested that the applicant take leave for the period of 9 November to 7 December 2023 in accordance with the medical certificate he had provided. In response to that the Applicant agreed to retrospectively apply for leave for the period of 6 December to 11 December 2023.
- The Applicant stated that he was not refusing to return to the office but required additional time to work remotely until March 2024. Mr Osman stated that the Applicant's role was required in the office and that if the Applicant needed to continue to work remotely, he would need to provide professional documentation in relation to his medical condition.
- Mr Osman also referred to the Applicant's relocation to Queensland without the necessary approvals, to which the Applicant responded that the corporate rules only stated that he was not allowed to work from another country.

[41] Mr Osman stated the Applicant's explanation of having difficulty accessing the Respondent's payroll system did not seem logical as he had observed the Applicant undertaking tasks that required connectivity to the Respondent's IT system.<sup>35</sup>

[42] At 10:17am on 12 December 2023, Mr Osman sent correspondence by email to the Applicant stating:<sup>36</sup>

*Hi Imran,*

*As discussed yesterday, please apply for sick leave for 6<sup>th</sup> to 11<sup>th</sup> Dec. also, do share a doctor's certificate for prolonged absence from the office, even if you're working from home. Lastly, you will need approvals for changing your location work.*

[43] At 10:17am on 12 December 2023, Mr Osman received an automatic reply from the Applicant's email account stating:<sup>37</sup>

*AUTO REPLY*

*Hi,*

*Thank you for your email. Please note that I have taken leave from the 6<sup>th</sup> of Dec to 13<sup>th</sup> of Dec.*

*My team can be reached on [email address redacted].*

*Please make sure to raise any AHD for any laptop.issues you may experience in using the link below.*

*Your first POC for any account related issues is the Global Helpdesk Team. They can be contacted on AU: [contact details and links redacted].*

*Best Regards,*

*ImranKarim.Budhwani.*

*(Emphasis added)*

[44] Mr Osman stated that upon receiving that automatic reply, he became aware that the Applicant had extended his period of unauthorised leave until 13 December 2023. Mr Osman stated that as of 12 December 2023, the Applicant had not submitted any leave request for the period of 6 December to 13 December 2023.<sup>38</sup> The Applicant does not dispute this and agrees that he did not apply for leave or inform his manager and that he acted contrary to the Respondent's Leave Policy.<sup>39</sup>

[45] After receiving that automatic reply, Mr Osman telephoned Mr Dundov to update him on the matter before sending Mr Dundov the following correspondence by email:<sup>40</sup>

*Hi Jonathan,*

*I spoke with Imran last evening, and he stated that he went on leave from 6th to 11th Dec as per my email. I reminded him that I had suggested he take leave for the duration of 9th November to 7th December in line with the doctor's recommendation in the medical certificate he shared. He's agreed to apply for leave for 6th to 11th Dec instead, when he went on leave without informing anyone in CCD.*

*Regarding extended work from home, he stated he's not refusing to come back to work, but just needs time till March. He asked why we need a medical certificate for this. I*

*reminded him that we got this approval from Andrew and HR after a lot of follow up over the last year, and the CCD role requires that he be in the office. If he needs to work from home, there needs to be a valid reason with approvals. I also reminded him that he hasn't provided any professional documents about his condition, just that he's self-diagnosed it.*

*Lastly, we spoke about his moving to Queensland without approvals. He stated that the corporate rules only state that you're not allowed to leave the country. I told him no, I've checked with HR and have confirmation that it includes leaving to a different part of the country as well. He wants to see the policy that states this. He's stated that he will not be replying to my mails to him, and that if HR has any more questions they can contact him directly.*

[46] At 5:03pm on 13 December 2023, Mr Osman sent further correspondence by email to Mr Dundov stating:<sup>41</sup>

*Hi Jonathan,*

*As discussed, Imran has been on unapproved leave since 6th December. He had set an Out of Office message stating he's on leave till the 11th. He hadn't applied for leaves, and I called him on the evening of the 11th asking about this and advising him to apply for leave. He said he will do this. I was expecting him to be back to working from home on the 12th, only to see he had extended his leave till the 13th without informing anyone. I got to know this only when I saw his updated OOO message. **Today, he has gone ahead and further extended it to the 17th** (as per OOO, no intimation). **I've checked and confirmed that he hasn't applied for any of these leaves as yet.***

*I tried calling him again thrice today to understand what's going on, but got no response. **So he's been on unapproved leave since 6th, without informing me nor requesting leaves, and has decided to extend it further to 17th December.***

(Emphasis added)

[47] The Applicant does not dispute extending his period of unauthorised leave to 17 December 2023 and agrees that he did not apply for that leave or inform his manager and that he acted contrary to the Respondent's Leave Policy.<sup>42</sup>

[48] Upon receipt of this information, Mr Dundov considered that the Applicant's alleged conduct was in breach of the Respondents policies and procedures and its Code of Conduct and initiated a "disciplinary proceeding".<sup>43</sup>

[49] On 14 December 2023, Mr Dundov sent a calendar invitation to the Applicant titled "HR Discussion" inviting the Applicant to attend a Microsoft Teams meeting at 10:30am on 15 December 2023. At 9:06am on 14 December 2023, Mr Dundov received an automatic reply from the Applicant's email account stating:<sup>44</sup>

*AUTO REPLY*

Hi,

Thank you for your email. Please note that I have taken leave from the **6th of Dec to 17th of Dec.**

My team can be reached on [email address redacted].

Please make sure to raise any AHD for any laptop.issues you may experience in using the link below.

Your first POC for any account related issues is the Global Helpdesk Team. They can be contacted on AU: [contact details and links redacted].

Best Regards,

ImranKarim.Budhwani.

(Emphasis added)

[50] Upon receiving that automatic reply, Mr Dundov reviewed the Respondent's payroll system which indicated that the Applicant had not submitted any application for leave and was on unauthorised leave.<sup>45</sup>

[51] At approximately 10:30am on 15 December 2023, the Applicant joined the Microsoft Teams meeting with Mr Dundov. Mr Dundov stated that the purpose of the meeting was to discuss the Respondent's concerns regarding the Applicant's conduct and issue the Applicant with a "show cause notice". However, Mr Dundov stated that the Applicant did not wish to participate in the meeting as he was on leave. Mr Dundov's file note of the meeting records the following:<sup>46</sup>

**Attendees:** Imran Karim Budhwani & Jonathan Dundov

**Date:** 15th December 2023

**Time:** 10:30AM

**Jonathan:** Hi Imran, thanks for joining....Imran interrupts

**Imran:** I apologise, I only joined this call because I don't have my Infosys laptop on me, I have had to take emergency personal leave and I would like to reschedule the call when back from leave. I would like to have this discussion with HR once I am back from leave. I think it is ok to ask for that especially when I am on leave. It's a miracle that I even found the meeting so I hope that is ok Jono.

**Jonathan:** Imran I have checked our internal systems and there is no leave applied for you at this stage. I have also had a few conversations with your manager who has also confirmed they have not approved any leave for you and have requested you multiple times to enter in the leave as per standard process. During those conversations you have

*acknowledged that you would enter in leave, however you have not yet done so. Which means you are on unapproved leave right now.*

**Imran:** *Does that mean I shouldn't apply for leave for today so when I do put it in the system?*

**Jonathan:** *That is up to you Imran, if you are working today, then you don't need to apply for leave.*

**Imran:** *I've been here for 5 years so I know how the process works, so when there is an emergency you apply for leave when you can. So, I just don't feel it is appropriate to have anything work related happening (even though Imran initiated joined this meeting), respectfully this discussion is going for too long. I'm on leave today and the situation is just not appropriate again to start working today, I actually answered this call on purpose to inform you that I am on leave today in case you did not see my auto reply email, I'm sure it's a normal thing, sometimes people cannot apply for leave. So I mean, I do think it is ok.*

**Jonathan:** *As I mentioned Imran, as of now you are on unapproved. The purpose of this discussion was not to discuss your leave, but to discuss other matters that have been brought to our attention.*

**Imran:** *I would like to respectfully hang up if that is ok?*

**Jonathan:** *That is up to you Imran, however I will be sending you an email shortly after our discussion outlining the purpose behind this call.*

**Imran:** *Continues to outline that he is on leave, and that he did not have the ability to login to apply for leave as he did not have his Infosys laptop.*

**Jonathan:** *Outlines that the purpose behind this call was not in relation to leave and there were other matters to discuss.*

**Imran:** *Hangs up after advising he would do so.*

[52] At 10:50am on 15 December 2023, Mr Dundov sent email correspondence to the Applicant stating:<sup>47</sup>

*Confidential*  
*Hi Imran,*

*Thank you for your time today. The purpose of the meeting organised for today was in relation to matters that have been brought to our attention regarding concerns pertaining to potential breaches of the Employee Handbook Australia and the terms and conditions of your employment agreement.*



*Although we were not able to go through the details pertaining to the purpose of today's meeting, I have attached for you your Show Cause Notice that we are issuing you today in relation to the allegations.*

*You are requested to respond to this show cause notice in writing latest by close of business Tuesday 19<sup>th</sup> December 2023.*

*Please be reminded of your Employee Assistance Program available should you wish to utilise it, details are also attached.*

*Should you have any questions, please contact me directly.*

**[53]** Attached to that email correspondence was a letter inviting the Applicant to show cause as to why the Respondent should not take disciplinary action against the Applicant (**Show Cause Letter**). The Show Cause Letter relevantly states:<sup>48</sup>

*We are writing to formally set out in detail about matters that have been brought to the attention of Infosys technologies Limited (“Infosys”/“Company”) regarding concerns pertaining to potential breaches of the employee handbook Australia, and the terms and conditions of your employment agreement.*

### **ALLEGATIONS**

*Infosys has identified that the allegations relate to potential breaches of the employee handbook Australia and the terms and conditions of employment agreement.*

#### **1. Insubordination**

- 1.1 On 3<sup>rd</sup> November 2023 and 8<sup>th</sup> November 2023, you had conversations with your Manager, Nimshy Osman who provided details to you regarding the requirement to attend the Infosys North Sydney office.*
- 1.2 You received an email on 24<sup>th</sup> November 2023 where you were recently requested to commence attending the office effective 11<sup>th</sup> December 2023 to fulfil the inherent requirements of your role.*
- 1.3 You have wilfully failed and refused to perform duties and responsibilities which have been allotted to you, under Section 9.1 of the Employee Handbook Australia.*
- 1.4 If proven, this conduct would amount to a breach under the Employee Handbook Australia and the terms and conditions of your employment agreement.*

#### **2. Working from a Different Location**

- 2.1 On 19 September 2018, you signed and accepted your employment agreement which was for a Sydney-based Systems Engineer - IT Service Management*

*position. Further, your employment agreement stipulates Sydney as your work location.*

- 2.2 *It is alleged that you have recently been working from Queensland during your employment with Infosys without seeking approval from your supervisor or a member of management.*
- 2.3 *On 30<sup>th</sup> November 2023, Nimshy Osman emailed you requesting details of approvals obtained to relocate and continue working. You chose not to respond.*
- 2.4 *On 12<sup>th</sup> December 2023, Nimshy Osman emailed you requesting details of approvals to relocate and continue working. You chose not to respond.*
- 2.5 *If proven, these conducts would amount to a breach of your employment agreement.*

### ***Opportunity to respond***

*We want to be clear that the above allegations are very serious, particularly because they are based on insubordinate which, if proven, affect the trust and confidence that is so central to an employment relationship. Further, and importantly, any concerns about misconduct puts at risk, Infosys' ability to have you work for our clients.*

*This letter is being issued to you to show cause and seek an explanation from you as to why Infosys should not initiate disciplinary proceedings against you, including but not limited to termination of your services with the Company.*

*You are requested to respond to the show cause notice latest by close of business 19 December 2023. After Infosys has had a chance to consider your written responses, we will schedule another meeting with you to notify you of our findings in relation to your conduct, as well as the outcome of any decision.*

*In the event you fail to provide us with a response, it will be presumed that you have nothing to say in the matter and the Company shall take appropriate action or decision in this matter. Please be reminded that this matter remains fitly confidential and should not be discussed with anyone.*

*Should you have any questions please contact Jonathan Dundov.*

**[54]** At 12:00pm on 18 December 2023, Mr Dundov and the Applicant had a further meeting over Microsoft Teams, the purpose of which was to provide the Applicant with an opportunity to ask any questions in relation to the Show Cause Letter. Mr Dundov's file note of that meeting, which the Applicant agrees is a "fair summary", is set out as follows:<sup>49</sup>

***Jonathan:*** *Hi Imran, thanks for joining...Imran Interrupts*

***Imran:*** *Before we continue, I would like this meeting to be recorded please.*

**Jonathan:** *Sorry Imran what is the reason you would like for it to be recorded?*

**Imran:** *I don't, and I apologise if I'm hurting anyone's feelings, I just don't feel comfortable speaking with you one on one directly without....Imran cuts out....I would like a witness, not to come off rude or anything. I'd like to do this so that we are both happy, I was going to ask...*

**Jonathan:** *Is it ok if I add one of my colleagues to this call?*

**Imran:** *Who would that be?*

**Jonathan:** *Rita*

**Imran:** *That would not help at all, I need someone who would not be bias. I think you do understand, I will send an email with this request, I would like to respond to the SCN but I think it would be a good decision.*

**Jonathan:** *Imran just so you know, the purpose of this call was not to go through your response, but just to see if you have any questions about the show cause notice?*

**Imran:** *What do I do if I feel that you guys have got everything wrong?*

**Jonathan:** *Then just put those details as part of your response to the SCN.*

**Imran:** *The email that Nimshy had sent me, that was a whole...that was a big lie that Nimshy had sent me, I had explained to him my whole...the auto immune condition I have, I explained it started in April, and it is still continuing and I'm trying to recover my body, so I can be in society again, so Nimshy wrote an email, saying you did not mention anything about any my medical condition. Its not supposed to be shared at work but I just mentioned to it Nimshy. I felt like I owed that to him. But for some reason he emailed an email that was a bunch of lies, so after that I'm like what's going on. So anyway as I said in my email before I'd like to come back to the office, I will be coming to the office, I will do my best to come in Feb or March, if I don't you will have.all I want to do is come back to the office, you guys are picking on something that has no relation to me coming to the office. Anyway id like to have this phone call record and a witness present, and I hope that is ok, and if that is ok. I can definitely respond to that show cause there is no truth in there.*

**Jonathan:** *That is fine Imran, as I mentioned we are not here to discuss your response now. If you don't have any questions relating to the show cause notice (allegations) then we do not need to discuss, and we will await your response by the due date.*

**Imran:** *Ok thank you Jono.*

**Jonathan:** *Thanks, Bye.*

[55] There was no dispute that the Applicant and Mr Dundov had several further telephone discussions over the period of 18 December 2023 to 19 December 2023 during which the

Applicant sought guidance as to how to respond to the Show Cause Letter, how to “*prove*” his location, and/or discussing his period of leave and medical condition. On each occasion, Mr Dundov advised the Applicant to put any questions in writing.<sup>50</sup>

[56] The Applicant did not provide any response to the Show Cause Letter by close of business on 19 December 2023. The Applicant accepted that the Show Cause Letter refers to the possibility of termination of employment but stated that he did not know that was a possible outcome for not responding to the Show Cause Letter. The Applicant stated had he known that he would have taken responding to the Show Cause Letter more seriously.<sup>51</sup>

[57] At 2:20am on 20 December 2023, the Applicant sent email correspondence to Mr Dundov stating:<sup>52</sup>

*Hi Jonathan,*

*Could I ask you for a few more days to respond to [the Show Cause Letter]?*

[58] At 10:12am on 20 December 2023, Mr Dundov sent email correspondence in reply to the Applicant which stated:<sup>53</sup>

*Hi Imran*

*We had the initial Show Cause Notice discussion on Friday 15th December 2023 and you were provided time up until close of business 19th December 2023 to respond to the allegations outlined in the Show Cause Notice. Further, we had a follow up discussion on Monday 18th December where you had an opportunity to ask any questions that you may have had with respect to the Show Cause Notice. I had also responded to your calls via Teams yesterday, 19th December 2023, and answered questions you had.*

*We believe that you have had a reasonable amount of time to respond to the Show Cause Notice, therefore we will not be able to consider any extension.*

*In saying that, I will be scheduling a follow up meeting with yourself tomorrow to continue our discussion regarding the Show Cause Notice that was issued to you on 15th December 2023.*

*If you wish to bring a support person with you that is fine. Please note that the role of the support person is to provide emotional support only. The support person is not to represent or act as an advocate for you.*

*I will also have one of my colleagues present who will be taking notes on my behalf.*

[59] Mr Dundov subsequently sent the Applicant an invitation to attend a meeting over Microsoft Teams at 10:30am on 21 December 2023.<sup>54</sup>

[60] It was not in dispute that the Applicant failed to attend the meeting at 10:30am on 21 December 2023 and did not provide any reason for that non-attendance when telephoned by Mr

Dundov shortly after 10:30am. Under cross examination, the Applicant stated that he formed the view that Mr Dundov was not helping him, so decided not to attend and participate.<sup>55</sup>

[61] At 11:08am on 21 December 2023, Mr Dundov sent email correspondence to the Applicant which relevantly stated:<sup>56</sup>

*Hi Imran*

*We spoke a short while ago on the phone at 10:32AM. I had sent you a calendar invitation yesterday for a meeting this morning at 10:30AM. Shortly after the meeting commenced, I called your mobile to see if you would be attending and what the reason might be that you were not able to attend. You did not provide a reason.*

*The purpose of the meeting was in continuation of the disciplinary investigation against you on the grounds of the breach of the Employee Handbook, Australia and the terms and conditions of your employment agreement. Infosys had identified allegations which relate to potential breaches of the Employee Handbook, Australia and the terms and conditions of your employment agreement.*

*Subsequently, Infosys held a meeting with you on 15th December 2023 where a Show Cause Notice was formally issued to you with complete details of the allegations made against you. Infosys then held a second meeting with you on 18<sup>th</sup> December 2023 to answer any questions you had with relation to the Show Cause Notice. You were provided with an opportunity to respond to the allegations made against you, but you have chosen not to respond.*

*Infosys has, in all the circumstances, formed the view that all the allegations are substantiated and that your actions constitute misconduct.*

*In these circumstances, given all the factors, Infosys has grounds to terminate your employment based on misconduct. Your employment will end today 21 December 2023.*

*You will need to hand over all company assets to Infosys by close of business 22nd December 2023. I will be raising your separation on your behalf today.*

*Please find below some points of contact of people you can reach out to after your last working if required.*

***Returning of Assets***

*Please ensure you return the assets allocated to you to the CCD Team in Sydney by close of business today 22<sup>nd</sup> December 2023. Please reach out to [redacted] if you have any questions.*

[62] Attached to that email correspondence was a letter of termination of employment which stated:<sup>57</sup>

*Dear Imran,*

*This is in the continuation of the disciplinary investigation against you on the grounds of the breach of the Employee Handbook, Australia and the terms and conditions of your employment agreement.*

*As you are aware, Infosys had identified allegations which relate to potential breaches of the Employee Handbook, Australia and the terms and conditions of your employment agreement.*

*Subsequently, Infosys held a meeting with you on 15<sup>th</sup> December 2023 where a Show Cause Notice was formally issued to you with complete details of the allegations made against you. Infosys then held a second meeting with you on 18<sup>th</sup> December 2023 to answer any questions you had with relation to the Show Cause Notice. You were provided with an opportunity to respond to the allegations made against you but you have chosen not to respond.*

*As discussed with you, Infosys has, in all the circumstances form the view that all the allegations are substantiated and that your actions constitute misconduct.*

*In these circumstances, given all the factors, Infosys has grounds to terminate your employment based on misconduct.*

*Please hand over all company assets allocated to you by close of business 22<sup>nd</sup> December 2023.*

*You are of course still bound by your post-employment obligations, including your postemployment restraints. Your settlement will be done as per company Policy and statutory entitlements.*

[63] Shortly after being informed that he was dismissed, the Applicant accessed the Respondent's Asset Management System and "falsely deallocated" three laptop computers that belong to the Respondent and that were assigned to him during his employment. The Applicant stated he did that so the Asset Management System would indicate those assets had been returned and his payment in lieu of notice would not be delayed. As at the date of hearing, the Applicant had not returned the laptop computers.<sup>58</sup>

#### Unauthorised Leave/Personal Emergency: 6-17 December 2023

[64] As set out above, during the period of 6 December 2023 to 17 December 2023, the Applicant implemented an automatic reply stating that he was on leave. Initially, the period was stated to be from 6 December to 11 December. The Applicant progressively amended the automatic reply to indicate the period of leave was from 6 December 2023 to 17 December 2023.

[65] In his materials in reply, the Applicant stated that in addition to not having a medical certificate, he also made the decision to take leave over that period due to a personal emergency.<sup>59</sup>

[66] On the first day of proceedings, the Applicant refused to answer questions about the nature of the personal emergency and confirmed that he would not be relying on any personal emergency necessitating the taking of any form of leave in that period and stated the only reason for the taking of leave was that he was upset with Mr Osman.<sup>60</sup>

[67] Shortly after the commencement of the second day of proceedings, the Applicant made an application to re-open his evidentiary case and give further evidence. The Applicant stated that he wanted to tell the “*whole truth now*” because he was “*hiding stuff*” and he now wanted to address the issue of the personal emergency.<sup>61</sup>

[68] The Respondent did not object to the application if it was limited to the issue of the personal emergency. Accordingly, I granted the application on that basis.<sup>62</sup>

[69] The Applicant gave further evidence that he took leave for the period of 6 December 2023 to 11 December 2023 because he did not have a medical certificate and that on 11 December 2023 he was evicted from his place of residence in Landsborough and given two days’ notice to vacate the premises by the Queensland Police. The Applicant then amended the period of leave in his automatic reply to allow him sufficient time to move out of his premises and return to work on 18 December 2023.<sup>63</sup>

[70] However, under further cross examination, the Applicant stated:

- That he took leave for the period of 6 December 2023 to 11 December 2023, because he did not have a medical certificate and that he had a friend visit him and he wanted to spend time with her,<sup>64</sup>
- That he extended the period of leave progressively to 17 December 2023 to deal with moving house and wanting to spend more time with his friend;<sup>65</sup>
- That he moved to Queensland for lifestyle reasons, and he did not advise the Respondent or seek approval because he was concerned that the Respondent would not allow him to work remotely from Queensland;<sup>66</sup> and
- That he did not inform the Respondent that he was working from Queensland throughout the show cause process because he “*was trying to spend more time trying to figure out a better answer*”.<sup>67</sup>

[71] After the Applicant’s further evidence had closed and following the luncheon adjournment, the Applicant sought to correct some of his evidence from the Bar Table. The Applicant stated:

- That his female friend had visited him from 15 November 2023 to 19 November 2023, and therefore the reason for taking leave from 6 December 2023 to 11 December 2023 was because he did not have a medical certificate;<sup>68</sup>
- That he extended the period of leave to 13 December 2023 because he was evicted from his place of residence;<sup>69</sup> and

- That he extended the period of leave until 17 December 2023, because he had met some “*good friends*” at an Airbnb, developed a good connection with them, and wanted to spend time with them. The Applicant further stated that the “*good friends*” had asked him to cat-sit their house for the period of 2 March 2024 to 21 March 2024.<sup>70</sup>

### **Has the Applicant been dismissed?**

[72] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[73] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant’s employment with the Respondent has been terminated on the Respondent’s initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[74] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[75] There was no dispute, and I find that the Applicant’s employment with the Respondent was terminated at the initiative of the Respondent.

[76] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

### **Initial matters**

[77] Section 396 of the FW Act requires the Commission to decide four initial matters before considering the merits of the application.

[78] There is no dispute between the parties, and I am satisfied on the evidence that:

- (a) the application was made within the period required in s.394(2);
- (b) the Applicant is a person protected from unfair dismissal;
- (c) the Small Business Fair Dismissal Code did not apply to the Applicant’s dismissal; and
- (d) the Applicant’s dismissal was not a case of genuine redundancy.

### **Was the dismissal harsh, unjust or unreasonable?**

[79] 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.

**[80]** I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>71</sup>

**[81]** I set out my consideration of each below.

**Was there a valid reason for the dismissal related to the Applicant’s capacity or conduct?**

**[82]** In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”<sup>72</sup> and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>73</sup> 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.<sup>74</sup>

**[83]** Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>75</sup> “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.”<sup>76</sup>

**[84]** The Applicant was dismissed for:

- (i) failing to follow a lawful and reasonable directions to recommence working from the Respondent’s Sydney office; and

- (ii) working from Queensland without approval and failing to respond to lawful and reasonable directions to provide details of his location and approval to work from that location;

[85] The Respondent also relies on two further reasons: the Applicant's failure to comply with Leave Policy, and the deallocation of the laptop computers.

[86] In *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal*<sup>77</sup> (**Mt Arthur Coal**) a Full Bench of the Commission considered the duty to obey lawful and reasonable directions. A helpful summary of this analysis was set out by Deputy President Saunders in *Gregory John Casper v New Horizons*<sup>78</sup>, as follows:

[28] In the absence of a contrary intention, there is a term implied into all contracts of employment to the effect that employees must follow the lawful and reasonable directions of their employer.

[29] A lawful direction is one which falls within the scope of the employee's employment. An employee is not obliged to obey a direction which goes beyond the nature of the work the employee has contracted to perform, although an employee is expected to obey instructions which are incidental to that work.

[30] A direction which endangers an employee's life or health, or which the employee reasonably believes endangers his or her life, will not be a lawful order, unless the nature of the work is itself inherently dangerous, in which case the employee has contracted to undertake the risk. Further, the direction must be lawful in the sense that it must not direct the employee to do something that would be unlawful, such as driving an unregistered or unroadworthy vehicle.

[31] The reasonableness of a direction given to an employee is a question of fact and must be judged objectively having regard to all the circumstances, including the nature of the particular employment, the established usages affecting the employment, the common practices that exist, the general provisions of any instrument governing the relationship, and whether the employer has complied with any relevant consultation obligations. It is not necessary to show that the direction in question is the preferable or most appropriate course of action or in accordance with 'best practice' or in the best interests of the parties. There may be a range of options open to an employer within the bounds of reasonableness.

[32] A direction lacking an evident or intelligible justification will not be reasonable, but that is not the only basis on which unreasonableness can be established. All the circumstances must be considered.<sup>79</sup>

(footnotes omitted)

[87] There was no exclusion of this common law term in the Applicant's contract of employment. However, as stated earlier, there was an express term requiring the Applicant to comply with the Respondent's directions.

Direction to recommence working from Respondent's Sydney office

[88] I have no hesitation in finding the direction to the Applicant to recommence working at the Respondent's Sydney office from 11 December 2023 was a lawful and reasonable direction.

[89] There is nothing illegal or unlawful regarding a direction to an employee to work from an office location and the Respondent's direction that the Applicant recommence working from the Sydney office clearly fell within the scope of the Applicant's employment, being a term of his employment agreement.<sup>80</sup>

[90] The only reason the Applicant was temporarily working remotely from the Sydney office was due to the implementation of the Vaccination Policy and its application to the Applicant as an unvaccinated person. The direction to recommence working from the Sydney office did no more than bring to an end the temporary remote working arrangement.

[91] The Applicant accepted that he could not perform all of his duties remotely.<sup>81</sup> The Applicant also agreed that the Respondent's direction was lawful and reasonable, and that it had "*every right to*" require the Applicant to work from the Sydney office as his job was "*at the office*".<sup>82</sup>

[92] While the Respondent was prepared to consider continuing to allow the Applicant to work remotely due to his medical condition, any consideration on that point was subject to the Applicant providing supporting medical evidence. Although the Applicant had stated on 27 November 2023 he would be providing a medical certificate in support, he failed to do so. The Applicant stated in the proceedings that he could not obtain a medical certificate because his condition has not been "*diagnosed under western medicine*".<sup>83</sup> This was despite the Applicant previously obtaining a medical certificate for the period of 9 November 2023 to 7 December 2023.

[93] I also do not accept the Applicant's eviction from his residence which he referred to as the 'personal emergency' is an acceptable or mitigating reason for failing to comply with the Respondent's direction to return to the Sydney office. The Applicant was first directed to return to the Sydney office in a telephone call on 3 November 2023. On 24 November 2023, the Applicant was subsequently issued a written direction to return to the Sydney office from 11 December 2023.

[94] Taking the Applicant's evidence at its highest, the eviction occurred in the week commencing 11 December 2023, and while that may have occurred, it seems the Applicant's priority that week was spending time with his female friend and/or the "*good friends*" he met at the Airbnb.

[95] Accordingly, I find the Applicant's failure to comply with the Respondent's direction to recommence working from the Respondent's Sydney office from 11 December 2023 was a valid reason for his dismissal.

Working from a different location

[96] The Respondent submitted that the Applicant's relocation to Queensland without prior approval and his failure to provide details of his location and approval to work from that location constituted a valid reason for dismissal. In support of this contention, the Respondent relied on the terms of the employment agreement, which records the Applicant's work location as Sydney.

[97] I do not accept the Applicant was required to seek the Respondent's prior approval to change his residential location.

[98] When properly construed, the location referred to in clause 5 of the employment agreement is clearly the *office* location of the Respondent. Furthermore, there is no evidence before me of any other term or condition of the Applicant's employment, or any policy of the Respondent, that required prior approval. This is unsurprising as, but for the COVID-19 pandemic and the implementation of the Vaccination Policy, the Applicant would ordinarily work from one of the Respondent's office locations, or that of a client of the Respondent. There is also no evidence that such a requirement was a term or condition of the temporary remote working arrangement.

[99] My view on this point is supported by the evidence of Mr Osman that he became aware on 8 November 2023 that the Applicant was working from a location outside of Sydney (presumed to be somewhere within New South Wales) and did not take issue with that.

[100] However, that is not the end of the matter, as part of the reason for dismissal on this ground was the Applicant's failure to provide details of his location when requested.

[101] It was a term and condition of the Applicant's employment that he provide accurate and complete personal data, including personal and emergency contact details, as and when it is required by the Respondent.

[102] The Applicant relocated to Queensland in April 2023. Despite being repeatedly directed to confirm his location, the Applicant refused to do so in circumstances where he knew he was required to provide those details to the Respondent. That the Applicant did not do so for fear of "*getting in trouble*" supports my view that the Applicant knew he was required to inform the Respondent of his location.

[103] The Respondent had a legitimate interest in knowing the Applicant's residential location, particularly in the context of the temporary remote working arrangement. The location of where the Applicant is based has the potential to impact the Respondent's work, health and safety obligations, workers compensation insurance premiums, payroll tax obligations, general insurance and security in relation to assets assigned to the Applicant, and the geographical area to which the cascading post-employment restraint clause in the Applicant's employment agreement will apply.

[104] The Applicant's deliberate concealment and his refusal to provide the details of his location when requested constituted a valid reason for his dismissal.

### Failure to comply with Leave Policy

[105] The Respondent submitted that the Applicant's failure to comply with the Leave Policy constituted a valid reason for dismissal. At the time of dismissal, the Respondent did not rely on this as a reason for dismissal.

[106] In *Newton v Toll Transport Pty Ltd*<sup>84</sup>, a Full Bench of the Commission stated:

*... in determining whether there was a valid reason for the dismissal the Commission is not confined to the reason advanced by the employer (either at the time of dismissal or during the course of the subsequent hearing). A valid reason for dismissal can be any valid reason underpinned by the evidence provided to the Commission.*

[107] In *APS Group (Placements) Pty Ltd v Stephen O'Loughlin*<sup>85</sup>, the majority stated:

*Section 387(a) of the FW Act requires FWA to consider "whether there was a valid reason for the dismissal". This language directs attention to whatever reason or reasons for dismissal emerge from the evidence and are relied upon by the employer. The tribunal is not confined to a consideration only of the reason or reasons given by the employer at the time of the dismissal. An employer is entitled at the hearing of an application for an unfair dismissal remedy to rely upon whatever reason(s) the employer wishes to rely upon at that time, albeit that in relation to any reason not relied upon at the time of dismissal the employer will have to contend with the consequences of not giving the employee an opportunity to respond to such reason (see s.387(b) and (c) of the FW Act).*

[108] There was no dispute that the Applicant was aware of the Leave Policy and had access to it during his employment. Furthermore, the Applicant agreed that in December 2023 he did not apply through the Respondent's payroll system or advise his manager (or anyone else) that he was taking leave. Rather the Applicant merely set up an automatic reply on his email account and progressively adjusted the dates to suit his personal circumstances. The Applicant accepted that his conduct was contrary to the Respondent's Leave Policy.

[109] There is nothing illegal or unlawful about the Leave Policy and the Respondent's direction that the Applicant comply with it clearly fell within the scope of the Applicant's employment.<sup>86</sup>

[110] Accordingly, I find that the Respondent's Leave Policy was a lawful and reasonable direction, and the Applicant's failure to comply with the Leave Policy, particularly clause 8.4, is a valid reason for his dismissal.

### Deallocation of Laptops

[111] The Applicant unashamedly acknowledged that he falsely deallocated laptops that were assigned to him to receive payment in lieu of notice without returning the laptops. In this respect, the Applicant's conduct was reprehensible.

[112] The Applicant did so shortly after being informed that his employment was terminated, while he was still an employee of the Respondent. Mr Osman stated that on the afternoon of 21 December 2023, and after the decision to terminate the Applicant's employment had been made, he became aware that the laptops had been deallocated but was uncertain who had done so.

[113] The Respondent submitted that the Applicant's dishonest deallocation of the laptops can be relied on as a valid reason for dismissal.

[114] It is well established that facts justifying dismissal, which existed at the time of the dismissal can be relied on, even if an employer was unaware of those facts and did not rely on them at the time of dismissal.<sup>87</sup>

[115] In my view, the Applicant's deallocation of the laptops, which occurred after the communication of dismissal, but before the ending of employment, is misconduct that can be relied on by the Respondent and constitutes a valid reason for dismissal. However, if I am wrong on this point, I would otherwise consider the Applicant's misconduct in deallocating the laptops as a relevant matter under s.387(h), that weighs against a finding that his dismissal was unfair.

**Was the Applicant notified of the valid reason and given an opportunity to respond to any valid reason related to their capacity or conduct?**

[116] In *Crozier v Palazzo Corporation Pty Ltd*<sup>88</sup>, (**Crozier**) the Full Bench found:

*As a matter of logic procedural fairness would require that an employee be **notified** of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG (3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.*

[117] While **Crozier** considered provisions under previous legislation, the principle in **Crozier** remains unchanged and continues to apply.<sup>89</sup>

[118] In relation to the matters set out in the Show Cause Letter, it is not in dispute, and I find that the Applicant was notified of the reason for the termination of his employment prior to the decision to dismiss being made (in explicit and plain and clear terms) and was given an opportunity to respond to the reason for dismissal.

[119] In relation to the Applicant's failure to comply with the Leave Policy and the deallocation of the laptop computers, I am not satisfied that the Applicant was notified of the reason for the termination of his employment prior to the decision to dismiss being made or given an opportunity to respond to the reason for dismissal.

[120] As stated by the majority in *APS Group (Placements) Pty Ltd v Stephen O'Loughlin*<sup>90</sup>:

*An employer is entitled at the hearing of an application for an unfair dismissal remedy to rely upon whatever reason(s) the employer wishes to rely upon at that time, albeit that in relation to any reason not relied upon at the time of dismissal the employer will have to contend with the consequences of not giving the employee an opportunity to respond to such reason (see s.387(b) and (c) of the FW Act).*

(Emphasis added)

[121] The mere fact that the Respondent has failed to provide the Applicant with an opportunity to respond does not automatically render the dismissal harsh, unjust or unreasonable. As noted by the Full Bench in *Etienne v FMG Personnel Service*<sup>91</sup>, “s.387(c) is not a ‘criterion’. It is not the case that a person must be provided with an opportunity to respond to any reason related to conduct or performance. Rather, s.387(c) is a consideration to which the Commission must have regard in its analysis of whether a termination is harsh, unjust or unreasonable...”

[122] The procedural defects relate to two of the four reasons that are relied on by the Respondent. Having regard to the gravity of the conduct that underpins those reasons, in particular the Applicant’s conduct in deallocating the laptop computers, and that the Applicant otherwise refused to provide any response to the Show Cause Letter or engage in any meaningful way with the Respondent on the other reasons, I am not satisfied that the procedural defects in relation to the Applicant’s failure to comply with the Leave Policy and the deallocation of the laptop computers are of sufficient significance as to weigh in favour of a finding that the Applicant’s dismissal was harsh, unjust or unreasonable.

**Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?**

[123] A meeting did not take place between the Applicant and the Respondent, as the Applicant refused to attend. However, the Respondent informed the Applicant that he was able to have a support person present at any discussions relating to dismissal.

[124] Accordingly, I find there was not any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist in discussions relating to his dismissal. This factor weights neutrally in my consideration.

**Was the Applicant warned about unsatisfactory performance before the dismissal?**

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

**To what degree would the size of the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[126] Neither party submitted that the size of the Respondent’s enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent’s enterprise had no such impact. This factor weights neutrally in my consideration.

**To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[127] It is not in dispute, and I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise. This factor weights neutrally in my consideration.

**What other matters are relevant?**

[128] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. There are two matters that I consider are relevant to my consideration.

Lack of knowledge/Second Chance

[129] The Applicant contended that he did not know that his employment could be terminated if he did not respond to the Show Cause Letter and that he should have been given a second chance. By second chance I understand the Applicant contends that his dismissal was harsh, and the punishment did not fit the crime.

[130] I do not accept the contention that he did not know that his employment may be terminated if he did not respond to the Show Cause Letter. The Show Cause Letter clearly states that termination of employment may be an outcome, and that if the Applicant fails to provide a response, the Respondent will proceed to determine the matter and take any appropriate action.

[131] I also do not accept the submission that the dismissal was harsh because the Applicant should have been given a second chance. The Applicant blatantly failed to comply with lawful and reasonable directions of the Respondent and failed to engage with the Respondent in any meaningful way when it attempted to raise those matters with him. Had the Applicant provided a medical certificate as he stated he would, and/or provided a response to the Show Cause Letter explaining his situation and/or participated in the meetings with Mr Dundov, another outcome may have been arrived at.

Return of Laptop Computers

[132] As at the date of hearing, the Applicant had not returned laptop computers belonging to the Respondent. I am satisfied that this is a relevant matter that weighs against a finding that the dismissal was unfair.

[133] The Applicant's failure to return the Respondent's laptop computers reflects poorly on him and is an issue the Respondent may choose to pursue in a different jurisdiction if it remains unresolved.

**Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?**



[134] I have made findings in relation to each matter specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>92</sup>

[135] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was not harsh, unjust or unreasonable because each of the reasons relied on by the Respondent was a valid reason for the dismissal and no other factors weigh in favour of a finding that the dismissal was unfair.

### **Conclusion**

[136] Not being satisfied that the dismissal was harsh, unjust or unreasonable, I am not satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

[137] The Application is dismissed. An Order to that effect will be issued with this decision.

[138] There is one further matter that I need to deal with. The Applicant knowingly gave false and misleading evidence despite having his attention drawn to the offence provisions set out in Division 9 of Part 5-1 of the FW Act. Accordingly, I will refer the matter to the General Manager of the Commission to consider whether the Applicant's conduct should be the subject of a referral to the Australian Federal Police.



### COMMISSIONER

#### *Appearances:*

*I Budhwani*, the Applicant  
*S Hardy*, solicitor, for the Respondent.

#### *Hearing details:*

Sydney:  
2024.  
27, 28 March

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<PR776548>

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- <sup>1</sup> Transcript at PN498, PN784-PN786; PN847; PN865-PN872.
- <sup>2</sup> Transcript at PN884-PN886; PN1006.
- <sup>3</sup> Transcript at PN1300-PN1346, PN1349-PN1352; See also paragraphs [64]-[71] below.
- <sup>4</sup> Exhibit R4 at [6]-[7].
- <sup>5</sup> Exhibit R4 at [9].
- <sup>6</sup> Exhibit R4 at [8]-[9], Annexure JD1.
- <sup>7</sup> Ibid.
- <sup>8</sup> Exhibit R1.
- <sup>9</sup> Transcript at PN523-PN526.
- <sup>10</sup> Transcript at PN527-PN539.
- <sup>11</sup> Exhibit R4 at [11], Annexure JD2.
- <sup>12</sup> Exhibit A3; Exhibit R4, Annexure JD3; Transcript at PN714-PN725; Transcript at PN741-PN742.
- <sup>13</sup> Exhibit A1; Exhibit R3 at [10]; Exhibit R4 at [16]; Transcript at PN746.
- <sup>14</sup> Exhibit R3 at [2], [6] and [11].
- <sup>15</sup> Exhibit R3 at [11]; Transcript at PN.
- <sup>16</sup> Exhibit R3 at [12].
- <sup>17</sup> Exhibit R3 at [13].
- <sup>18</sup> Exhibit R3 at [14]-[15].
- <sup>19</sup> Exhibit R3 at [16]; Transcript at PN842-PN843.
- <sup>20</sup> Exhibit R3 at [17]-[18]; Transcript at PN2083-PN2117.
- <sup>21</sup> Exhibit R3 at [19]-[20]; Exhibit R4 at [18]-[19]; Transcript at PN2118-PN2120.
- <sup>22</sup> Exhibit R3 at [21]-[22]; Annexure NO2.
- <sup>23</sup> Exhibit R3 at [23], [25], Annexure NO3.
- <sup>24</sup> Ibid.
- <sup>25</sup> Exhibit R3 at [24].
- <sup>26</sup> Exhibit R3 at [26]-[27]; Annexure NO4.
- <sup>27</sup> Exhibit R3 at [28].
- <sup>28</sup> Transcript at PN807, PN875, PN893-PN907.
- <sup>29</sup> Transcript at PN2215-PN2222.
- <sup>30</sup> Exhibit R3 at [28], Annexure NO5.
- <sup>31</sup> Exhibit R3 at [29], Annexure NO6.
- <sup>32</sup> Exhibit R3 at [29].
- <sup>33</sup> Transcript at PN465, PN877-PN883, PN934-PN935.
- <sup>34</sup> Exhibit R3 at [30].
- <sup>35</sup> Exhibit R3 at [31].
- <sup>36</sup> Exhibit R3 at [32]; Annexure NO7.
- <sup>37</sup> Exhibit R3 at [33], Annexure NO8.
- <sup>38</sup> Exhibit R3 at [33].
- <sup>39</sup> Transcript at PN465, PN877-PN883, PN934-PN935.
- <sup>40</sup> Exhibit R3 at [34], Annexure NO9; Exhibit R4 at [21], Annexure JD5.
- <sup>41</sup> Exhibit R3 at [37], Annexure NO10; Exhibit R4 at [22], Annexure JD5.
- <sup>42</sup> Transcript at PN465, PN877-PN883, PN934-PN935.
- <sup>43</sup> Exhibit R4 at [24]-[27].
- <sup>44</sup> Exhibit R4 at [28], Annexure JD6.

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- <sup>45</sup> Exhibit R4 at [29], Annexure JD7.
- <sup>46</sup> Exhibit R4 at [30]-[32], Annexure JD8.
- <sup>47</sup> Exhibit R4 at [33]-[34], Annexure JD9.
- <sup>48</sup> Ibid.
- <sup>49</sup> Exhibit R4 at [35]-[37], Annexure JD11; Transcript at PN1144, PN1152 and PN2629.
- <sup>50</sup> Exhibit A2 (Hearing Book at p.14); Exhibit A3 (Hearing Book at p.162); Exhibit R4, Annexure JD12; Transcript at PN1166-PN1168, PN1387-PN1400, PN2590 and PN2669-PN2673.
- <sup>51</sup> Exhibit A3 (Hearing Book at p.161); Exhibit R4 at [38].
- <sup>52</sup> Exhibit R4 at [39], Annexure JD12.
- <sup>53</sup> Exhibit R4 at [40]-[41], Annexure JD12.
- <sup>54</sup> Exhibit R4 at [42], Annexure JD13.
- <sup>55</sup> Exhibit R4 at [43]; Transcript at PN1166-PN1167.
- <sup>56</sup> Exhibit R4 at [44]-[45], Annexure JD12.
- <sup>57</sup> Ibid.
- <sup>58</sup> Exhibit R2; Exhibit R3 at [39]-[44]; Transcript at PN635-PN657, PN665-PN691 and PN3168.
- <sup>59</sup> Exhibit A3 (Hearing Book at p.161).
- <sup>60</sup> Transcript at PN1364-PN1378.
- <sup>61</sup> Transcript at PN1545-PN1552, PN1609-PN1759.
- <sup>62</sup> Transcript at PN1758-PN1759.
- <sup>63</sup> Transcript at PN1790-PN1838.
- <sup>64</sup> Transcript at PN1900-PN1906, PN1914-PN1915.
- <sup>65</sup> Transcript at PN2016-PN2022.
- <sup>66</sup> Transcript at PN1924-PN1933.
- <sup>67</sup> Transcript at PN1939.
- <sup>68</sup> Transcript at PN2352-PN2355.
- <sup>69</sup> Transcript at PN2357-PN2358.
- <sup>70</sup> Transcript at PN2358-PN2375.
- <sup>71</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWA FB 7498](#) at [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [69].
- <sup>72</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.
- <sup>73</sup> Ibid.
- <sup>74</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
- <sup>75</sup> *Edwards v Justice Giudice* [1999] FCA 1836 at [7].
- <sup>76</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].
- <sup>77</sup> [\[2021\] FWC FB 6059](#) at [64]-[81].
- <sup>78</sup> [\[2022\] FWC 1269](#).
- <sup>79</sup> Ibid at [28]-[32].
- <sup>80</sup> *Mt Arthur Coal* at [85].
- <sup>81</sup> Transcript at PN752-PN760.
- <sup>82</sup> Transcript at PN772-PN781.
- <sup>83</sup> Transcript at PN908-PN916
- <sup>84</sup> [\[2021\] FWC FB 3457](#) at [65].
- <sup>85</sup> [\[2011\] FWA FB 5230](#) at [51] (per majority).
- <sup>86</sup> *Mt Arthur Coal* at [85].
- <sup>87</sup> *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21 (per Starke J).

<sup>88</sup> (2000) 98 IR 137, at [73].

<sup>89</sup> *Gooch v Proware Pty Ltd T/A TSM (The Service Manager)* [\[2012\] FWA 10626](#).

<sup>90</sup> [\[2011\] FWAFB 5230](#) at [51] (per majority).

<sup>91</sup> *Etienne v FMG Personnel Services* [\[2017\] FWCFB 3864](#) at [33].

<sup>92</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357 at [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [92]; *Edwards v Justice Giudice* [1999] FCA 1836 at [6]-[7].