



# DECISION

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

**Daniel Pawelczyk**

v

**Commonwealth Bank of Australia**

(U2024/3942)

COMMISSIONER MCKINNON

SYDNEY, 15 AUGUST 2024

*Application for an unfair dismissal remedy – whether harsh, unjust or unreasonable*

[1] Mr Daniel Pawelczyk was employed by the Commonwealth Bank of Australia (CBA) as a Customer Engagement Specialist in its Financial Assistance Solutions area from 15 May 2023 until 15 March 2024. On 4 April 2024, Mr Pawelczyk applied in time for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (Cth) (the Act).

[2] Mr Pawelczyk is protected from unfair dismissal: at the time of dismissal, his gross annual salary was below the high income threshold; he had completed the minimum employment period of 6 months; and the *Commonwealth Bank Enterprise Agreement 2023* (the Agreement) applied to his employment. The Small Business Fair Dismissal Code did not apply to the dismissal because the CBA is not a small business employer. The dismissal was not a case of genuine redundancy.

[3] In summary, Mr Pawelczyk submits that the dismissal was unfair because:

1. Text messages he sent to his manager, Ms Jessica Obeid, were misinterpreted to fit the CBA's narrative,
2. He had no intent to harm Ms Obeid and she was okay with the messages,
3. The messages to Ms Obeid were factual, not personal,
4. Errors in his pay caused him financial distress and this was not taken seriously or properly addressed by Ms Obeid or the CBA,
5. The conduct for which he was dismissed occurred outside of working hours,
6. Ms Obeid 'torpedoed' his job application in another area of the CBA,
7. The CBA handled his complaint against Ms Obeid poorly including by separating it from the investigation in allegations about his conduct, and
8. He was dismissed after, and for, making the complaint against Ms Obeid.

[4] The question is whether I am satisfied that the dismissal was harsh, unjust or unreasonable.

[5] For the reasons below, I am not satisfied that the dismissal was harsh, unjust or unreasonable. Mr Pawelczyk was not unfairly dismissed by the CBA.

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

[6] Deciding whether a dismissal was harsh, unjust, or unreasonable requires an assessment of all relevant facts and circumstances, including the matters set out in section 387 of the Act.

[7] Mr Pawelczyk was dismissed because of messages he sent to Ms Obeid in the period from 16 November 2023 and 10 December 2023, and emails he sent about an unsuccessful job interview in the period from 13 to 19 December 2023. There is no dispute that Mr Pawelczyk sent the messages and the emails. The dispute is about why the messages and emails were sent, and what the consequences for Mr Pawelczyk should be.

[8] Mr Pawelczyk submits that the CBA showed no care for concerns he had raised about his pay, schedule changes, adequacy of training and lack of support; that the whole thing could have been avoided if it had done so; and rather than deal with the issues, the CBA decided it was easier to get rid of him. The CBA submits that even accepting the concerns raised by Mr Pawelczyk as legitimate, they do not justify his plainly unreasonable conduct toward or in relation to Ms Obeid and other employees.

Was there a valid reason for the dismissal related to Mr Pawelczyk's capacity or conduct, including its effect on the safety and welfare of other employees?

[9] The CBA dismissed Mr Pawelczyk for the reason that he engaged in misconduct of a serious nature when he sent the messages to Ms Obeid and when he sent the emails to other employees of the CBA about his job interview. According to the CBA, this conduct was in breach of its Values, Code of Conduct and Group Conduct Policy (Unlawful Workplace Conduct, Unacceptable Workplace Conduct and Workplace Bullying).

*The messages to Ms Obeid*

[10] Mr Pawelczyk sent more than 50 messages to Ms Obeid over three days in November 2023 (16, 18 and 19 November 2023) and three days in December 2023 (on 4, 7 and 10 December 2023). Many were sent in the early hours of the morning, or later in the evening, outside of working hours. The messages were extremely disrespectful to Ms Obeid, at times threatening, and made plain Mr Pawelczyk's disdain for her managerial ability and his desire for her to lose her job. By contrast, and as Mr Pawelczyk accepts, Ms Obeid was "unfailingly polite" in responding to the grievances he had raised with her.

[11] It does not matter whether Mr Pawelczyk intended to cause Ms Obeid harm or create a risk to her health and safety when he sent the messages. Mr Pawelczyk glosses over the serious nature of the messages, his motivation in sending them and their frequency. He does not properly acknowledge how he responded when Ms Obeid first told him to stop sending the messages, and later effectively begged him to cease what she felt was harassment. I do not accept that the messages to Ms Obeid were just factual, or that they were sent "without thinking". They were deliberate and they were targeted.

[12] I also do not accept that Ms Obeid was "ok" with the messages she received. On 16 November 2023, Ms Obeid responded to some of the messages, saying that she did not

appreciate feeling threatened by doing her job. It is true that on 23 November 2023, she advised Mr Pawelczyk that she had “not taken anything personal” and that she was “fine” about them continuing to work together. She dealt with the messages as professionally and politely as she could have done in the circumstances. But by 10 December 2023, as the conduct escalated, Ms Obeid made it clear that the messages were unwelcome, and that she wanted them to stop. Mr Pawelczyk did not stop. He responded to her request that he stop with a “Ha Ha” (laughing) emoji and proceeded to send 31 more messages.

[13] By the time the messages were sent, Mr Pawelczyk held a very dim view of Ms Obeid as a manager. He thought she was not doing her job properly, was never available, and had not stuck up for him or resolved issues that adversely affected his financial position involving changes to his roster, overpayments, and a weekend away he was planning to spend ‘working from home’ from a friend’s house so that he could perform paid comedy gigs in the evenings.

[14] On 11 October 2023, there was a minor disagreement between Ms Obeid and Mr Pawelczyk about whether changes to his hours of work following conversion from casual to permanent employment had been agreed. Mr Pawelczyk was annoyed because the changes affected his work/life balance, including his family needs and comedy business.

[15] On 12 October 2023, Ms Obeid advised Mr Pawelczyk of the “bad news” that a request he had made to work interstate at his friend’s house was not approved, and that he would have to work from CBA’s head office or take the planned day away as annual leave. Further messages on 23 and 24 October 2023 set out Ms Obeid’s attempts to explain the CBA’s rationale for the decision, and Mr Pawelczyk’s challenge to the reasoning and request for information so that he could follow it up. Mr Pawelczyk again became annoyed and even angry. The business decision did not make sense to him. It potentially meant lost income from the comedy gig, and he felt it would harm his reputation with the gig promoter.

[16] On 14 or 17 October 2023 (nothing turns on the precise date), Mr Pawelczyk noticed his pay was higher than expected. He raised a query with Ms Obeid and also rang ‘Human Resources’ (HR). He was given conflicting information from each source about how to fix the problem. He felt that Ms Obeid and HR were pointing the finger at each other rather than taking responsibility for an error that was very distressing to Mr Pawelczyk. A key reason for his joining the CBA earlier that year was to earn money to meet some serious financial challenges he was facing at the time. Rather than paying down debt, the error meant he was incurring new debt for reasons outside of his control. It was pressure he did not want in his life and the CBA did not take the matter as seriously as Mr Pawelczyk, nor treat it with the level of urgency that was necessary to alleviate his distress.

[17] On 24 October 2023, Mr Pawelczyk’s conduct toward Ms Obeid started to sour. Until then, messages between them had been positive and friendly. But Mr Pawelczyk felt let down by Ms Obeid and blamed her for his concerns about his request to work interstate and the “fuck up” on his schedule. He told her he could not “work like this” and mentioned transferring out of her team. Ms Obeid appears to have been quite taken aback. She responded: “Daniel where is this all coming from, please call me.”

[18] Mr Pawelczyk responded by accusing Ms Obeid of lying to him and saying he could no longer trust her. On 3 November 2023, he separately escalated his concerns to Ms Laura Rizk

(Ms Obeid's manager) and on 13 November 2023 raised his concerns with Mr Glenn Coleman (Executive Manager). The escalation of his concerns did not resolve them. Mr Pawelczyk felt ambushed and humiliated when Ms Rizk met with him and brought a colleague as a witness to a meeting where his personal circumstances were discussed in detail. He hoped the meeting with Mr Coleman would finally get results and this appears to be what happened at least in relation to the overpayment issue, until a second overpayment error occurred shortly afterward and revived the issue.

[19] After meeting with Mr Coleman on Monday 13 November 2023, Mr Pawelczyk wrote to Ms Obeid to acknowledge the toll on her mental health too, that his conduct toward her was not personal, that he was "trapped in process", but that he knew his rights and wanted it finalised. Despite this acknowledgement, three days later, on Thursday 16 November 2023, Mr Pawelczyk set upon a course he described in this proceeding as showing "how hard he had gone after" Ms Obeid.

*Responding to the job application feedback*

[20] On 6 December 2023, Mr Pawelczyk attended an interview for an internal role in a different area of the CBA. He thought the meeting went well but discovered on 8 December 2023 that he had been unsuccessful. The rejection came in the context of his understanding from colleagues, including Ms Obeid, that the area of the CBA in which he had sought work was struggling to find people, was "desperate" and would take anyone.

[21] Mr Pawelczyk felt humiliated. Aside from believing he was the most qualified for the role, the move was how he planned to get away from Ms Obeid as his manager. His initial request for feedback about the interview on 8 December 2023 was straightforward and polite. However, in successive emails over the period to 19 December 2023, Mr Pawelczyk began to disparage Ms Obeid, criticising her performance as a manager and implying that she had influenced the outcome including by 'torpedoing' his opportunity.

[22] After initially seeking feedback about the job interview, Mr Pawelczyk changed his mind and told the CBA not to worry about giving him feedback. The CBA did not listen and on 13 December 2023, it gave Mr Pawelczyk the feedback he had initially requested in an email. This upset Mr Pawelczyk. Over a series of emails from 13 to 19 December 2023, he responded by advising that the feedback was invalid and unacceptable; that the person providing the feedback had lied to him; that he was more suitable than 3 other candidates (2 of whom he said had only applied for the money); and that the feedback and relevant history would now form part of a grievance he was preparing.

*The context for his behaviour toward Ms Obeid*

[23] Mr Pawelczyk's behaviour toward Ms Obeid appears to have been motivated by his belief that she was lying to him and not providing the necessary support as his manager - either in his day-to-day work or by standing up for him in workplace disputes. In my view, these beliefs unfairly overplayed the role of Ms Obeid in relation to his concerns. There is no evidence that she was deliberately dishonest in her dealings with him.

[24] In relation to his scheduled hours, Ms Obeid and Mr Pawelczyk clearly had different perspectives about what had been agreed upon conversion from casual to permanent employment. Mr Pawelczyk recalled discussion of his weekly but not daily hours of work. The documents record Ms Obeid's recollection of an agreement about his roster schedule as part of the conversion process. There is no separate corroborative evidence for either perspective. I consider it unlikely that there was no discussion at all about the daily hours of work to be performed by Mr Pawelczyk once he became a permanent employee. This would have been an essential feature of the conversion from casual employment, for reasons including that both parties knew when Mr Pawelczyk was expected to be at work, and so the CBA could accommodate his availability as a part-time employee.

[25] It is conceded by the CBA that Mr Pawelczyk was given short notice of a roster change on 1 November 2023. There is no evidence about precisely what occurred, but it seems likely that the error involved rostering changes made by Ms Obeid. When the issue was raised by Mr Pawelczyk, it was immediately fixed.

[26] A further concern held by Mr Pawelczyk arose from the bad news communicated to him by Ms Obeid on 12 October 2023. In this instance, Ms Obeid was playing the part of messenger, acting on the instructions of Mr Coleman. Ms Obeid offered Mr Pawelczyk alternatives to assist in finding a way for him to work while away from home and still perform his comedy gigs, but none were acceptable to Mr Pawelczyk.

[27] There was then the overpayment error coinciding with Mr Pawelczyk's conversion to permanent employment. Although the error was not Ms Obeid's fault, it was reasonable for Mr Pawelczyk to attribute at least some responsibility for the difficulty he faced because HR had told him that there was a simple fix requiring action on the part of Ms Obeid. In the meantime, Ms Obeid tried to take responsibility for resolving the matter with payroll and did not simply 'sit on her hands'. Mr Pawelczyk was anxious about the situation and was not prepared to wait for Ms Obeid. He separately and simultaneously took the matter up with HR.

[28] I accept that Mr Pawelczyk's distress over the overpayment in October 2023 was not well handled by the CBA. In my view, the HR team must take responsibility for its passive approach in dealing with the issue, which caused unnecessary angst as between Mr Pawelczyk and Ms Obeid. HR told Mr Pawelczyk that fixing the issue required "his manager" to change information in its payroll system. But when Ms Obeid looked into the matter, she could find nothing in the payroll system she was required to action. There is no evidence of any support provided to Ms Obeid to fix the issue in a timely way.

[29] There is also no evidence to support the assertion that Ms Obeid interfered with Mr Pawelczyk's unsuccessful job application. By the time of the interview, many of the messages relied upon to terminate Mr Pawelczyk's employment had been received by Ms Obeid and she had asked him to stop sending them as she felt harassed. It is just as likely that Ms Obeid would have supported Mr Pawelczyk's move to another team, if for no other reason than her own wellbeing.

[30] Mr Pawelczyk submits that he has experienced mental health difficulties, both prior to his employment with the CBA and in connection with his work in Ms Obeid's team. There is no medical evidence to establish the nature of any diagnosed mental health condition or how

Mr Pawelczyk was affected in this regard by his experiences at the CBA. His conduct toward Ms Obeid is indicative of some degree of mental distress at relevant times and while this may help to explain his conduct, in the end, it does not excuse it. The concerns Mr Pawelczyk had in relation to his employment could just as easily have been raised in a civil and respectful way.

[31] The impression I am left with is that although Mr Pawelczyk acknowledges in passing that his conduct may not always have been exemplary, he considers it to have been justified because of the failings of Ms Obeid. In an email about his unsuccessful job application, Mr Pawelczyk expressly conceded that he had undermined Ms Obeid but that this was “deserving”. The same approach pervades both his initial response to the allegations and his submissions in the proceeding. Each seeks to minimise his conduct by repeatedly belittling and then blaming Ms Obeid for decisions of the CBA that did not go his way.

*The conduct being outside of work hours*

[32] Mr Pawelczyk submits that he cannot be disciplined for conduct that falls outside of working hours – that being his sending the text messages to Ms Obeid. In *Rose v Telstra Corporation Limited*<sup>1</sup> a Full Bench of the Commission described the parameters of conduct that may constitute a valid reason for dismissal:

“It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee. Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct.”

[33] A subsequent Full Bench in *Ventia Australia Pty Ltd v Pelly*<sup>2</sup> clarified the position in relation to repudiation. The Full Bench observed that it is not necessary for the relevant conduct to be repudiatory of the employment contract. The question is whether the conduct was so grave or important as to be indicative of such a rejection or repudiation. The conduct must also be sufficiently connected to the employee's employment: it must “touch the employment, or touch the duties or the abilities of the employee in relation to the duties” when regard is had to the relevant factual matrix, including the nature of the conduct (what happened, when and where, and in what circumstances), the nature of the employment in the context of the employer's business, and the effect of the conduct on the business and its employees. In this regard, although the terms of the contract of employment are relevant, they are not determinative of the existence of a connection between out of hours conduct and the employment relationship.

[34] In *McManus v Scott-Charlton*<sup>3</sup>, Finn J of the Federal Court of Australia drew attention to the increasing focus in legislation on protecting human rights in the workplace against both the actions of employers and co-workers. Workplace behaviour and its consequences were

accordingly considered to be matters of legitimate interest or concern to employers and employees. Conduct engaged in otherwise than at work was not, for that reason alone, precluded from being a matter of legitimate interest to an employer.

[35] Rather, some level of supervision by employers over the relationships of employees was likely required, at least for the purpose of protecting an employer’s interests against the adverse effects of employee misconduct or protecting other employees from an employee’s misuse of knowledge or connections acquired by virtue of their employment. As the Court observed, “...once an employee’s conduct can be shown to have significant and adverse effects in the workplace, because of its impact on workplace relations, on the productivity of others, or on the effective conduct of the employer’s business, that conduct becomes a proper matter of legitimate concern to an employer, and does so because of its consequences.”

[36] Mindful of the caution to be exercised when extending an employer’s right of supervision over the private activities of an employee, which must be carefully contained and fully justified, the Court in *McManus* held that sexual harassment of a co-worker outside working hours was capable of being the subject of a lawful and reasonable direction from the employer. The conduct was a consequence of the work relationship between the two employees. It had significant adverse effects for the workplace and the persons to whom the conduct was directed. Further, their continuing workplace proximity could cause the impact of the harassment to endure into the workplace.

[37] The subject of consideration in *McManus* can be distinguished from this case in that it was concerned with sexual harassment in a public service context, where this case concerns (non-sexual) harassment in a private sector context. Even so, it provides a useful framework for dealing with Mr Pawelczyk’s contention that his conduct was outside working hours and thus could not constitute a valid reason for dismissal.

[38] As was the case in *McManus*, the impugned conduct of Mr Pawelczyk was only possible because of his employment. It was through his position in the CBA that Mr Pawelczyk met Ms Obeid and obtained her contact details as well as knowledge of her working hours. It occurred in the context of:

1. the CBA’s duty to comply with the *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulations 2011* (WHS Regulations) including by managing psychosocial risk, and
2. Mr Pawelczyk’s duty to take reasonable care for the health and safety of others who may be affected by his acts or omissions, including by reasonable compliance with instructions given by the CBA to comply with the WHS Act and cooperating with any notified and reasonable policy or procedure of the CBA relating to health or safety at the workplace.

[39] Relevantly, the CBA’s Group Conduct policy deals with workplace interactions and behaviours. It is expressed to apply “at all times” when employees are interacting with their colleagues. The existence of the Group Conduct policy was notified to Mr Pawelczyk in his employment agreement dated 2 October 2023, approximately 6 weeks before the messages were sent to Ms Obeid. The employment agreement contained information for Mr Pawelczyk about where to find the policy (on the “One.CBA” platform) and advised that he was required

to comply with the policy; that compliance was monitored; and that failure to comply may result in disciplinary action.

[40] The Group Conduct policy sets an expectation of CBA employees “treating everyone with whom they come into contact with as a representative of the Group with respect and courtesy”. The policy defines “unacceptable workplace conduct” as “when Our People do not act in a professional manner, act unreasonably towards others, treat others without courtesy and/or respect, or otherwise behave in a manner that does not reflect the Group’s Code of Conduct and Values.” This includes “offensive, belittling, abusive, teasing or threatening behaviours, (even where it may not meet the definition of Unlawful Workplace Conduct), as set out in this Policy.” There is no suggestion that the policy was unlawful either in whole or in part.

[41] In my view, the policy was also reasonable, including in its application to out of hours conduct where the conduct was directly work-related and likely to give rise to employee psychosocial risk. The connection between Mr Pawelczyk’s conduct and the employment is readily apparent from the subject matter of the messages sent to Ms Obeid, which all arose from Mr Pawelczyk’s work or work-related concerns, as made clear in his official response to the allegations. The messages were deliberately sent out of hours because, according to Mr Pawelczyk, this was the only time Ms Obeid would respond, and they made it plain that Mr Pawelczyk would no longer continue to meet his obligations as an employee in the context of his role and reporting structure. There is no context outside of work in which the messages could have arisen. The only relationship between Mr Pawelczyk and Ms Obeid was a work relationship, commencing upon Ms Obeid becoming Mr Pawelczyk’s manager. The messages were sent by Mr Pawelczyk in his capacity as her subordinate, and they were directed to Ms Obeid in her capacity as his manager.

[42] The messages were likely to cause serious damage to the relationship between the CBA and Mr Pawelczyk. How could it now be confident that he would act with due care for the health and safety of his co-workers or treat his managers with respect and courtesy when his stated aim in those messages was to cause Ms Obeid to lose her job? Not only was the conduct damaging to the CBA’s interests by exposing it to loss of productivity and liability in relation to psychosocial risk, it made untenable any continuing work proximity as between Ms Obeid and Mr Pawelczyk.

[43] Viewed objectively, the messages sent by Mr Pawelczyk were inconsistent with the Group Conduct policy and Mr Pawelczyk’s duty as an employee to cooperate with the CBA and follow its reasonable and lawful directions. They demonstrated that Mr Pawelczyk did not take seriously his duty to treat co-workers with due care. They were not trivial or ‘one-off’ outbursts. They were sustained, hostile and at times threatening. They were sent even after it became crystal clear that Ms Obeid wanted the messages to stop.

[44] The content, frequency and timing of the messages had the likely consequence of causing Ms Obeid harm. There is also some evidence of actual harm in Ms Obeid’s characterisation of his messaging as a constant “put down”, insulting and harassment that made her feel threatened for doing her job. The available inference is that the conduct had significant adverse effects both for Ms Obeid and the CBA in the manner described above.



*The handling of his complaint, including whether termination was retaliatory*

[45] Mr Pawelczyk submits that the dismissal was unfair because his own complaint against Ms Obeid was not taken seriously and should have been dealt with at the same time as the CBA was dealing with the allegations against him. Although the complaint made by Mr Pawelczyk was “mainly with” Ms Obeid, it covered broader ground.

[46] The timeline of events is consistent with Mr Pawelczyk’s case theory. The allegations against him on 17 January 2024 arose only after he made his complaint on 8 January 2024. If his complaint was the reason for termination, this could amount to adverse action for a prohibited reason.

[47] There is another equally available narrative to explain the timeline of events. That is, that it may have been only after his complaint was made to the CBA that it became aware of the full context of Mr Pawelczyk’s conduct toward Ms Obeid. The timeline itself is illustrative: after having been unable to resolve the overpayment issue since first raising it with Ms Obeid on 18 October 2023, Mr Pawelczyk took sick leave from 6 to 10 November 2023. He started sending the messages to Ms Obeid on 16 November 2023, and Ms Obeid took sick leave on 22 November 2023. On 23 November 2023, Ms Obeid communicated the need for Mr Pawelczyk to undertake “breach training” in connection with his handling of a case involving a homeless girl. Mr Pawelczyk immediately took sick leave. He subsequently took a mix of paid and unpaid sick and special leave leading into the Christmas period. While absent on 8 December 2023, Mr Pawelczyk became aware of the unsuccessful job interview described above. He began to prepare his complaint which was formally lodged on 8 January 2024.

[48] The complaint was very disparaging of Ms Obeid. It concluded by calling her a “regulatory breach”, suggesting that she be fired or demoted, saying this would be an “act of compassion” that would be “putting her out of her misery”, because she was “clearly out of her league”. It would not be surprising, in this context, for the CBA to have sought more information about the context for his commentary, including from Ms Obeid. Whether it was because of the complaint, or because of information obtained while looking into the complaint, Mr Pawelczyk was suspended from work on 17 January 2024.

[49] The difficulty is that neither theory is established on the evidence. Mr Pawelczyk’s conduct toward Ms Obeid was always likely to lead to disciplinary action. The allegations against him were not ‘trumped up charges’ and nor had his conduct previously been accepted by, or acquiesced to, by the CBA. Although Mr Pawelczyk had stopped sending the messages by the time the allegations arose, that does not mean the CBA was bound to simply let matters lie. Once it had the knowledge of his conduct, the CBA’s responsibility for managing psychosocial hazards arising from, or related to, workplace interactions and behaviours within its organisation required it to take responsive action. In this regard, it had a duty of care both to Mr Pawelczyk and Ms Obeid.

[50] There is merit in the submission that the complaints about Ms Obeid and the allegations against Mr Pawelczyk should or could have been dealt with as one. But that is not to say that the approach of dealing with them separately was unreasonable or even unfair. Mr Pawelczyk had the opportunity to respond to the allegations against him by raising any matters that he

wished the CBA to consider, including any contextual matters that helped explain his behaviour.

[51] Mr Pawelczyk took up this opportunity on 8 February 2024 in an 11-page “Official response to allegations of harassment and conduct issues”. He canvassed the relevant timeline of events, reasons why the allegations against him were invalid, the need for the full context of his messages with Ms Obeid to be considered rather than only the “greatest hits”, actions he had taken to deal with the difficulties he was facing, and his personal circumstances including how the conduct of Ms Obeid and the CBA was affecting him. Mr Pawelczyk’s concerns were elaborated on in a meeting with the CBA on 19 January 2024 and on 23 and 24 January 2024 when Mr Pawelczyk sent information about the allegations and his complaint to Mr Coleman. On 29 and 30 January 2024, Mr Pawelczyk provided additional information to the CBA in support of his complaint against Ms Obeid. All of this information was available to the CBA before it made the decision to dismiss.

*Other relevant matters*

[52] There are two further examples of behaviour that was both antagonistic toward Ms Obeid and in wilful defiance of instructions given to Mr Pawelczyk by the CBA:

1. The breach training scheduled for Mr Pawelczyk on 23 November 2023 involved his interactions with a homeless girl. The matter was dealt with by Mr Pawelczyk in a way that was deliberately inconsistent with processes put in place by the CBA to ensure regulatory compliance when dealing with customers experiencing financial distress. His motive was to expose Ms Obeid for failing to provide appropriate training to her team. This was misguided and risky behaviour. Mr Pawelczyk remains unapologetic, considering his actions to have been both legal and necessary.
2. On 19 December 2023, Mr Coleman emailed Mr Pawelczyk about their earlier understanding that Mr Pawelczyk would not contact Ms Obeid while the complaint he had made about her was investigated. Mr Coleman advised Mr Pawelczyk that an alternative interim manager had been arranged for him; that he was to channel any further communication through Mr Coleman; and that he was to cease any communication with Ms Obeid and two other employees of the CBA. Mr Pawelczyk’s one line response was: “She is my boss I can copy her in work emails until I no longer report to her.” This was as insubordinate as it was incorrect.
3. On 12 February 2024, Mr Pawelczyk lodged a separate workplace grievance against Mr Coleman. In this proceeding, he made the surprising admission that the grievance against Mr Coleman was lodged for his own personal “amusement” given the state of his relationship with the CBA by that time. The available conclusion is that the grievance was frivolous and vexatious. This was conduct that was inconsistent with Mr Pawelczyk’s duty to the CBA and his continuing employment. It was separately capable of constituting a valid reason for dismissal.

Conclusion on valid reason

[53] The messages sent by Mr Pawelczyk to Ms Obeid were not misinterpreted to “fit” a narrative. They fell within the ambit of unacceptable workplace conduct as defined in the CBA’s Group Conduct Policy. Although Mr Pawelczyk’s intentions in this regard are largely irrelevant to the characterisation of his conduct, I do not accept that the messages were not personal to Ms Obeid. From at least November 2023, part of the motivation for Mr Pawelczyk’s conduct was his desire for Ms Obeid to lose her job.

[54] The job interview emails from 13 to 19 December 2023 formed part of the reasons given by the CBA for Mr Pawelczyk’s dismissal. Mr Pawelczyk was alleged to have not accepted the feedback he had been given despite asking for it; questioning the integrity of the person providing the feedback; speaking ill of other candidates for the position; and speaking ill of Ms Obeid. The first of these reasons, although strictly correct, overlooks Mr Pawelczyk’s change of mind and advice to the CBA that he no longer wanted feedback on the job interview. On its own, this could not constitute a valid reason for dismissal. However, the remaining concerns in relation to the job interview correspondence are well founded on the materials. Taken together with the messages sent to Ms Obeid, they form part of a pattern of conduct by Mr Pawelczyk that indicated he was no longer prepared to cooperate with the CBA or to follow its reasonable and lawful instructions including by complying with the Group Conduct policy.

[55] When he responded to the allegations of 17 January 2024, Mr Pawelczyk did not meaningfully acknowledge his conduct toward Ms Obeid or show any genuine remorse. In the circumstances, it was open to the CBA to consider that his conduct was likely to be repeated if Mr Pawelczyk remained in employment.

[56] On balance and for the reasons above, I am satisfied that there was a valid reason for the dismissal of Mr Pawelczyk.

Was the valid reason notified to Mr Pawelczyk?

[57] Mr Pawelczyk was notified of the reasons upon which CBA proposed to terminate his employment in letters dated 17 January 2024 and 7 March 2024. Each letter set out the CBA’s reasons for concern about his conduct by reference to relevant extracts from its Values, Code of Conduct and Group Conduct Policy.

Was there an opportunity to respond to any capacity or conduct related reason?

[58] Mr Pawelczyk was given an opportunity to respond to the CBA’s concerns about his conduct. The letter of allegations on 17 January 2024 set out the concerns expressly invited a response and the parties met to discuss the matter on 19 January 2024. Mr Pawelczyk then provided a written response to the allegations on 8 February 2024. On 7 March 2024, the CBA confirmed its findings in relation to the allegations and invited any further response from Mr Pawelczyk by 11 March 2024. Mr Pawelczyk declined to provide a further response on the basis that CBA had the information it required to make a decision. His employment was terminated on 15 March 2024 by notice in writing.

Was there any unreasonable refusal to allow a support person to be present to assist at any discussions relating to dismissal?

[59] There was no unreasonable refusal to allow Mr Pawelczyk to have a support person to assist in discussions about the dismissal. Mr Pawelczyk was expressly advised that he could have a support person to assist him in the relevant discussions. Mr Pawelczyk did not take up the invitation as he did not want to give the business “the satisfaction”.

Was Mr Pawelczyk warned about relevant unsatisfactory performance?

[60] This criterion is not relevant. Mr Pawelczyk was dismissed for conduct reasons, rather than because of unsatisfactory performance.

Degree to which the size of the business and any absence of dedicated human resources management specialists or expertise in the business would be likely to impact on procedures followed in effecting the dismissal

[61] CBA is an organisation of significant size with dedicated human resources and other specialist expertise available to it to manage and assist with procedures that may lead to termination of employment. The process it undertook in relation to the allegations against Mr Pawelczyk was procedurally fair, including the decision to deal separately with the complaint against Ms Obeid and the allegations against Mr Pawelczyk.

Other relevant matters

[62] Although there is limited evidence in this regard, it may be accepted that Mr Pawelczyk’s personal circumstances were adversely affected by the decision to dismiss him. This likely included both distress and loss of income, although it is impossible to quantify to what degree on the materials. Mr Pawelczyk also asserts reputational damage but again without corroboration.

[63] The letter of termination described Mr Pawelczyk’s conduct as serious and advised that the CBA was required under the *Banking Industry Conduct Background Check Protocol* to notify any future prospective employers requesting a “Conduct Background Check” that he was dismissed by reason of a misconduct of a serious nature. The CBA subsequently formed the view that this was incorrect advice. As a result, no such notification has been implemented.

[64] Mr Pawelczyk was a significant contributor to the circumstances of his dismissal. But for the sending of the messages, Mr Pawelczyk would likely have remained in his employment.

**Conclusion on the merits**

[65] There was a valid reason for the dismissal of Mr Pawelczyk and the process of dismissal was a fair one. These matters carry significant weight in the circumstances of this case. They are not outweighed by any of the other relevant matters, including the personal effects of the dismissal on Mr Pawelczyk or his reasons for acting the way that he did toward Ms Obeid.

[66] On balance, I am not satisfied the dismissal was harsh, unjust or unreasonable. It follows that Mr Pawelczyk has not been unfairly dismissed.

[67] The application is dismissed.



*Appearances:*

*D Pawelczyk* on his own behalf.

*L Meagher* of Counsel for the respondent.

*Hearing details:*

2024.

Sydney:

July 9.

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<sup>1</sup> Print Q9292 [1998] AIRC 1592 (4 December 1998).

<sup>2</sup> [\[2023\] FWCFB 201](#).

<sup>3</sup> (1996) 140 ALR 625.