



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Vino Rodrigues

v

Anglican Community Services

(U2024/5845)

DEPUTY PRESIDENT CROSS

SYDNEY, 14 NOVEMBER 2024

Application for an unfair dismissal remedy – serious misconduct – inappropriate work relationship – breach of policy – risk to vulnerable persons – valid reasons – application dismissed

[1] On 22 May 2024, Mr Vino Rodrigues (the Applicant) lodged an application (the Application) in the Fair Work Commission (the Commission) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act), for relief in respect of the termination of his employment by Anglican Community Services (the Respondent/Anglicare). The termination of the Applicant's employment occurred on 14 May 2024, effective 15 May 2024, by way of a letter that stated the Applicant's employment was being terminated for serious misconduct.

[2] The matter was scheduled for a conciliation on 25 June 2024. On 5 June 2024, however, the Applicant sent an email to the Commissions registry requesting to vacate the conciliation and proceed to arbitration. The email relevantly stated:

Dear Fair Work Commission,

I am writing to formally express my decision not to participate in the upcoming conciliation meeting regarding my case, Case Number U2024/5845.

The employer and I had, over a whole month engaged in multiple investigation meetings in an attempt to reach a mutually acceptable resolution. Despite our best efforts, we have been unable to come to an agreement. Given the extensive discussions and the lack of progress, I believe that further conciliation will not be fruitful.

Furthermore - Anglicare Community Services has since this notice remediated some of their obligations by only paying out my accrued leave - I cannot speculate of intent, but the timing (i.e. post this notification) comes across as nefarious and I hold no faith that their intent has not changed.

As such, I respectfully request that we proceed directly to arbitration. I am confident that arbitration will provide a more efficient and definitive resolution to this matter.

Thank you for your understanding and attention to this request. Please confirm the next steps in the arbitration process at your earliest convenience.

Yours sincerely,

Vino Rodrigues

[3] On 25 June 2024, a case management conference was held, and directions were issued to program the manner in which the Application was to proceed to hearing. The parties complied with those directions. In particular:

- a) On 9 July 2024 the Applicant filed a Statement/Submission with annexures;
- b) On 23 July 2024, the Respondent filed a submission in the matter and the following witness statements:
 - i. Witness Statement of Laurie Boxwell, the Chief Operating Officer of the Seniors Living Division of the Respondent;
 - ii. Witness Statement of Allison Claxton; and IR/Er Specialist employed by the Respondent; and
 - iii. Witness Statement of Dylan Kovacevich, A workplace Planning Business Partner employed by the Respondent.
- c) On 30 July 2024, the Applicant filed a Statement/Submission in Reply with annexures, in response to the Respondent's submission.

[4] The Hearing of the Application was held on 5 August 2024 (the Hearing). In the Hearing of the matter, the Applicant represented himself. The Respondent was represented, with permission, by Mr Klepac.

[5] A closing written submission was submitted by Applicant and Respondent on 18 August 2024 and 26 August 2024 respectively.

Background Facts

[6] There is no real issue between the parties as to the relevant facts in the matter. The issues between the parties arise from the conclusions that may be drawn from those facts.

[7] The Applicant commenced full-time employment with the Respondent on 22 May 2023, in the position of Asset & Facility Manager – South, principally located at Castle Hill. The Applicant received an Offer of Employment, with attached Position Description, that included the following:

Vision, Values & Policies

Please read carefully all documents provided. In accepting this offer you agree to abide by and support Anglicare's Vision, Mission and Values together with all policies and procedures.

And:

- *I have a duty of fidelity and good faith towards Anglicare. I will demonstrate due care and skill in my work and act in a way to maintain Anglicare's trust and confidence in me throughout my employment.*
- *Responsibilities, accountabilities and duties may vary from those originally outlined in my Position Description. I understand that these also form part of my employment obligations.*
- *Anglicare actively promotes codes of behaviour that embody applicable anti-discrimination and equal employment opportunity legislation and that all staff are expected, as an essential term of their employment contract, to honour such principles in the manner in which they relate to fellow staff and clients of Anglicare. Complaints in relation to breach of anti-discrimination and equal employment opportunity legislation should be addressed in accordance with Anglicare policy.*
- *I have an obligation to observe safe work practices and to bring to the immediate attention of my supervisor any concerns I might have with respect to work, health and safety issues. Furthermore, I accept my obligation to immediately report any workplace injury I might sustain.*

[8] On or around 21 September 2023, the Applicant was engaged in the role of Retirement Living Village Manager (the Village Manager) for Woodbury, located in Winston Hills (the Village). Retirement Villages of Anglicare provide care and support to residents who live independently, to the extent they are able to do so.

[9] The Applicant's Training Record was in evidence, and it disclosed he had completed, in sessions or on-line, the training for the position of Village Manager.

[10] The role of Village Manager involves being on site, dealing with residents on a day to day basis, and managing the facility regarding such things as use of common space, gardening and maintenance, and transport to activities. The position description of Village Manager, which was provided to the Applicant by email on 4 September 2023, contained the following:

*Ensure **safety and risk are managed and problems solved** by ensuring sources of risk are identified and preventative action taken to minimise risk, ensuring legislative requirements are monitored and managed, including effective supervision and training of staff to know risks, controls, escalation and reporting protocols, and that staff follow safe work practices. Also use the WHSIMS to capture and review incidents, accidents and hazards, and ensure staff work cooperatively with supervisors, HR and Injury Management Coordinators when injuries occur.*

[11] Prior to commencing at Woodbury, the Applicant had a discussion with a Regional Manager of the Respondent and became aware that the Village had significant issues and that the Applicant's tenure there would be short lived (less than one year) as he would be entering into a volatile environment as a disrupter and would face significant animosity. The Regional Manager assured the Applicant that he had the backing of the Respondent.

[12] There was an apparent polarisation between groups of residents. The Operations Manager asked the Applicant to manage the polarisation of the village residents and attempt to create an all-inclusive cohort.

[13] When the Applicant commenced as Village Manager, he became aware that the Operations Manager had resigned and left the previous Friday. Mr Boxwell notified the Applicant that he did not want him to report to a Regional Manager, but rather to him directly.

[14] Throughout the rest of 2023, the Applicant managed the Village with significant conflict with the incumbent Coordinator. After some months the Coordinator advised the Applicant that "*you and I don't see eye to eye*". From that conversation onward the Coordinator refused to speak to the Applicant and had written several emails to HR staff, and several Anglicare leaders, including the COO and the CEO. That Coordinator left the Respondent in January 2024.

[15] The Applicant stated that during his tenure as Village Manager he was left to manage at his own discretion, in that Mr Boxwell did not manage him at all. The Applicant understood that Mr. Boxwell was busy with executive tasks and that he did not have time to manage him on a "*Village*" level, but rather had confidence in the Applicant to manage the Village at his own discretion. Mr Boxwell, on the other hand, stated that the Applicant's direct Manager, at least at the time of the investigation into his conduct and his termination, was Vanessa Liddle, General Manager Villages.

[16] The Applicant stated that many of the residents insisted that he was not to attend their homes without a female representative. As a result, it was critical that a female colleague be employed in the care capacity as he, the handyman and the gardener were all male.

[17] Upon the resignation of the previous Coordinator, the Respondent was required to hire a new Coordinator. The person who was hired for that role became very involved in the facts of this matter, however as she did not give evidence, and to preserve her relative anonymity, she will be referred to in this decision as "*Ms B*". Ms B was employed in the Coordinator role from 19 February 2024 to April 2024.

[18] The Applicant had met Ms B in her capacity of an At-Home Care Worker within a division of Anglicare that provides remote aged care. The Applicant considered Ms B had shown remarkable expertise in dealing with two of the Village residents who had mental health issues. Ms B is a single parent with four children, three of whom have an incurable autoimmune disease, resulting in relatively greater amounts of medical treatment being required. The treatments required Ms B to be home for 2-3 days every 2 weeks. Ms B had relied on her mother to pick up her children from school prior to her accepting the Coordinator role, but her mother had left her home after her employment commenced.

[19] In evidence were hundreds of text and email messages between the Applicant and Ms B, tendered by the Applicant, in the period 27 November 2023 to 18 April 2024. Those messages show the various stages of what was eventually a non-romantic relationship between the Applicant and Ms B, across a period of 5 months, during which Ms B was employed by the Respondent for 2 to 3 months. Particular messages relevant to the issues in this matter, were:

(a) On 29 November 2023, in the Applicant's second message to Ms B, the Applicant wrote:

Hey. Oh wow – I'm so glad you said that – I would really, really, really like to have another chat over coffee. You intrigue me. ...

(b) Between 1 January and 15 January 2024, at least 66 text messages were exchanged.

(c) On 15 January 2024, the Applicant wrote to Ms B:

.. so my co-ordinator quit ... that I expected ...

The Applicant subsequently emailed the Coordinator job advertisement to Ms B.

(d) On 17 January 2024, the Applicant wrote to Ms B:

Hey. You're through to the interview round. I need to have a female pear (sic.) with me. Will be a called Kathryn Thew. Is there any specific day you can come to the site next week?

And:

Don't be too excited. I can't guarantee the role, it's not only up to me - and there are other candidates. But we'll give it a good go. Just you be you.

(e) Later on 17 January 2024, after arranging an interview time, the following exchange occurred:

The Applicant: *I'm kinda sad tho.*

Ms B: *How come?*

The Applicant: *I'll be your Manager – won't be able to send/receive txt's at 9PM*

Ms B: *Oh darn! That's a shame but at least we can chat in person.*

(f) At 9.30am on 23 January 2024, the Applicant emailed Mr Boxwell as follows:

Katharine Thew and I conducted an interview with the internal candidate and we're both very impressed with what she has to offer here at Woodberry. (Post interview reviews attached.) I would want to offer her the role. (Original emphasis)

She has not however told her manager about this lateral move, and I was hoping to get some guidance on how I can approach this with the manager - Sylvia O'Brien. What is the norm in this situation?

@Neha Chanda – I've marked on the PageUp app that we should progress to reference and medicals ... but did you want to meet with her? (I will ask Laurie too.)

(g) At 9.48am on 23 January 2024, the Applicant emailed other managers of the Respondent as follows:

Laurie,

Katharine Thew and I conducted an interview with an internal candidate for the role of village coordinator here at Woodberry. [Ms B] is currently a care worker for our At-Home team.

[Ms B] has done some care work here before as a substitute for our usual crew and she's made a remarkable impression on the few residents she's served – including [Deleted] (she's the resident that was at the centre of the verbal altercation with Caitlin prior to my tenure here). [Ms B] not only served her with respect and dignity, despite the hoarding state of her unit – but made such a good impression that came to report a compliment with me.

With this in mind, I had asked [Ms B] if she was interested in the role, and she had applied for it during our internal advertising window.

Both Katharine and I are of the opinion that she's a superb fit for the role. (I'd asked Katharine to co-interview with me as she had spent some time at Woodberry and knew the residents and could judge the fit.) Her resume, and Katherine and I's evaluation attached.

Did you want to meet with her though? And if your time is a bit tight, should I ask someone, like Leonard Marshal, if he can? Bar, that I'm comfortable to progress with an offer.

(h) On 24 January 2024, Ms B emailed the Applicant advising that her Team Leader was happy for her to move. The Applicant replied on 25 January 2024, as follows:

That's good news.

Next step is the recruitment team does referrals. ... we're almost there.

(i) From 17 January to 1 February 2024 there were no text messages (though there were the above, and more, email messages), but when the text message discussion recommenced, it was regarding the time recruitment was taking place. Then, at 8.18pm on 2 February 2024, the Applicant advised Ms B:

Hi there. Sorry for the late txt. But somethings should not wait. We've just approved an offer have you join us, and you will be getting that Monday (or even sometime over the weekend, depending on the system). You will find that the remuneration is a bit higher than what we spoke of in the interview. Anyway – I hope it's attractive enough for you to say yes. Have a wonderful weekend.

(j) On 12 March 2024, Ms B first asked if one of her children could come with her to work, though there was an option for the child to stay with Ms B's mother. The Applicant wrote "Yes. Of course".

(k) On 13 March 2024, Ms B first asked if her child would be too sick to come to work if he had croup. There was again an option for the child to stay with Ms B's mother, but the child wanted to come to the office. The Applicant wrote "Bring him. It's ok".

(l) On 18 March 2024, the following exchange occurred:

Ms B: ... [Child] asked if he can come to the village I said maybe Wednesday or Friday because Vanessa is on sight tomorrow.

The Applicant: *Yeah. Good idea ... we just don't know Vanessa yet – but Wednesday for sure!*

The Vanessa referred to was, I understood, Vanessa Liddle.

(m) Later on 18 March 2024, the following exchange occurred:

The Applicant: *Is [Child] going to be ok at home with you at work?*

Ms B: *Hard to get away sometimes. He should be ok. I'll call through the day to check on him.*

The Applicant: *ok. Go home after Vanessa leaves tomorrow*

Does [Second Child] need to be home too?

Ms B: *If you like I can grab [Child] after Vanessa leaves and stay at the office until 2.30pm. I can call [Child] when I'm on my way to make sure he is ready.*

Nope, the doctor said she is ok for school

The Applicant: *Naa...just go home. Bring him on Wednesday*

(n) On 19 March 2024, the following exchange occurred:

Ms B: *[Second Child] asked if she could come to the office tomorrow with [Child]. If it's not ok, she can stay with my mum. They both will be ok in the office while I talk to Julie and the cleaning company at 1pm.*

The Applicant: *More than welcome. You should know that btw.*

(o) On 23 March 2024, the following exchange occurred:

Ms B: *I'm good and I had fun hanging out with you and the kids. But, it made clear to me that I couldn't and don't think we could go past anything other than colleagues. I am so thankful for all of the support and guidance you have given to me. I have also realised I don't want to be in a relationship at all possibly with anyone. I am finally happy and I don't need anything else to feel happy. I've had a few people ask over pasr 3 years and I always knew it was a no. It's not to be rude or that I think I'm to good for anyone. I'm one or those people who are happy on their own and don't need another person to feel complete or to be happy. I'm very sorry if I've upset you in any way and I truly value you as a friend and colleague.*

I also thought that when you first asked about the movies it was a friend's and I'm so sorry if I gave any other impression

(p) On 2 April 2024, the Applicant gave Ms B the day off for her birthday.

(q) On 4 April 2024, the following exchange occurred:

Ms B: *Can I bring [Child]? He had a temp last night and is a bit off at the moment. He might be able to lay in the drs room with his pillow and game.*

The Applicant: *You don't need to ask. You know they're welcome!!*

(r) On 9 April 2024, the following exchange occurred:

The Applicant: *so he says to me: "you've got a mad crush on her", and i go: "what the f&*, why do you say that?" - and he says: "because the way you talk to her. it's not like how you would speak to someone you work with." geeez ... am i that obvious? or is it because he knows me best. [Emoticon]*

(s) On Wednesday 10 April 2024, the Applicant took Ms B's four children to an appointment, and then for fast food. Thereafter he took them to his home around 4.00pm.

(t) On 11 April 2024, the Applicant was to receive two parcels delivered to work. He advised Ms B as follows:

If Vanessa sees that the parcels are for me don't take them – she'll think it's suss that you do. Sorry for this

[20] On the third day after her appointment to the Coordinators role, Ms B informed the Applicant that she needed to resign because she had no-one to look after her children. The Applicant took what he described as a “*management decision*” to allow her to work from 9am to 2pm at the Village premises, and then work the remaining time of the day on a “*work from home*” basis. The Applicant outlined that his considerations in making the above decision were:

- He needed a colleague to handle the “*human*” element of managing the residents, so Ms B’s attendance was critical;
- Ms B also had significant administration work to do, but that that part was not location dependant;
- That the Applicant could manage an “*in village presence*” as he tended to work from 7am to well after 5pm most days; and
- As the Respondent was a Christian, not-for-profit, organisation, the Applicant expected and assumed that caring for staff was included in those principles.

[21] The Applicant claimed he was not aware of a policy within the Respondent regarding working from home. He stated that several of his colleges regularly worked from home.

[22] By letter dated 20 February 2024, which was apparently the day after Ms B was employed in the Coordinator role on 19 February 2024, and two days before the Applicant said he was advised of Ms B resigning, the Applicant provided Ms B with a letter that stated as follows:

Subject: Working Arrangements, [Redacted]

[Redacted],

This letter serves to document our discussion around working hours. It does not supersede any contractual agreements with Anglicare and does not change any obligations, or remuneration set In your contract.

As mentioned in our discussion – family, in my opinion, is the most important aspect of life- but, at the same time contractual obligations must be met. Insofar as working hours, your contract stipulates 7.6 hours paid per day – and the general expection, including a lunch hour, is 8 hours of committed work.

Given your children situation we have come to an agreement as follow:

- *You may begin work, on premises, at 9am, to allow for school drop-offs.*
- *You may depart the site at 2:30pm to pick up your children from school.*

- *It is expected that you continue doing your administrative tasks and receive calls in a “Work from Home” capacity, until 5pm.*
- *Lunch hour and any breaks will be at your discretion.*
- *I will provide you with a laptop dock, computer screen, keyboard and mouse for you to work on. Internet connection is at your obligation.*
- *I will provide you with a suitable office chair. A suitable desk is at your obligation.*

These arrangements are to be considered temporary and I (or another Anglicare manager) may change these arrangements in the future.

Goods provided (chair, computer equipment, etc.) is on a loan basis and should be returned if this arrangement changes.

Yours sincerely,

Vino Rodrigues.

[23] During Ms B’s employment she had needed to take significant days of leave in circumstances where she had few leave entitlements. The Applicant stated he was aware of Anglicare’s Children policy, and that it specifically stated that children should only attend the workplace on the specific permission of the staff members manager. As he was Ms B’s Manager, and he needed her to be present, he gave her permission to bring her children to work. He described the occasions as “rare” and “under controlled conditions”.

[24] The Respondent had a policy titled Child Safe, Child-Friendly Organisation Policy (the Child Policy), into which the training records of the Applicant list he was trained on 17 May 2023.¹ The Child Policy provided:

4. Working with Children Check

All Staff in Child-related Work (including authorised carers and prospective adoptive parents) and all Staff who work in Anglicare’s Community and Mission business unit (other than Op-Shops), require a Valid Working With Children Check (WWCC). The cost of obtaining a WWCC is the responsibility of the Staff member. The WWCC must be verified with the OCG before commencing employment with Anglicare. For more information refer to the Employee Probity Check Policy and related procedure.

And:

10. Children on Premises

Staff must not bring Children or Young People in their care onto Anglicare premises without approval. This will help ensure that Children and Young People are kept safe, Anglicare is not put at undue risk, and Staff are not distracted from their work. Staff will seek email approval from their supervisor or Manager if they need to bring a Child or

Young Person in their care into the workplace. If approval is given, Children and Young People will not have any exposure to any clients or client-related materials.

[25] It was in evidence that Ms B's oldest child, while present at the Village, had participated in delivering mail with the Handyman, and rubbish removal.

[26] Between 6 and 12 April 2024, the Respondent received ten letters/notes of complaint from residents of the Village regarding issues particularly involving children, absent from school due to illness, being present at the Village.

[27] On Wednesday 10 April 2024, the Respondent advised the Applicant that he was being suspended from duties while Anglicare conducted an investigation into a number of concerns that had been raised in relation to his conduct as Village Manager.

[28] On 24 April 2024, the Applicant received a letter from the Respondent informing he was suspended from duties while the Respondent conducted an investigation regarding his conduct involving failure to declare a conflict of interest and taking part in a fair recruitment and selection process whilst recruiting and appointing Ms B as Coordinator. That letter (the Letter of Allegation) provided as follows:

Dear Vino,

We refer to our discussions with you of 10 April 2024, and formal notification thereafter, where you were advised that you were being suspended from duties while Anglicare conducted an investigation into a number of concerns that had been raised in relation to your conduct in your role as Village Manager at Woodbery.

Anglicare has completed their initial investigation of this matter and now seek your responses the allegations, outlined below.

In your role as Village Manager at Woodberry from September 2023- March 2024

- 1. Whilst recruiting and appointing Ms B to the Village Coordinator role you
 - a) failed to declare a conflict of interest arising out of what you have identified as a personal friendship with Ms Br when you participated in the recruitment and selection for the role as the hiring manager.*
 - b) failed to partake in a fair recruitment and selection process as you had a vested interest arising from your personal friendship with Ms B when appointing her to the role.**
- 2. You have contributed to a making the workplace psychologically unsafe for Ms B and in that you have continued to pursue a "personal friendship" with her in circumstances where you are her direct manager and therefore had bearing on her ongoing employment. Under these circumstances, Ms B did not feel comfortable declining your approaches towards her when you:*

- a) *asked her to accompany you to watch the movie "Ghostbusters" with her children on a weekend.*
- b) *asked her to publish a photo of her children in the March 2024, Woodberry Village- Seniors Living newsletter.*
- c) *stated to her at the workplace that you really liked her.*
- d) *offered to invite her and her children to dinner at your place for dinner.*
- e) *Commented to her, "when I saw you with resident J for the first time, something clicked".*

3. *You were distracted your duties and responsibilities as a Village Manager and failed to demonstrate appropriate professional boundaries with Children and Young People when you authorised Ms B to bring her children into the Woodberry Village site and:*

- a) *offered to take Ms B's son to lunch to "Hungry Jacks" during work hours and asked him personal questions in relation to his father.*
- b) *offered to pick up Ms B's four (4) children from school on 10 April 2024 during work hours and took them to your home residence whilst Ms B attended training at the workplace.*
- c) *asked Ms B's oldest child to complete tasks in the workplace, including taking out the garbage and accompanying the Village Maintenance person to deliver mail to the residents in circumstances where you should have been aware that it was inappropriate for the child to complete these tasks.*
- d) *supervised Ms B's children at the workplace and in her absence on more than one occasions, meaning that you were not focused on completing your own tasks.*

4. *You failed to adhere to Anglicare "Child Safe Child-Friendly Organisation Policy" when you provided written approval for Ms B to bring her medically unfit children onto Anglicare premises on more than one occasions, and as a result failed to*

- a) *proactively identify and address risks to Children and Young People's safety and wellbeing in accordance with Anglicare's risk assessment processes.*
- b) *ensure that the children, the residents and Anglicare were not put at risk.*

c) provide constant supervision to the children, specifically on 10 April 2024 when you picked them up from school dropped them unsupervised in the community area at Woodberry Village in Ms B's absence.

d) ensure that the children did not have exposure to any clients or client-related materials, specifically when Ms B's children accompanied her during her visits to clients' homes.

5. You failed to follow Anglicare's flexible working arrangement process when you provided written approval to Ms B to change her work timings from 8:00 am- 4:00 pm to 9:00 am- 2:30 pm which reduced her time on site by two and a half hours per day, in circumstances where the majority of Ms B's role involved interacting directly with residents of Woodberry Village. In doing so, you failed to

a) seek the necessary approvals from Human Resources and your manager in finalising the flexible working arrangement.

b) formalise the change in work hours through a contract change form.

c) document the duration of the flexible working arrangement in the letter issued to the employee.

6. You failed to follow a reasonable and lawful direction given to you by Anglicare, specifically, in our correspondence to you of 10 April 2024 (Suspension of Employment letter) wherein you were advised that you were "directed to keep the matters outlined in this letter confidential and to not contact any Anglicare staff member, resident or any other Anglicare stakeholder". Despite this direction, you:

a) Informed Ms B that you had been suspended when she attended your home to collect her children on 10 April 2024; and

b) You had further made contact with Ms B to her personal phone on or around 11 April, 16 April and 17 April 2024.

7. You brought Anglicare into disrepute through your actions, specifically when you were observed by Village residents playing with Ms B's child on the floor of the reception area in the Woodberry Village Office, rather than performing your duties.

8. You failed to act in accordance with the Retirement Villages Act 1999 when you amended the minutes of the Resident Committee Meeting without prior approval from the Resident Committee President and members and in doing this demonstrated poor judgement leading to the loss of trust and confidence of the residents.

9. You engaged in inappropriate workplace conduct towards Anglicare residents and employees on multiple occasions by making unprofessional comments to them, which included:

a) speaking to a colleague DE (DE) in the retirement village office wherein you spoke to him of “today being no undie Monday” and on questioning further, you repeated the statement several times and stated words to the effect, “no undies/underpants” which implied that “no one is supposed to wear underpants on that particular day”.

b) at a social gathering and in the presence of residents, you stated to those present that DE called you “Sir”, and when questioned why, stated that it meant “Cir- cumference” and it was to in reference his health and weight. DE found this disrespectful as he had informed you on a previous occasion that a Baptist Pastor used to call him “Sir” in a derogative way.

c) speaking to residents about your personal life, specifically your undiagnosed medical conditions and your marriage, and making comments to the effect, “you only took this low-paid job because it meant that your maintenance payments to your ex-wife would be reduced”.

d) Stated to residents that you had met your next wife in relation to Ms B.

10. You failed to bring your personal friendship with Village Coordinator Ms B to Anglicare’s attention and raise it as a Conflict of Interest as her immediate manager.

Direction to Attend Meeting

Our investigation into this matter has been conducted in accordance with Anglicare’s Managing Performance and Misconduct Policy and the principles of procedural fairness. You are now directed to attend a meeting to respond to these allegations, prior to any findings being made.

[29] On 29 April 2024, the Applicant provided a detailed response (the Letter of Response) to the Letter of Allegation. Those responses will be addressed in the Consideration below.

[30] A further meeting was conducted on 30 April 2024, and on 7 May 2024, the Applicant received a letter regarding the investigation outcome (the Outcome Letter) and the intent to terminate his employment. In the Outcome Letter, the Respondent outlined the ten allegations against the Applicant, and advised that all allegations but for allegations 1(b), 3(a), 8, and 9(d) were found to be substantiated.

[31] The Applicant was directed in the Outcome Letter to attend a meeting on 9 May 2024 to address the preliminary decision that his conduct constituted misconduct, and his employment would be terminated. That meeting occurred.

[32] On 14 May 2024, the Applicant received the letter to terminate his employment. That letter provided:

We have now considered your responses to the meeting on 9 May 2024 and do not believe that you have provided sufficient reason for us to rescind the decision to terminate your employment. Of particular concern to us was the disregard you showed for the investigation, including statements made by you that you had found the process “entertaining”. Your lack of insight in relation to your actions mean that Anglicare has lost trust in you to perform your role in accordance with our expectations.

[33] The termination took place on 15 May 2024, one day after the notice.

Applicant’s Submission

[34] The Applicant submitted that the alleged “*serious misconduct*” that led to his termination was, on closer examination, not substantiated by the facts, and the Respondent’s allegations and reasons cited for his termination do not constitute misconduct.

[35] The Applicant noted that Section 12 of the Act defines “*serious misconduct*” as behaviour that is wilful or deliberate and is inconsistent with the continuation of the employment contract. Examples include theft, fraud, assault, intoxication at work, or refusal to carry out lawful and reasonable instructions that are part of the employee's job. None of those examples were submitted to apply to this matter.

[36] Regarding the allegation he had hired Ms B without declaring that he had a prior “*relationship*” with her, the Applicant submitted he was specifically asked to recommend someone he knew. Ms B was already an employee, he had followed the guidance of the HR associates in the process, and his acquaintance with Ms B at the time was not of a personal nature.

[37] Regarding the allegation that he contributed to a making the workplace psychologically unsafe for Ms B by pursuing a “*personal relationship*”, the Applicant submitted he had openly admitted that he had developed a personal friendship with Ms B and her children over the two months that they worked together, and that relationship extended to her entrusting the Applicant with accompanying her family to out of work events, and on one occasion to school pickup.

[38] The Applicant submitted that this allegation contradicts other allegations made that are based on the allegation that a close relationship was already established.

[39] Regarding allegations he was distracted from his duties and responsibilities as a Village Manager when he authorised Ms B to bring her children to the Village, and failed to adhere to Anglicare Child Policy when he provided written approval for Ms B to bring her children to work, the Applicant submitted he complied with the Child Policy. He noted the Child Policy specifically provided for him, as the Manager, to “*manage staff requests to bring Children [...] to Anglicare premises*”, in granting her permission to occasionally have her children with her whilst at work.

[40] In relation to the allegation that he failed to follow Anglicare’s flexible working arrangement process when he provided approval to Ms B to work partially from home to account for her childcare commitments, the Applicant submitted the Respondent failed to

provide any documented process or policy document that showed that they had a “*flexible working arrangement*”, or that the Applicant had been educated or informed of such a process or policy. The Applicant stated that he granted Ms B permission based on that fact that his job description empowered him to roster staff, provide empathy for her home circumstances and account for her family responsibilities.

[41] Regarding the allegation that he failed to follow a reasonable and lawful direction given not to correspond with Ms B after his suspension on the 10th of April 2024, the Applicant submitted that he was not specifically asked to cease communication with Ms B. Rather, he was instructed not to contact staff in general. As Ms B's and his relationship was already established, they continued their “*non-work friendship*”.

[42] The Applicant submitted there was no evidence to support the allegation that he brought Anglicare into disrepute by playing with Ms B's children in the office.

[43] Regarding the allegation that he engaged in inappropriate workplace conduct towards Anglicare residents and employees by sharing jokes with colleagues, the Applicant submitted that such behaviour that would not justify summary dismissal, and since the humorous banter was self-deprecating, at the very worst it should have been resolved with a verbal reprimand.

[44] Finally, regarding the allegation a conflict of interest arising from failure to bring his personal friendship with Ms B to Anglicare's attention, the Applicant submitted that a conflict of interest arises when a person stands to gain private benefits from actions or decisions made in their official capacity. His friendship with Ms B was just a friendship, with no personal gains to be had at the expense of the Respondent.

[45] The Applicant further submitted that inferring that friendships developed at work require disclosure is a violation of his constitutional right to freedom of association, and his rights to privacy, and may also infringe on the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*, that protect individuals from discrimination in various contexts, including those that might affect their ability to form friendships.

[46] In summary, the Applicant submitted:

(a) There was a lack of substantive evidence that the Applicant had engaged in misconduct. The allegations were based on the personal opinions of Mr. Boxwell, vague and frivolous accusations, hearsay, or misinterpretation of events. No credible or corroborated evidence supported the Respondent's claims of misconduct;

(b) That there existed “*procedural fairness violations*”, because there were no warnings offered, no disciplinary action invoked, and no performance improvement opportunities given, which is the criteria outlined in the Act. Notwithstanding, several of the allegations were based on some of the management decisions the Applicant had taken, Mr. Boxwell as the Applicant's Manager, was able to redact or revert any permissions granted to Ms B;

(c) That he had an exemplary record, with no prior disciplinary actions. That history contradicts the notion that he would engage in the misconduct that disadvantaged the Respondent and supports the assertion that the dismissal was unwarranted; and

(d) That the dismissal has had a profound impact on the Applicant, including financial hardship, damage to his reputation, and emotional distress.

Respondent's Submission

[47] The Respondent submitted that in his written submissions of 30 July 2024, the Applicant indicated there were no issues of procedural fairness in his dismissal, and so the Commission should proceed on the basis that the termination of employment was procedurally valid.

[48] Regarding the reasons for the dismissal, the Respondent submitted that the Applicant was in a management role and committed serious breaches of his responsibilities

[49] The Respondent submitted the evidence disclosed that the Applicant:

(a) Allowed Ms B's children to attend the Village including whilst sick without considering the residents of the Village;

(b) Allowed Ms B's children to become involved in various tasks on the premises without any regard to child safety, insurance concerns or the wellbeing of Residents;

(c) Unilaterally amended Ms B's employment conditions to allow her not to attend the Village during afternoons despite the role fundamentally requiring close resident engagement and co-ordination.

[50] Regarding whether the conduct constituted serious misconduct justifying summary termination, the Respondent submitted that an aggravating factor in the Applicant's conduct was the wilful and deliberate nature of that conduct in taking action which he thought would not become apparent to Anglicare. While the Applicant argued that he didn't cause any financial loss to Anglicare to justify his conduct being deemed as misconduct, the Resident complaint forms tendered show that a number of residents, who paid fees to Anglicare, had complained about the conduct of the Applicant including in relation to Ms B.

[51] The Respondent submitted the conduct of the Applicant could constitute breaches of both the Children's Guardian legislation and Work Health and Safety Legislation which justify the conduct being considered serious misconduct.

[52] While the Applicant argued that he was not aware of or trained in relevant policies and procedures within Anglicare, the evidence demonstrated the Applicant had a training record and was trained in the relevant policies.

[53] The Respondent submitted that the evidence disclosed the Applicant had more than a working relationship with Ms B, and his actions consistently favoured Ms B over his obligations to Village residents and Anglicare.

Evidence and Witness Credibility

[54] This matter was remarkable in terms of the scant written evidence of the Respondent which, by way of example, gave no record of key events such as the initial discussions with the Applicant on 10 April 2024 which led to his suspension. Nonetheless, each of the Respondent's witnesses were cross-examined and each presented as a truthful and reliable witness.

[55] The Applicant, on the other hand, presented as a witness who was keen to tailor his evidence to a narrative that best suited the case he sought to present, rather than providing responsive evidence. Accordingly, where I have needed to resolve evidentiary issues, I have preferred the evidence of the Respondent's witnesses where it exists and identified evidence of the Applicant that was simply unbelievable.

Consideration

[56] There are no jurisdictional objections to the Applicant's application being determined by the Commission. Specifically, I am satisfied that:

- a) the Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));
- b) his unfair dismissal application was lodged within the 21-day statutory time limitation found at s 394(2) of the Act;
- c) the Applicant is a person protected from unfair dismissal in that:
 - i. he had completed the minimum employment period set out in ss 382 and 383 of the Act, being 2 years; and
 - ii. while Mr Rodrigues' income was above the high income threshold, an enterprise agreement applied to his employment. It is ARV Staff Agreement 2008 (s 382(3)(b)(ii));
- d) his dismissal was not a case of genuine redundancy (s 385(d)); and
- e) his dismissal was not a case involving the Small Business Fair Dismissal Code, as the respondent employs more than 100 employees (s 385(c)).

[57] Section 385 of the Act defines an unfair dismissal based on four criteria there set out, each of which must be satisfied if the person seeking a remedy from unfair dismissal is to succeed. The section reads:

“385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC 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.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

[58] The matters to be taken into account under s 387 of the Act are:

- (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.

Section 387(a) - whether there was a valid reason(s) for the applicant’s dismissal

[59] In *Rode v Burwood Mitsubishi*,² a Full Bench of the then Australian Industrial Relations Commission discussed the meaning of valid reason in the context of the relevant provisions of the *Workplace Relations Act 1996*, and referring to *Selvachandran v Peteron Plastics Pty Ltd*³(*Selvachandran*). The Full Bench found:

[18] While Selvachandran was decided under the former statutory scheme the above observations remain relevant in the context of s.170CG(3)(a). A valid reason is one which is sound, defensible or well founded. A reason for termination which is capricious, fanciful, spiteful or prejudiced is not a valid reason for the purpose of s.170CG(3)(a).

[19] We agree with the appellant’s submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason.

[60] I find that each of the allegations found to be substantiated in the Anglicare letter of 7 May 2024, were valid reasons for the termination of the Applicant.

[61] As the emails at [19(c) to (i)] above disclose, the Applicant was involved in the recruitment process for the Coordinator's role, and actively promoted Ms B's appointment, without having disclosed their friendship. That the Applicant knew of the impropriety of the conflict arising from the friendship can be established from the Letter of Response, where the Applicant stated, "*On this day [17 January 2024] I had also informed [Ms B] that our private (of personal nature) SMS' would come to an end – she concurred*". That statement disregards the emails sent to Ms B during the recruitment process (para [19 (f) to (h)] above).

[62] The text messages and emails in evidence clearly disclose the Applicant seeking a personal relationship with Ms B, on a basis far deeper than any relationship with any other employee. While not eventually resulting in a romantic relationship, which I consider was the Applicant's aim, the resultant relationship was close, with significant communication and acts of generosity. I note that there did not appear to be any significant "*push back*" by Ms B, except possibly on 23 March 2024 after attending the movies, that would have rendered the Applicant's advances unwanted and repetitive.

[63] It was in the circumstances of that relationship, however, that the concessions granted to Ms B must be assessed. I accept the evidence overwhelmingly established that Ms B's role as Coordinator was a client-facing role. She worked as a "*pair*" with the Applicant in dealing with female and male residents respectively. It was in those circumstances that the ludicrous nature of the work-from-home arrangement afforded to Ms B could be established. When the Applicant was questioned about that arrangement, his evidence, which also exhibited his tendency to tailor his evidence, was as follows:⁴

How can I make that statement? She had a client-facing role; correct? --- Correct.

She was the village coordinator? --- Yes.

Her role was to interact with clients? --- Correct.

So you agreed to a work-from-home arrangement where she didn't need to be at the village after 2.30? --- That's - yes, after 2.30, correct.

Is that an example of you accommodating Ms B? --- It's accommodating her work - her home circumstances, because she had kids that needed to be looked after and she had no one to look after them, so I accommodated that, and I actually gave her KPIs around making sure that every resident was visited during the morning and that she should reserve writing the reports to when she goes at home and she can write the reports then. So it was - - -

Where did you refer to KPIs and visiting every resident? --- It was done verbally to her.

But in the working from home letter, you didn't refer to KPIs that she had to visit the residents - - -? --- No, because the KPIs were set up after the letter. The letter was sent out within the first couple of weeks.

...

So how was it best for the business that she be allowed not to work at the village after 2.30 ---? --- How ---

--- given her role was client facing, Mr Rodrigues? --- She had all morning to deal with the clients, and I was there, too. The clients didn't need to speak to her alone; they had me to speak to as well. As a matter of fact, I was the preference.

I'm sorry, but if you recall your own submissions, you say it was important to have a pair? --- Yes.

Do you remember that part? --- Yes.

And it was important to have a female to visit clients? --- Yes.

But now you're saying, 'It was okay because I was there'? --- Yes.

Isn't that inconsistent, Mr Rodrigues? --- No, it isn't. No, it isn't, because the bulk of her time was allocated to be at work. Everything that was manageable as a pair or as a female was to be done before 2 o'clock.

...

You're saying, 'Well, all of her work could have been done before 2.30'? --- No, I said that her visitations and client facing were supposed to be done by 2.30 and, after 2.30, she had to look after her children and, during that time, she was supposed to do all the paperwork, and writing the newsletters, and updating the CRM systems, and doing all the administration, and sending out emails, which she didn't need to be at work for, and so I've made an accommodation for that.

So you basically decided she could look after her children on Anglicare time? Well, you just said it? --- Well, it is an accommodation to account for her work, to allow for her personal circumstances, yes.

...

So what was she doing? You say she was writing reports. Well, who was looking after the kids? --- That's not my problem.

But you gave her ---? --- Yes.

You gave her an arrangement where she was in a client facing role and you said, 'Well, you don't need to be at the village after 2.30? --- Not every day.

Yes? --- Yes.

That's what you did? --- Yes.

That was, presumably, because she had school aged kids to pick up and drop off? --- Correct.

But she wasn't available to the residents after 2.30? --- She was. She had the telephone.

She wasn't available to meet with them. It's a client facing role? --- And if there was a meeting required, then I would have been on site.

Yes, but you said, in your own submissions, residents didn't want to have a male meeting with them and that's why you needed a pair? --- Not for all engagements, for certain engagements. Are you saying that, during my time, that I couldn't interact with the residents at all?

Just tell me - visitation - you talk of visitation. Visitation can be planned and unplanned, can it not? --- For the residents?

Yes? --- Correct.

So if there was a female visitation required after 2.30 in a day, it could not be performed? --- No, but then I would have planned it otherwise, and we have the chaplaincy available, who is also - - -

But it's unplanned. But it's unplanned? --- Correct.

I put it to you as an unplanned one. So if it's an unplanned visitation, after 2.30, you can't plan some way around it, can you? --- No.

[64] What was remarkable, and inexplicable, about the work from home arrangement was that it was put in place by letter dated 20 February 2024, which was the day after Ms B was employed in the Coordinator role on 19 February 2024 or very soon thereafter, and two days before the Applicant said he was advised of Ms B resigning because of issues with childcare. It could not have arisen from actual issues, but rather perceived issues.

[65] The work from home arrangement afforded to Ms B was entirely inconsistent with her role and duties. The Applicant afforded that arrangement to Ms B in an act of favouritism, that he knew was inconsistent with her role and duties.

[66] The Applicant allowing Ms B to bring her children, sick or otherwise, to the Village was also a serious breach of policy, that was notable because there was no necessity as Ms B indicated on a number of early occasions, she had the alternative of taking her children to her mother's (para [19(j) and (k)] above).

[67] It is axiomatic that elderly persons are subject to greater risks from exposure to illnesses. Accordingly, it is prudent to take steps to reduce such risks. The world having recently lived through such a disastrous pandemic and exercised significant levels of disease control, it is extraordinary that I have to observe that bringing sick children to an aged care facility increases such risks. Yet that is what the Applicant encouraged.

[68] When the Applicant was questioned about the children attending the Village, his evidence, which again exhibited his tendency to tailor his evidence, was as follows:⁵

The residents at the village, they have their own accommodation and then they have common areas, don't they? -- That's correct.

So it's not correct to say they just live in their accommodation, because the whole point of the village is to encourage interaction and activities and the like? --- That's correct.

Those residents are quite elderly, aren't they? --- Correct. It's an aged care.

...

Okay. But you were aware that Ms B's children had an unfortunate health condition, weren't you? --- Correct.

You were aware that bringing in kids into the retirement village environment, particularly if those kids were sick, could impact the residents? --- Was I aware? Yes. But I'd left - sorry, I was aware.

Right. Notwithstanding that awareness, you still allowed Ms B to bring in her kids whilst they were sick? --- At her discretion.

...

You just said earlier you left it to her discretion as to when she brought in the kids? --- Absolutely. If she felt that they were symptomatic in terms of a contagious disease, then I assume that she would have not brought them home - to work, sorry.

So you let her make the judgment of bringing in her kids - - -? --- And I made the judgment, too, absolutely.

Well, how did you make the judgment? You left it to her? --- I left it to her to ask whether or not they needed to come in, and I - and that was - and then if she had - if she had have said, 'No, they're fine' and they came in coughing, I would have sent them home. That's what I mean. But that didn't happen.

...

At page 119 of the text messages, but bearing in mind you said, I think, you know, 'If the kids were coughing, I would have intervened'? --- Yes, yes.

You see that text message where Ms B is saying to you, 'Can I bring [Child]? He had a temp last night and is a bit off at the moment'? --- Yes.

'He might be able to lay in the doctor's room with his pillow and game.' You responded, 'You don't need to ask, you know they're welcome'? --- Yes.

Well, that's inconsistent with what you just said, Mr Rodrigues? -- Right.

You agree? --- It is.

...

Can you see how that could be a conflict of interest with your obligations to the residents? --- The residents weren't in the office, so I don't see that as a conflict of interest, and if the kids had come through ill, I would have sent them home.

Yet you said here, 'You don't need to ask, you know they're welcome'? --- Yes, the kids are welcome. That's a general statement.

But you didn't just restrict the kids to the office, did you? --- Define 'restrict'.

'You're not allowed to leave this room.' That would be an example of a restriction? --- Well, that would be infringing on their human rights. No, I wouldn't have done that. Why would I imprison them?

I see. So it's an infringement of human rights? --- For me to restrict what they do, or where they can be.

What about the human rights of the residents, Mr Rodrigues? --- Yes?

What about their right not to get sick? --- Did they get sick?

...

So you said it would have been an infringement of the kids' human rights to restrict them to the office? --- Correct.

I said to you, 'Well, what about the human rights of the residents not to get sick'? --- All right, what about them?

So if the kids are sick, or if the kids are interacting with residents, they could have potentially got the resident sick? --- If the kids were sick, I would have sent them home.

Yes, but this is kind of circular, Mr Rodrigues. You say, 'If they were sick, I would have sent them home', but the email on page 119 suggests that wasn't your approach? --- Okay.

[69] Far from avoiding contact with the residents, the Applicant even asked Ms B's oldest child to complete tasks in the workplace, including taking out the garbage and accompanying the Village Maintenance person to deliver mail to the residents.

[70] It is also clear from email correspondence (paragraph [19 (l) and (m)] above) that the Applicant, and Ms B, were aware that the attendance of the children at the Village was problematic. When a child asked to come to the Village, not due to sickness but because he liked it, Ms B wrote "*maybe Wednesday or Friday because Vanessa [Liddle – the Applicant's Manager] is onsite tomorrow*" to which the Applicant replied, "*Good idea ... we just don't know Vanessa yet*", and "*Go home after Vanessa leaves tomorrow.*"

[71] The attendances of Ms B's children at the Village also constituted a failure by the Applicant to comply with the Child Policy. The Applicant failed to:

- (a) proactively identify and address risks to Children and Young People's safety and wellbeing in accordance with Anglicare's risk assessment processes;
- (b) ensure that the children, the residents and Anglicare were not put at risk; and
- (c) provide constant supervision to the children.

[72] The Applicant's evidence regarding the Child Policy was, eventually:⁶

I'm suggesting to you that what you've done is tried - you had the allegations put to you and then you've tried to retrofit them to this policy? --- No, that's not correct.

You didn't have a working with children check? --- Yes.

But you allowed the children to access the village? --- Yes.

You hid the children when you had your superiors turning up to the site? --- Yes.

Put them in a lunch room? --- Yes.

[73] The Applicant even failed to follow the reasonable and lawful direction given to him by Anglicare in the correspondence of 10 April 2024, wherein he advised that he was "*directed to keep the matters outlined in this letter confidential and to not contact any Anglicare staff member, resident or any other Anglicare stakeholder*". Despite that direction, the Applicant made contact with Ms B on 11, 16 April and 17 April 2024. His disingenuous explanation was:⁷

Yet you continued to text her, notwithstanding you were asked not to contact her as well, didn't you? --- As a friend, yes.

But you were asked, as an employee, not to contact her? --- I was, and I didn't contact her with regards to work. I contacted her with regards to our personal relationship.

[74] It is uncontroversial that an employer can expect more from employees in senior positions. In *Hocking v Public Service Association of South Australia Inc.*,⁸ Stanley J of the Industrial Court was considering a matter involving an applicant who was employed either in the capacity of Administrative Co-ordinator (Industrial) or Industrial Officer of the Union, and was dismissed from her employment with the respondent association following alleged misconduct by her in removing and playing to unauthorised persons a tape of a confidential meeting of the council of respondent association. Stanley J. held:

The applicant was a senior officer in the employ of the respondent. The executive and council of that association were entitled to expect that they would receive loyalty, trustworthiness and honesty from the applicant. On the findings I have made they did not receive them.

[75] Similarly, I consider the Respondent was entitled to expect loyalty, trustworthiness and honesty from the Applicant. Such expectations were not forthcoming.

[76] I find that each limb of conduct alleged to have been engaged in by the Applicant as specified in the Letter of Allegation actually occurred and constituted serious and wilful misconduct. The Applicant's conduct was wilful, deliberate and inconsistent with the continuation of his employment. That conduct, involving such serious safety breaches, constituted serious misconduct as defined in clause 1.07 of the *Fair Work Regulation 2009*.

Section 387(b) – Notification of the reason for the dismissal

[77] The Applicant was notified of the reason for the dismissal in the Outcome Letter. That correspondence outlined a detailed explanation of reasons.

Section 387(c) – Opportunity to respond to any reason

[78] The Applicant was provided with an opportunity to provide a response to the Letter of Allegation, that outlined the allegations that were the foundation of his dismissal.

[79] While the Applicant submitted that there existed “*procedural fairness violations*”, because there were no warnings offered, no disciplinary action invoked, and no performance improvement opportunities given, I consider in the circumstances where the Respondent was unaware of the Applicant's conduct until 10 April 2024 and taking into account the gravity of the Applicant's misconduct, that warnings and disciplinary action were not appropriate.

Section 387(d) – Unreasonable refusal by the employer of a support person

[80] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[81] There is no positive obligation on an employer to offer an employee the opportunity to have a support person, and I note the Applicant did not request a support person.

Section 387(e) – Unsatisfactory performance

[82] The dismissal was not for unsatisfactory performance, and this is not a relevant consideration.

Sections 387(f) and 387(g) – The size of the employer’s enterprise/human resources

[83] The Respondent is a large employer, with access to dedicated human resource managers. I consider the size of the Respondent would not have affected the procedures followed in effecting the dismissal.

Section 387(h) – Other relevant matters

[84] The Applicant submitted that he had an exemplary record, with no prior disciplinary actions, and that history contradicted the notion that he would engage in the misconduct that disadvantaged the Respondent. I reject that submission and note that the Applicant was employed for less than a year (22 May 2023 to 14 April 2024). During that period of time the Applicant actively hid his conduct to avoid the Respondent becoming aware of its existence.

[85] As to the Applicant’s submission that inferring friendships developed at work require disclosure is a violation of his constitutional right to freedom of association, his rights to privacy, and may also infringe on the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*, the Applicant did not explain how such violations arose. I can see no basis where it could be said that appropriately disclosing a conflict of interest could have any such effect.

Conclusion

[86] I have made findings in relation to all matters specified in s 387 of the Act 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 and therefore an unfair dismissal.

[87] I have found the Respondent had valid reasons for the dismissal of the Applicant, and that procedural fairness was afforded to the Applicant. I therefore do not find that the dismissal of the Applicant was harsh, unjust or unreasonable.

[88] The Application is dismissed.



DEPUTY PRESIDENT

Appearances:

Mr V Rodrigues, the Applicant.

Mr D Keplac, Solicitor on behalf of the Respondent.

Hearing details:

5 August 2024.

Sydney.

In-person.

Final written submissions:

Applicant Final written Submissions filed on *18 August 2024*.

Respondent Final written Submissions filed on *26 August 2024*.

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¹ Transcript PN 789.

² Print R4471, at [18] and [19].

³ (1995) 62 IR 371

⁴ Transcript PN252 to 293.

⁵ Transcript PN 297 to 356

⁶ Transcript PN 850 to 854.

⁷ Transcript PN 519 and 520.

⁸ (1978) 45 S.A.I.R. 637