[2024] FWC 2313

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Clint Dupre
v
Excell Protective Group Pty Ltd
(U2024/4896)

DEPUTY PRESIDENT MASSON — MELBOURNE, 2 SEPTEMBER 2024

Application for an unfair dismissal remedy – *jurisdictional objections raised – whether Applicant dismissed – jurisdictional objections dismissed – Applicant found to have been dismissed within meaning of s 386(1)(a) of the Fair Work Act 2009 - dismissal found to be unfair – reinstatement not appropriate - compensation ordered.*

[1] On 1 May 2024, Mr Clint Dupre (the Applicant) made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (Cth) (the Act) for a remedy, alleging he had been unfairly dismissed from his employment with Excell Protective Group Pty Ltd (the Respondent) on 11 April 2024. On 24 June 2024, the Respondent filed its Form F3 response to the unfair dismissal application in which it raised a jurisdictional objection to the application, that being the Applicant was not dismissed.

[2] The matter was listed for determinative conference/hearing before me on 26 August 2024 to deal with both the jurisdictional objection and the merits of the application. Both parties filed material in advance of the determinative conference/hearing in accordance with directions issued. At the hearing, Paris Lettau of Counsel, who was granted permission to appear on behalf of the Applicant pursuant to s 596(2)(a) of the Act called the Applicant to give evidence. John Pereira of William Partners Australia Pty Ltd was granted permission to appear on behalf of the Respondent pursuant to s 596(2)(a) of the Act. The Respondent relied on the evidence of the following witnesses;

- Nigel Edwards – Manager, Capability and Culture
- Benny Kaushal – CEO/Owner
- Atul Vashist – Operations Leader
- Patrick Soos – Technician
- Carlos Quiroga – Commercial Manager Business Development

Background and evidence

[3] The Applicant states that he commenced employment with the Respondent on 23 March 2015 in the position of Operations Manager at which time signed a written contract of employment[1]. The Applicant states he did not receive any warnings of unsatisfactory performance or conduct issues during his employment with the respondent. Mr Kaushal states

that while a contract was signed by the Applicant on 19 March 2015, due to an issue with licensing of the Respondent's business, it did not trade from June 2015 to July 2017. In that period the Applicant was paid by a different entity named SPS Security Service PL which was not an associated entity of the Respondent according to Mr Kaushal. While payments to the Applicant by the Respondent resumed in July 2017, the Applicant did not have a signed contract of employment after July 2017 with the Respondent[2]. Contrary to Mr Kaushal's evidence, the Applicant claims that SPS Security Service PL was controlled by Mr Kaushal and that Mr Kaushal has used these different employment entities as a means to deny the Applicant his full long service leave entitlement on termination of employment[3].

[4] At the time of the Applicant's dismissal, he was employed in the position of Business Development Manager and received the following remuneration package;

(a) a salary of $95,000 per annum plus superannuation;

(b) payments to car lease to the value of $267.46 per week;

(c) car insurance payments of $50.81 per week;

(d) a fuel card;

(e) car servicing; and

(f) a phone allowance of $14.81 per week.

(a total value of $112,320.16 per annum plus $9,975 in superannuation).[4]

[5] On 19 November 2023, the Applicant states he was provided with a copy of a proposed new contract of employment dated 25 October 2023[5], job description and non-disclosure agreement. Relevantly, the new contract of employment included a higher sales target, non-solicitation and post termination restraint clauses (collectively the Restraint Clauses). The Applicant was concerned with the scope of the Restraint Clauses and says he met with Mr Kaushal and Mr Edwards on 4 January 2024 during which meeting he says he raised those concerns in response to which he states Mr Kaushal agreed to make amendments to the contract[6].

[6] Mr Edwards' evidence on the above-referred meeting is that it took place on 3 January 2024 and that the Applicant's concerns expressed at that meeting were confined to remuneration and commissions[7]. During cross-examination Mr Edwards clarified that the Applicant also raised the issue of the confidentiality agreement during the meeting and that no changes were subsequently made to the proposed employment agreement despite the concerns raised by the Applicant in the 3 January 2024 meeting. Both he and Mr Kaushal gave evidence during cross-examination that Mr Kaushal was away on leave at the time of the meeting on 3 January 2024.

[7] The Applicant goes on to state that in early March 2024, Mr Kaushal announced that the management team of the Respondent would be transferred to another company called Zipd which Mr Kaushal owned, the stated reason being to reduce payroll tax expenses. Service and leave accruals were to be rolled over into Zipd according to the Applicant. Mr Kaushal stated

during cross-examination that there was no intention of dismissing any employees in transferring staff to Zipd, that he did not own Zipd and that while he was not the CEO of Zipd, he had a financial interest in that company and stood to benefit financially if staff moved across from the Respondent to Zipd.

[8] Following Mr Kaushal's announcement of the proposed transfer of staff to Zipd, the Applicant states he received an email on 6 March 2024 from Mr Edwards containing a new employment agreement[8], job description[9], and non-disclosure agreement[10] for the Applicant's employment transfer to Zipd. The Zipd contract of employment retained the clauses of concern that the Applicant had previously raised. Among other things, Mr Edwards' covering email stated as follows;

> "…………
>
> We have been looking at this contract content for some time and you are aware of the matters raised.
> I believe we have got to the point of resolution so we should be able to close this matter asap.
>
> Still, you should read the documents thoroughly and quickly as this is a very important step in the business moving forward.
>
> FYI, Benny is aware of the detail and we both want to resolve this matter this week.
> This matter is now pressing and so it must be resolved no later than 1500 Friday 8 March 2024.
> I am contactable by telephone at any time for this matter so do not delay.
>
> Put simply, you must decide whether you will come to an agreement.
> If you do agree then please sign the documents in the appropriate spaces and return it to me asap, but no later than 1500 this Friday 8 March.
>
> …………..
>
> If you do not agree, you must contact me asap so we can resolve this as a matter of urgency.
> If an agreement cannot be reached this week then a decision must be made upon your role in the business.
>
> ………………"[11]

[9] When questioned on the above email from Mr Edwards to the Applicant, both Mr Kaushal and Mr Edwards agreed that the language in the email could be read as a threat to the Applicant's employment if he did not sign the Zipd contract of Employment. Mr Edwards clarified that was not the intention and that the context in which the email was sent was important, that being various discussions held with the Applicant which led him to believe that agreement had essentially been reached on the terms of the contract. Mr Edwards denied that the reference to a decision needing to be made about the Applicant's role indicated that his employment was at risk. He explained the reference to the review of the Applicant's role as

being a reference to the specific role the Applicant would fill when staff moved across to Zipd. He agreed however that the email conveyed a sense of urgency which he said was necessary because of the project delivery timeframes. Mr Edwards repeatedly rejected that it was his intention to convey a threat to the Applicant that his employment was at risk if he did not sign the contract.

[10] When questioned on the 6 March 2024 email to the Applicant, Mr Kaushal agreed that he could not force the Applicant to sign the contract, that there was no valid reason to dismiss the Applicant because of his refusal to sign the contract and that the Applicant's position was required and not redundant. He also agreed that the option of resigning was available but had not been discussed with the Applicant. He also stated that the option for the Applicant to remain on his current contract with the Respondent was also available although he accepted that option was not specifically discussed with or put to the Applicant. Mr Kaushal was adamant that the Applicant could have remained employed on his existing contract if agreement was not reached on the terms of the new contract of employment.

[11] On 8 March 2024, Mr Edwards sent a text message to the Applicant in the following terms;

> "Clint
> there was a deadline for contract resolution which was not met
> The best you can do is to sign it and get it witnessed and leave it on my desk and hope the boss will be lenient.
> Benny may now lawfully reject it as you have not resolved in accordance with reasonable directions.
> …………."[12]

[12] Mr Edwards when questioned on the text message conceded that the message again conveyed an urgency to resolving the Applicant's unwillingness to sign the contract. He also accepted that use of the language 'you have not resolved in accordance with reasonable directions' had a particular meaning when used in the context of employment matters, that being to place a person on notice that they may be subject to some form of disciplinary action. He rejected that was the intention of the text message.

[13] On 11 March 2024, the Applicant sent an email[13] to Mr Edwards attaching a document which set out various clarifications he sought in relation to the Zipd contract of employment. The concerns identified in the attachment to the 11 March 2024 email included sales and commission arrangements, confidentiality agreement and non-solicitation clauses. The email made clear that the Applicant's concerns previously raised had not been addressed or resolved when the email stated as follows;

> "…….
>
> Please clarification questions and items I want addressed.
>
> These where the same 2 sticking points last time.
>
> ……………'

[14] The Applicant clarified during cross-examination that his concerns over the proposed commission structure under the proposed new contract of employment were twofold. Firstly, the Respondent proposed a significant increase to the sales target on which commissions would be calculated and paid, to a level which he said was well above industry standards. Secondly, he stated that Mr Kaushal had consistently resisted providing transparent sales figures for the Applicant which he says made it difficult to determine the accuracy of the commissions actually paid to him. This had led him to estimate that he had suffered a significant commissions underpayment. When further questioned on his unwillingness to sign the new contract of employment, the Applicant explained that he regarded the proposed Restraint Clauses as unreasonable. He stated that he had no issues with the Confidentiality Agreement per se but took issue with it covering associated entities of the Respondent of which he had no knowledge or involvement.

[15] On 12 March 2024, the Applicant received a letter titled *'Performance Review'* which invited him to a meeting on 15 March 2024 with Mr Kaushal and Mr Edwards for the purpose of participating in a performance review. The letter relevantly stated as follows;

> "……..
>
> Excell Protective Group has been informally reviewing your performance in your role in the company on an on-going basis.
>
> In light of these reviews, we would like to invite you to a formal performance review meeting.
>
> …………"[14]

[16] Mr Edwards was questioned on the timing of his 12 March 2024 letter to the Applicant which immediately followed the Applicant's email of 11 March 2024. Mr Edwards stated that the same approach was taken with other employees who had not signed off on their new contracts of employment. He claimed that the performance review meeting was about trying to resolve outstanding contract issues, but he could not when questioned reconcile the language in the letter which specifically referred to 'performance review' with his claim that the meeting was to resolve contract of employment issues. He also conceded that he was not aware of any previous formal performance review having been initiated with the Applicant. He did however refer to the fact that other employees were treated the same as the Applicant and were also invited to performance review meetings in circumstances where they had similarly not signed new contracts of employment at that point. Mr Edwards' evidence on this point was supported by copies of letters sent to other staff that was produced at the request of the Commission. Those letters to colleagues of the Applicant were sent on or about 11 March 2024 in the same terms as the 12 March 2024 letter to the Applicant. Copies of signed contracts of those employees were also produced and revealed that those employees signed off on new Zipd contracts of employment subsequent to 'performance review' meetings.

[17] On 3 April 2024, the Applicant states he attended an office management meeting along with a number of colleagues during which Mr Kaushal advised those present that if they did not sign the Zipd contracts of employment, he (Mr Kaushal) would consider that to be a resignation

and that he would accept such resignation as bringing the employment to an end.[15] Following this meeting, the Applicant states he contacted Jobwatch on 4 April 2024 and was advised that he was under no legal obligation to sign the contract. When questioned on this he responded that the only reason he contacted Jobwatch was because of Mr Kaushal's threat that a failure to sign the new contract would be treated as a resignation. Mr Kaushal denied making such a statement.

[18] The Applicant attended a further meeting on 11 April 2024 with Mr Kaushal and Mr Edwards. The Applicant's version of events of that meeting is as follows;

(a) he was presented with the Zipd contract of employment again without any of his requested changes;

(b) Mr Edwards and Mr Kaushal demanded that he sign the proposed Zipd contract of employment;

(c) he advised that he would not sign it without the requested amendments;

(d) he repeated on multiple occasions that he was not resigning, clearly stating *"I want this noted that I am not resigning"*;

(e) Kaushal stated in response that he would need to *"finish up"*;

(f) Edwards asked Kaushal *"when do you want him to finish?";*

(g) Kaushal stated *"now";*

(h) he was directed to hand back his access fob and collect all his belongings and leave the work premises;

(i) he was informed by Edwards that leave entitlements would be provided with a separation certificate and that *"I could go to Fair Work if I chose"*; and

(j) he collected his belongings and left the building.[16]

[19] Mr Kaushal's evidence regarding the meeting with the Applicant on 11 April 2024 differed significantly from the Applicant. He states he told the Applicant during the meeting that the Restraint Clauses in the proposed contract of employment could be changed and that he specifically asked Mr Edwards to make whatever changes the Applicant required. Mr Kaushal further states that he asked the Applicant to meet again on the following Wednesday. At the conclusion of the meeting Mr Kaushal says the Applicant handed over his access fob which Mr Kaushal did not ask for; the Applicant placed it on the table at which point Mr Kaushal pushed it back towards the Applicant and the Applicant left it on the table. Mr Kaushal rejects that the Applicant was dismissed during the meeting and refers to the fact that he asked the Applicant to return and meet the following Wednesday and he also asked the Applicant to take his laptop and phone with him in case of a business need[17].

[20] Mr Edward's version of the 11 April 2024 meeting was as follows. He states that during the meeting the Applicant objected to the Restraint Clauses, apparently because he feared the clause would impact on his wife's occupational therapy business. In response to these concerns Mr Edwards states the Applicant was advised that changes would be made to the contract to satisfy his concerns. Despite those assurances, the Applicant refused to sign the confidentiality agreement presented to him. The Applicant was then advised to take some paid time off to reflect on his position and seek advice. It was also suggested that the Applicant return to the office on Wednesday 17 April 2024 to resume the discussion. The Applicant then left the office with his company computer, remote access in place and logo clothing while leaving his personal possessions in the office.

[21] When pressed on the details of the meeting during cross-examination Mr Edwards agreed that Mr Kaushal had directed him to make changes to the contract of employment as sought by the Applicant. He did not however subsequently make those changes or send a revised contract of employment to the Applicant. He also agreed that towards the end of the meeting, the Applicant had stated he was not resigning which Mr Edwards says shocked him as the statement came out of the blue. Neither Mr Edwards or Mr Kaushal were able to explain what provoked this statement by the Applicant and both denied that the statement was made in response to any threats or pressure applied by them on the Applicant during the meeting.

[22] Mr Edwards further states that later that day a client contacted the Respondent querying an auto-response received from the Applicant that he was not working with the Respondent any longer[18]. He says the Respondent also became aware that the Applicant was accessing the Respondent's IT system and relied on a screenshot of the Applicant's computer home page[19]. At this point it was decided that the Applicant's IT access ought to be restricted. Mr Edwards also claims he became aware of a LinkedIn post made by the Applicant on the same day to the effect that he no longer worked for the Respondent[20]. The Applicant rejected that the screenshot of his laptop revealed that he had accessed the Respondent's system following his dismissal. He confirmed that his last action was to place an autoreply on his email account and that all the screenshot revealed was that an IT person had remotely accessed his laptop at 4.01pm on 11 April 2024 and was able to see the last documents the Applicant had worked on.

[23] In response to other evidence of Mr Kaushal and Mr Edwards, the Applicant denies that Mr Kaushal asked Mr Edwards to amend the proposed contract, re-affirmed that he told Mr Kaushal and Mr Edwards in the meeting that he was not resigning, and that he was in fact directed by Mr Kaushal to return the access fob and was not asked by Mr Kaushal to take his laptop and phone. He also states that he was directed by Mr Edwards to *"pack up my belongings and not to make a scene"* or words to that effect. In response to that direction, he collected important personal items and that all he left was some honey, coffee cups and a charging cable. As regards the LinkedIn post referred to by Mr Edwards, the Applicant states the post was not made until 17 April 2024[21] which was after he received a letter from Mr Edwards on 17 April 2024 which confirmed the termination of his employment.[22]

[24] The Applicant was also questioned on how he knew he had been dismissed during the meeting on 11 April 2024 to which he responded that he was told to 'finish up' and that his entitlements would be paid out the following week. He also confirmed that he didn't perform any work following the meeting on 11 April 2024 because he believed he had been dismissed

and categorically rejected that he had sought to orchestrate or put pressure on the Respondent to dismiss him or that he had abandoned his employment

[25] The Applicant states that when he returned home from the 11 April 2024 meeting an hour later, he set up an autoreply on his work email address to notify people that he was no longer working for the Respondent. He also sent a text message to a work colleague Patrick Soos around the same time confirming that he had been terminated[23]. He sent an email to Mr Edwards on 16 April 2024 asking for a confirmation letter including the reason for his termination of employment, a separation certificate and payment of his entitlements[24]. He received an email from Mr Edwards on 17 April 2024 to which a letter was attached which relevantly stated as follows;

> "……………
>
> Excell Security became aware of your resignation on 11 April 2024 when it became aware of your email note indicating that you no longer work for Excell Security.
>
> I am advised that Excell is to accept this as a resignation and I ask that you confirm the resignation in writing so that entitlements can be calculated and paid to you.
>
> Please arrange to collect the personal items that you left at the office. If you wish, they can be sent to you by mail or courier.
>
> Please arrange to return any/all of the following asap as may apply:
>
> - computer, laptop, drive or other IT hardware
> - files or other software items
> - any clothing or other property with Excell logos
> - keys, cards, fobs or other access control items
> - business information, documents, passwords or other document containing
> - business information including passwords
> - any property at all that can reasonable be identified as belonging to Excell
> - including, but not limited to, books, manuals and drives.
>
> I ask that all of this be accomplished as soon as is practicable. If you wish to discuss this matter please feel free to contact me so we arrange a suitable time to meet to discuss the matter.
>
> …………."[25]

[26] On 19 April 2024, the Applicant replied to Mr Edwards by email in the following terms;

> "…………..
>
> I refer to your letter dated 17 April 2024 which requests for me to confirm that I resigned from my employment with Excell Protective Group.
>
> However, I confirm that I have not, and will not, be resigning from my employment.

I simply wish to remain employed under the current written contract signed by the company and myself. Please confirm by close of business on 22nd April 2024 that I will continue to be employed under that contract.

If the company is not agreeable with the above, please confirm my termination in writing and organise for my employment entitlements including my long service leave, annual leave and notice will be paid within seven days."[26]

[27] Having not received a response from the Respondent to his email on 19 April 2024, The Applicant sent a further email to Mr Edwards on 23 April 2024 in the following relevant terms;

"……….

I note that you have refused to respond to my email dated 19 April 2024.

In that email, I gave you the opportunity to confirm that you would continue to employ me pursuant to my current written contract of employment. However, it is now clear that Excell is refusing to do so.

Accordingly, I hereby accept this fundamental breach of the written employment contract as repudiating both the employment contract and the employment relationship.

For the avoidance of doubt, I now consider myself to have been dismissed by the company.

Again, I demand my employment entitlements which the company is withholding.

…………."[27]

[28] Mr Kaushal states that following the Applicant's resignation on 11 April 2024, he did not take his personal belongings on that date and nor has he collected them since. Further, he did not return company property in his possession until 28 May 2024[28]. As regards payment of his entitlements, his annual leave and long service leave were respectively paid on 20 June and 11 July 2024[29]. When questioned why no steps were taken to contact the Applicant after becoming aware of his 'resignation', Mr Kaushal agreed that he was not aware of any steps taken to contact the Applicant or clarify the Applicant's employment status after the 11 April 2024 meeting beyond Mr Edwards' email to the Applicant on 17 April 2024. He stated this caution arose from his being conscious of legal implications.

[29] Mr Edwards and Mr Kaushal were both cross-examined on why no contact was made with the Applicant after they say they became aware of his 'resignation' on the afternoon of 11 April 2024. They both agreed that they took no steps to clarify or correct any misunderstanding the Applicant may have had regarding his employment in circumstances where they both claimed to have been shocked by that development. Both Mr Edwards and Kaushal also stated during cross-examination that despite their doubts about the Applicant's intention they assumed and/or hoped he would attend the meeting tentatively arranged for 17 April 2024. No time or meeting request was sent in relation to the meeting claimed to have been arranged for that day

[30] They also agreed that they had not responded to the point made by the Applicant in various correspondence sent to Mr Edwards on 16, 19 & 23 April 2024 in which the Applicant stated unequivocally that he had not resigned his employment. Mr Edwards offered in reply that based on other matters raised by the Applicant during the 11 April 2024 meeting as well as the Applicant's autoreply message, the 'terminated' text message to a colleague on 11 April 2024 and subsequent LinkedIn post, he had formed the view that the Applicant had abandoned his employment. He agreed however that at no stage did he call the Applicant to confirm his intentions or correct any potential misunderstanding.

[31] When questioned on why he retained his laptop after he claimed to have been dismissed on 11 April 2024 the Applicant replied that he took the laptop to access evidence going to his dismissal. He further conceded that he retained the laptop for an extended period because the Respondent had failed to pay out his accrued entitlements in a timely manner, which he conceded he should not have done.

[32] Since the termination of his employment the Applicant was unsuccessful in securing new employment until very recently despite multiple job applications. He furnished evidence of seventeen unsuccessful job applications made between 28 April and 15 July 2024[30]. It was however confirmed that after the Applicant prepared and filed his material in this matter, he obtained new employment and will commence on 27 August 2024 on a full-time basis on a remuneration package comparable to what he received from the Respondent.

Has the Applicant been dismissed?

[33] A threshold issue to be determined in this matter is whether the Applicant has been dismissed from his employment. The circumstances in which a person is taken to be "dismissed" are set out in s 386 of the Act. Section 386(1) relevantly provides as follows:

> (1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

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

[35] In *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*[31] (Bupa), a Full Bench was dealing with an appeal of a decision in which the member at first instance found that the dismissal was within the meaning of s.386(1) and that the dismissal was unfair. The Full Bench identified there were two elements to s.386(1) and after extensively considering the authorities, said as follows;

> **"[47]** Having regard to the above authorities and the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:
>
> (1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.
>
> (2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element." (my emphasis added)

[36] The Applicant's primary argument is that he claims to have been dismissed within the meaning of the first limb of s. 386(1), that being he was dismissed at the Respondent's initiative. In the alternative he contends that if it were found that he had resigned, his resignation was caused by conduct or a course of conduct by the Respondent. I turn firstly to whether the Applicant was dismissed within the meaning of s 386(1)(a).

Witness credit

[37] The Applicant and the Respondent's witness have provided competing accounts of events including the critical meeting on the 11 April 2024 at which the Applicant claims to have been dismissed. Having regard to those evidentiary conflicts it is necessary for me to make findings on witness credit before proceeding to deal with the substantive arguments over whether the Applicant was dismissed at the initiative of the Respondent.

[38] Turning firstly to the Applicant, I found him to be consistent, forthright and unwavering in his account of events including up to, during and following the 11 April 2024 meeting. His evidence of the meeting was also supported by and consistent with the various documentary evidence before me. I found the Applicant to be credible and reliable in his account of events and he also made admissions where appropriate. For example, he readily admitted that retaining possession of company equipment following his dismissal was not appropriate but was done in circumstances where he had not been paid out his leave entitlements.

[39] By contrast, I found Mr Kaushal to be an unimpressive witness. During cross-examination he gave rambling explanations and at times irrelevant responses to questions. At other times he gave evidence that was inconsistent with his witness statement or earlier oral evidence. For example, in his witness statement he stated that he had asked the Applicant during the 11 April 2024 meeting to return on Wednesday 17 April 2024 for a further meeting. During cross-examination he then stated that Mr Edwards asked the Applicant to return for a further meeting the following Wednesday. When this difference in evidence was raised with him, he then claimed that both he and Mr Edwards had made that request to the Applicant. At another point during cross-examination, he claimed not to have spoken with the Applicant regarding his contract of employment concerns prior to the 11 April 2024 meeting and then later conceded that he had spoken to him between January and April 2024. When pressed on this point he responded that the discussions with the Applicant were informal. That evidence also conflicts with the uncontradicted evidence that Mr Kaushal met with his management team (including the Applicant) as a group on 3 April 2024 regarding the new contracts of employment.

[40] Mr Kaushal could offer no explanation of why the Applicant stated during the meeting that he was not resigning. He also gave evidence that he was shocked by news that the Applicant had resigned following the meeting on 11 April 2024. He also claimed in his evidence that he wanted to keep all his team through the transfer to Zipd, and he professed to have had a good relationship with the Applicant. Despite all of this, he provided no plausible explanation as to why he made no contact with the Applicant after the 11 April 2024 meeting to resolve any misunderstanding or check the Applicant's employment intentions. This is despite also stating that he was optimistic the Applicant would come for a meeting tentatively arranged for Wednesday 17 April 2024. These are some examples where it is not possible to reconcile Mr Kaushal's evidence with the events that were said by him to have transpired during the meeting of 11 April 2024. This leads me to distrust Mr Kaushal's evidence where it conflicts with that of the Applicant.

[41] Similar to Mr Kaushal, I found Mr Edward's evidence to be unconvincing at times. For example, when cross-examined on his 6 March 2024 email to the Applicant, he was questioned on his use of the phrase 'If you do not agree…….a decision must be made upon your role in the business'. He responded that the reference to a decision needing to be made on the Applicant's role in the business was simply a reference to which role the Applicant would fill moving forward, not whether he would in fact retain his job if he failed to sign the new contract of employment. Mr Edwards response was utterly unconvincing in the context of the 'urgency' with which the Respondent was approaching the task of getting its staff to sign new contracts. Nor could Mr Edwards' explanation of the meaning of the 6 March 2024 email be reconciled with his text message of 8 March 2024 when he advised the Applicant that Mr Kaushal may 'now lawfully reject it as you have not resolved in accordance with reasonable directions'. Mr Edward's 6 March 2024 email was clearly a threat that unless the Applicant signed the new contract of employment, his job was at risk. For Mr Edwards to contend otherwise is simply not believable.

[42] A further example of Mr Edwards' (and Mr Kaushal's) unreliable evidence can be seen in their claim that an option available to the Applicant given his unwillingness to sign the new contract of employment was to remain an employee of the Respondent rather than transfer to Zipd. That evidence must also be treated with great caution in circumstances where neither man ever advised the Applicant of that option. To claim, as both Mr Kaushal and Mr Edwards did

during cross-examination, that remaining an employee of the Respondent on the pre-existing contract was an option available to the Applicant is utterly disingenuous in my view.

[43] The above examples lead me to approach the evidence of both Mr Edwards and Mr Kaushal with great caution. Where there is a conflict in their evidence with that of the Applicant, I prefer the evidence of the Applicant unless otherwise stated.

Whether Applicant was dismissed within meaning of s 386(1)(a)

[44] As set out in the evidence above, the Applicant contends that he was dismissed during a meeting with Mr Kaushal and Mr Edwards on 11 April 2024. Mr Kaushal's and Mr Edwards version of that meeting differs significantly from that of the Applicant in that they claim he was not dismissed but was requested to take some time off, to consider his position on signing the new contract of employment and return for a further meeting the following week on Wednesday 17 April 2024. I have already made findings of credit in relation to the witnesses and unless stated otherwise prefer the evidence of the Applicant on the critical meeting on 11 April 2024. My further reasons for preferring the evidence of the Applicant on the meeting of 11 April 2024 follow.

[45] Firstly, the Applicant gave clear, consistent evidence both in his witness statement and during cross examination. Any challenge to that evidence was coherently rebutted in answers to questions put to him by the Respondent during cross-examination.

[46] Secondly, there was no clear unambiguous statement made either orally or in writing by the Applicant to the Respondent that he was resigning. In fact, he made it unequivocally clear to the Respondent that he was not resigning.

[47] Thirdly, the documentary and other evidence of events leading up to the 11 April 2024 meeting reveals a campaign of pressure being applied to the Applicant and his colleagues to sign the proposed new contract of employment. This can be seen by the threat to the Applicant's employment contained in Mr Edward's 6 March 2024 email, Mr Edwards' follow-up text message to the Applicant on 8 March 2024 confirming his refusal to follow a lawful direction and his 12 March 2024 letter to the Applicant regarding the required performance review. I also find that at the 3 April 2024 meeting of managers, Mr Kaushal advised that he would regard employees who declined to sign the new contract as having resigned. While Mr Kaushal denied that such a statement was made, the fact that the Applicant sought advice from Jobwatch the following day regarding his rights supports the Applicant's evidence on what Mr Kaushal stated. It was open for the Respondent to call evidence from other participants in that meeting to specifically rebut the Applicant's evidence but did not do so.

[48] Against the above background of pressure and the clear unwillingness of the Respondent between January and April 11 2024 to address the Applicant's contract concerns, the claim by the Respondent that it was flexible and prepared to amend the proposed contract of employment is simply not believable. It is apparent that the Respondent wanted the Applicant to sign the new contract of employment and placed considerable pressure on him to do so prior to the 11 April 2024 meeting. These lead up events strongly support the Applicant's account of the 11 April 2024 meeting and its outcome.

[49] Fourthly, the claim by the Respondent's witnesses that it was an option for the Applicant to remain as an employee of the Respondent on his pre-exiting contract of employment must also be rejected. At no stage did the employer offer the Applicant that alternative, either before, during or after the 11 April 2024 meeting. This was readily conceded by both Mr Edwards and Mr Kaushal. The fact the option was not raised leads me to conclude that it was never an option as far as the Respondent was concerned to have allowed the Applicant to have remained an employee of the Respondent rather than transfer to Zipd which would have negated the intended financial benefit to the Respondent of transferring employees to Zipd.

[50] Fifthly, it was accepted by Mr Edwards and Mr Kaushal that the Applicant made a clear statement during the 11 April 2024 meeting that he was not resigning. Both men expressed surprise at that statement being made by the Applicant and could offer no explanation as to why it was made. For his part the Applicant explained that he stated on multiple occasions during the meeting that he was not resigning, these statements being made in the face of pressure from Mr Kaushal and Mr Edwards to sign the new contract without amendments. There is no plausible explanation for the Applicant's statement of not resigning being made during the meeting other than in circumstances where he was being pressured to sign the new contract without amendment. Mr Edwards' and Mr Kaushal's explanation that the statement 'came out of the blue' and was not provoked by pressure being applied to the Applicant strains credibility and is not accepted.

[51] Sixthly, the post termination conduct of the Applicant was entirely consistent with his version of the meeting and its outcome. On arriving home an hour after he left the meeting, he put an autoreply message on his work email stating he was no longer employed by the Respondent. In response to a text message from a colleague he replied that he had been 'terminated'. He wrote to Mr Edwards on 16 April 2024 seeking confirmation of his dismissal and the reasons for his termination. In response to Mr Edwards' 17 April 2024 letter, he responded on 19 April 2024 strenuously denying Mr Edwards' assertion that he had resigned and sought confirmation that he would remain employed by the Respondent. Finally, when no response to that email was received, he followed up on 23 April 2024 with a further email to Mr Edwards confirming that he regarded himself as having been dismissed. All the Applicant's post dismissal actions and communications were consistent with having been dismissed during the meeting on 11 April 2024.

[52] Seventhly, Mr Kaushal's and Mr Edwards' post termination conduct cannot be reconciled with their version of the 11 April 2024 meeting. They both gave evidence that they were expecting the Applicant to return for a meeting on Wednesday 17 April 2024 although they conceded that a time was not set, and no meeting request was initiated. In circumstances where they say they were shocked on becoming aware of the Applicant's resignation later that day, it is telling that they took no steps to clarify with the Applicant that they believed a further meeting had been arranged the following Wednesday to discuss the matter further. Nor did Mr Edwards seek to provide an updated contract of employment to the Applicant reflecting the direction he and Mr Kaushal states was given to him during the 11 April 2024 meeting to amend the contract as sought by the Applicant. One would think that if the Applicant had resigned in these circumstances as claimed by the Respondent, that either Mr Kaushal or Mr Edwards would have immediately contacted the Applicant to check what was going on and remind him that Mr Edwards was going to amend the contracts as alleged to have been directed to do by Mr Kaushal. This did not occur and Mr Edwards explanation that he thought the Applicant had

'abandoned' his employment cannot be accepted in circumstances where he took no steps to check the Applicant's intentions.

[53] Further post dismissal conduct of the Respondent that cannot be reconciled with their version of the 11 April 2024 meeting is seen in the failure of either Mr Edwards or Mr Kaushal to respond to the Applicant's post dismissal statements that he had not resigned. Other than Mr Edwards' email of 17 April 2024, no other response was provided to the Applicant. If Mr Kaushal and Mr Edwards were genuine in their statements made in these proceedings that the Applicant had the option of remaining employed by the Respondent under his pre-existing contract, one again would have expected a follow-up to the Applicant's communication on 19 April 2024 when that option was specifically sought by the Applicant. No response was provided which reinforces my earlier finding that the evidence of Mr Edwards and Mr Kaushal on this point is not to be believed. It also serves to again highlight the unreliability of the evidence of the Respondent's witnesses on events surrounding the 11 April 2024 meeting.

[54] Finally, there was a lack of a credible motive for the Applicant to resign in circumstances of having worked for the Respondent for over nine years and with no alternative role to move to outside the organisation. By resigning without notice as claimed by the Respondent, the Applicant was not entitled to payment of notice and had to endure several weeks without payment of his accrued statutory leave entitlements. By contrast, the Respondent was motivated to get its senior staff on new contracts as evidenced by the pressure brought to bear on the Applicant and his colleagues. It was also motivated financially to move its staff across to Zipd. The Applicant in declining the new contract of employment without amendments was clearly frustrating those objectives.

[55] It follows from the foregoing that the clear documentary and other evidence of events that occurred prior to and following the 11 April 2024 meeting cannot be reconciled with Mr Edwards and Mr Kaushal's version of events in the 11 April 2024 meeting. In fact, the conduct of both the Applicant and the Respondent's witnesses prior to and following the 11 April 2024 is entirely consistent with the Applicant's account of that meeting. It is for that reason that I prefer the Applicant's evidence on the meeting and make the following findings on the meeting of 11 April 2024;

- The Applicant attended the meeting on 11 April 2024 with Mr Edwards and Mr Kaushal.

- During the meeting Mr Kaushal and Mr Edwards maintained their demand that the Applicant sign the proposed new contract of employment.

- The Applicant continued to resist the Respondents' demand that he sign the new contract of employment due to his concerns over the proposed commissions structure and restraint clause scope.

- No alternatives to signing the Zipd contract of employment in the proposed terms was offered or discussed with the Applicant during the meeting.

- The applicant was not offered a 'cooling off period' to reconsider his position and nor was a further meeting on Wednesday 17 April 2024 proposed.

- Mr Kaushal did not direct Mr Edwards to amend the contract of employment as claimed and nor did Mr Edwards take steps to do so.

- Feeling under pressure to sign the new contract of employment and being unwilling to do so without requested amendments being made, the Applicant made clear that he was not resigning and repeatedly stated so during the meeting.

- Frustrated with the Applicant's refusal to sign the new contract of employment, Mr Kaushal stated to the Applicant that he was to 'finish up' and when queried by Mr Edwards on the timing said 'now'.

- The Applicant was then directed to return his access fob, pack up his personal belongings and leave the building, with which directions he complied save for leaving some inconsequential personal items behind.

[56] Having regard to the findings I have made in relation to the evidence, and particularly the meeting on 11 April 2024, I am satisfied that the Applicant did not resign as contended by the Respondent. It was the actions of the Respondent that resulted in the termination of employment. Mr Kaushal's clear statement that the Applicant was to 'finish up' 'today', return his access fob, collect his personal possessions and leave the building had the effect of ending the employment relationship at the initiative of the Respondent. The dismissal was at the initiative of the Respondent within the meaning of s 386(1)(a). As such, the jurisdictional objection must be dismissed. Having reached this conclusion, it is unnecessary for me to deal with the Applicant's alternate submissions.

Initial matters

[57] Having found that the Applicant was dismissed within the meaning of s 386(1) of the Act, I am now obliged under section 396 of the Act, to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and

(d) whether the dismissal was a case of genuine redundancy.

[58] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant was dismissed on 11 April 2024 and filed his unfair dismissal application on 1 May 2024, that latter date being within 21 days of the date of his dismissal;

- the Applicant commenced employment with the Respondent on 23 March 2015 and at the time of his dismissal had been employed for a period of over nine years, that

period being more than the minimum employment period of either six months or twelve months in the case of a small business employer;

- at the date of his dismissal the Applicant was in receipt of an annual base salary of $95,000;
- the Respondent employed 50 employees; and
- the Applicant was not dismissed due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[59] Having considered each of the initial matters, I am satisfied that the application was made within the required period in subsection 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application.

Was the dismissal harsh, unjust, or unreasonable?

[60] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct – s.387(a)?

[61] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[32] and should not be "capricious, fanciful, spiteful or prejudiced[33]." However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer[34].

[62] As I have found above, the Applicant was dismissed for declining to sign a proposed new contract of employment due to terms contained within it which he found to be unreasonable. It is also plainly apparent he sought to remain in the employ of the Respondent. The elements of the contract he found unreasonable were the proposed new commissions structure and the post-termination restraints. On any view, termination of employment on the grounds of declining to sign the proposed new contract of employment, absent requested amendments being made to the contract, cannot be considered to be misconduct, be that serious or any other kind. Nor can the grounds of dismissal be characterised as being based on the Applicant's performance. In all these circumstances, the Respondent did not have a "sound, defensible or well-founded reason" for the dismissal. It follows that there was not a valid reason for the Applicant's dismissal which weighs heavily against a finding that the dismissal was not unfair.

Notification of the valid reason – s.387(b)

[63] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[35] and in explicit[36], plain and clear terms[37].

[64] In the circumstances of my having found there was not a valid reason for the dismissal, it follows the Applicant could not have been notified of a valid reason for his dismissal. In any case, it is apparent that the Applicant was not notified in explicit, plain and clear terms of the reasons for his dismissal prior to the decision being made to dismiss him. This weighs against a finding that the dismissal was not unfair.

Opportunity to respond to any reason related to capacity or conduct – s.387(c)

[65] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[38]

[66] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.[39] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to the concern, this is enough to satisfy the requirements.[40]

[67] I accept that a meeting was held on 11 April 2024 at which the Applicant's unwillingness to sign the proposed new contract of employment was discussed between

himself, Mr Kaushal and Mr Edwards. It is uncontroversial that during the meeting, the Applicant explained the reasons why he was unwilling to sign the unamended contract. It is also clear on the basis of the Applicant's evidence of the meeting, which I accept, that the meeting reached an impasse at which point Mr Kaushal made the decision to dismiss the Applicant from his employment. Absent a valid reason for dismissal, the Applicant was clearly not provided with an opportunity to respond to any conduct or performance issues before the decision to dismiss him was made. This weighs against a finding that the dismissal was not unfair.

Support person – s.387(d)

[68] 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.

[69] There is no evidence that the Applicant requested and was denied the ability to have a support person present at the meeting on 11 April 2024. This factor consequently weighs neutrally in my consideration.

Warnings regarding unsatisfactory performance – s.387(e)

[70] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed and impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(f)

[71] The Respondent's *Form F3 - Employer Response* indicates that at the time of the Applicant's dismissal it employed fifty employees. There is no evidence before me, and nor did either party contend, that the Respondent organisation's size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g)

[72] The evidence in this matter indicates that despite the Respondent's access to an in-house human resources specialist and external workplace relations advisory service, the Respondent dismissed the Applicant without a valid reason and in a procedurally unfair manner. This criterion weighs against a finding that the dismissal was not unfair.

Other relevant matters – s.387(h)

[73] The Applicant raised a number of other matters that it submits should be taken into account. These are the financial and psychological impact of the dismissal, the Applicant's work history over nine years without conduct or performance concerns, the absence of procedural fairness in relation to the dismissal and the delayed payment of the Applicant's accrued annual leave and long service leave entitlements. With respect to the accrued annual leave entitlements the Applicant also points to a discrepancy in the annual leave accrual

reported on his payslip for the pay period 8-14 April 2024 in which he was dismissed which showed an accrual of 224 hours. His final annual leave payout on 20 June 2024 was however only 64 hours.

[74] As regards the financial impact of the dismissal, that may be taken into account when considering the question of remedy and does not in my view weigh in favour of unfairness. Nor does the claimed psychological impact of the dismissal. That is because no medical or other probative evidence was led to indicate that the Applicant suffered any greater distress and anxiety than one would normally expect a dismissed employee to experience.

[75] Turning to the delay in payment of the Applicant's annual leave and long service leave entitlements, the two-month delay in finalisation of these payments in circumstances where the Applicant had no other source of income reflects poorly on the Respondent. One can infer by the conduct of both the Respondent and the Applicant that each held property of the other and may have been determined to use that leverage to place pressure on the other. For the Applicant's part, he acknowledged that he improperly retained the company laptop until 28 May 2024, but did so because he had not been paid out his entitlements. That candid admission of the Applicant may be contrasted with what I found to be Mr Edward's dissembling evidence that there were difficulties' in calculating the accrued entitlements. Beyond a submission that the accrual calculation was wrong in April 2024, no evidence was led by the Respondent to explain the discrepancy between the accrued annual leave entitlement at the time of dismissal and the much lesser final payment of annual leave on 20 June 2024.

[76] While the Applicant's conduct in retaining company property for several weeks after his dismissal is worthy of criticism, legal avenues to pursue recovery of that property were available to the Respondent. What the Respondent was not entitled to do was withhold payment of the Applicant's statutory entitlements for a prolonged period, noting there remains considerable doubt as to whether the Applicant has in fact received his full annual leave entitlements paid out. The delayed payment of these entitlements in the circumstances of the Applicant having no other immediate source of income in the wake of his dismissal weighs in favour of a finding of harshness as does the Applicant's unblemished employment record.

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

[77] I have made findings in relation to each matter 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.[41]

[78] I have found that the Applicant's dismissal was unsupported by a valid reason. There were also significant procedural failures of the Respondent in effecting the dismissal. Those failures were such that the Applicant was denied any opportunity to persuade the Respondent that dismissal was not appropriate. I have also found that the Respondent's access to HR support weighs in favour of a finding of unfairness in circumstances where the process followed by the employer was so flawed. Finally, I have found that the Applicant's employment record and the Respondent's failure to pay the Applicant his accrued statutory leave entitlements in a timely manner weighs in favour of a finding of unfairness. The remaining criteria weigh neutrally in my consideration.

[79] Having considered each of the matters specified in s.387 of the Act, all the factors described above are either neutral or tell strongly in favour of a finding that the dismissal was unfair. Most tellingly there was an absence of a valid reason for dismissal. I am satisfied that the dismissal was unreasonable, unjust and harsh because of the absence of a valid reason, the procedural failures and delayed leave entitlement payments, and was thereby unfair.

Remedy

[80] Having found that the Applicant was unfairly dismissed I now turn to consider the question of remedy pursuant to section 390 of the Act. Significantly, under s.390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[81] Dealing firstly with whether reinstatement is inappropriate, the Applicant submits that reinstatement is not appropriate as does the Respondent. In these circumstances I consider that reinstatement is inappropriate.

[82] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[42].

[83] The Applicant submits that payment of compensation is appropriate because he had been unfairly dismissed and had not until recently secured alternate employment following his dismissal, whereas the Respondent argues that no compensation would be appropriate in circumstances where the Applicant resigned.

[84] Having found that the Applicant was unfairly dismissed and noting that the Applicant remained unemployed until 27 August 2024, in these circumstances, I consider that an order for payment of compensation is appropriate. There is nothing in the material filed by the Respondent in the substantive proceedings that persuades me that a payment of compensation would be inappropriate.

[85] Turning now to the question of compensation, s 392(2) of the Act requires all the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the Commission considers relevant.

[86] I consider all the circumstances of the case below.

[87] No material was filed, or evidence led by the Respondent that would support a finding that an order for compensation would have an effect on the viability of the employer's enterprise. I consequently find that an order for compensation is unlikely to have an effect on the viability of the employer's enterprise (s 392(2)(a)).

[88] The Applicant commenced employment with the Respondent on 23 March 2015 and was terminated on 11 April 2024, a period of over nine years which was served as a permanent full-time employee. I consider that the Applicant's substantial length of service weighs in favour of a significant award of compensation (s 392(2)(b)).

[89] As stated by a majority of the Full Court of the Federal Court, "in determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[43]

[90] The Applicant had been employed by the Respondent for over nine years, there had been no performance or conduct issues raised with him by the Respondent during his employment and he gave evidence that he enjoyed working for the Respondent and had intended to remain employed for an indefinite period. The Respondent led no evidence to rebut the Applicant's evidence. Based on these factors I am satisfied that but for the Applicant's dismissal he would have remained employed by the Respondent for a further period of at least two years. The Applicant's annual remuneration excluding superannuation at the time of dismissal was $112,320.16. That means his anticipated earnings excluding superannuation for the estimated two-year period of further employment is $224,640.32 (s 392(2)(c)).

[91] Turning to the Applicant's efforts to mitigate his losses, the Applicant must provide evidence that he has taken reasonable steps to minimise the impact of his dismissal[44] and what is reasonable depends on the circumstances of the case.[45] I am satisfied on the evidence that the

Applicant made multiple job applications in the wake of his dismissal. It was confirmed during the proceedings that after filing his material, the Applicant had secured comparable full-time employment commencing on 27 August 2024. I am comfortably satisfied that the Applicant made reasonable efforts to mitigate his loss and that no adjustment to the compensation otherwise calculated is appropriate for the period from 11 April – 26 August 2024 (s 392(2)(d)).

[92] As to the income likely to be earned in the period between the making of the order for compensation and the payment of compensation I am satisfied on the evidence of the Applicant that he is likely to earn income in that period based on his having secured employment commencing on 27 August 2024(s 392(2)(g)).

[93] No other relevant matters were raised by the parties going to an order for compensation (s 392(2)(g)).

[94] As noted by the Full Bench in *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries*, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*).[46] This approach was articulated in the context of the Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[47]."[48]

[95] The approach to calculating compensation per *Sprigg* is as follows:

> Step 1: Estimate the remuneration the Applicant would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

[96] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated his employment to be $224,640.32 (excluding superannuation) based on my finding that it is likely the Applicant would have remained in employment for a further period of two years. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment."[49]

[97] I have found that the Applicant has earned no remuneration since the date of his dismissal, but that he is likely to earn remuneration between the making of the order for compensation and the payment of compensation. He has however secured employment commencing on 27 August 2024 on a level of remuneration that is comparable to that he enjoyed when employed by the Respondent. In these circumstances it is appropriate to make a deduction equivalent to the balance of the two-year period from 27 August 2024 onwards. In other words, the loss of earnings since the dismissal is to be calculated for the period from 11

April – 27 August 2024. That is a period of 19.7 weeks which based on the Applicant's anticipated earnings of $224,640.32 equals $42,552.06 (plus superannuation).

[98] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[50] I do not consider it appropriate to deduct an amount for contingencies.

[99] I have considered the impact of taxation but have elected to settle a gross amount of $42,552.06 which is to be subject to normal taxation, plus superannuation. Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[51] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the Act.

[100] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss him, I am obliged by section 392(3) of the Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct (s 392(3)). I am satisfied that there was no misconduct on the part of the Applicant that contributed to the employer's decision to dismiss. In these circumstances, no reduction in the amount of compensation is appropriate.

[101] Finally, ss 392(5) & (6) of the Act requires that the amount of compensation ordered by the Commission must not exceed the lesser of 6 months' pay calculated at the high-income threshold (HIT) or the total amount of remuneration the Applicant received or was entitled to receive during the 26-week period prior to his dismissal. Based on the pay slips provided by the Applicant, I find that the total amount of remuneration the Applicant was entitled to receive during the 26-week period prior to dismissal was $56,160.08 while the HIT at the time of dismissal on 11 April 2024 was $167,500. Half of that amount is $83,750. It follows from the foregoing that the amount of compensation ordered must not exceed $56,160.08.

[102] Considering the above, I will make an order that the Respondent pay $42,552.06 gross less taxation as required by law, plus superannuation on that amount, to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

Conclusion

[103] I am satisfied that the Applicant was dismissed at the initiative of the Respondent. Having been satisfied in respect of the other initial matters, I have considered and determined that the Applicant's dismissal was unjust, unreasonable and harsh and thereby unfair. I am further satisfied that reinstatement would be inappropriate and that an award of compensation is appropriate.

[104] Finally, I have determined to make an order that the Respondent pay $42,552.06 gross less taxation as required by law, plus superannuation on that amount, to the Applicant in lieu of reinstatement within 14 days of the date of this decision. An order giving effect to this decision will be issued separately in conjunction with this decision.

DEPUTY PRESIDENT

Appearances:
P Lettau of Counsel for the Applicant.
J Pereira for the Respondent.

Hearing details:

2024.
Melbourne:
August 26.

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<PR778754>

[1] Exhibit A1, Witness Statement of Clint Dupre, at [2], Annexure CD-1, Contract of Employment

[2] Exhibit R1, Witness Statement of Benny Kaushal, at [2]-]7]

[3] Exhibit A1, at [22]

[4] Exhibit A1, at [3]-[4], Annexure CD-14, Payslips

[5] Exhibit A1, Annexure CD-2, Employment Contract, dated 25 October 2023

[6] Exhibit A1, at [6]

[7] Exhibit R2, Witness Statement of Nigel Edwards, at [4]

[8] Exhibit R24, Zipd Employment Contract, Court Book p. 233

[9] Exhibit R26, Business Development Manager Position Description, Court Book p, 244

[10] Exhibit R25, Zipd Confidentiality Agreement, Court Book p. 241

[11] Exhibit A1, Annexure CD-3, Email from Nigel Edwards to Clint Dupre, dated 6 March 2024, titled ‘Contract’

[12] Exhibit A2, Annexure CD-4, Text message from Nigel Edwards to Clint Dupre, dated 8 March 2024

[13] Exhibit A1, Annexure CD-5, Email from Clint Dupre to Nigel Edwards, dated 11 March 2024, titled ‘Clarification Clint’

[14] Exhibit A1, Annexure CD-6

[15] Exhibit A1, at [12]

[16] Exhibit A1, at [14]

[17] Exhibit R1, at [10]-[16]

[18] Exhibit R11, Automatic Reply from Clint Dupre, dated 11 April 2024, Court Book p.204

[19] Exhibit R21, Screen shot of Applicant’s laptop homepage, Court Book p.216

[20] Exhibit R2, at [8]-[10]

[21] Exhibit A1, Annexure CD-11, LinkedIn post, dated 17 April 2024

[22] Exhibit A1, at [25]-[29]

[23] Exhibit R20, Text message to Patrick Soos at 12.30pm on 11 April 2024, Court Book p. 215

[24] Exhibit A1, at [15]-[16]

[25] Exhibit A1, Annexure CD-7, Letter from Nigel Edwards to Clint Dupre, dated 17 April 2024

[26] Exhibit A1, Annexure CD-8, Email from Clint Dupre to Nigel Edwards, dated 19 April 2024

[27] Exhibit A1, Annexure CD-9, Email from Clint Dupre to Mr Edwards, dated 23 April 2024

[28] Exhibit R17, Email from Clint Dupre to Nigel Edwards, dated 25 May 2024, titled 'Final payout and separation certificate', Court Book p. 212

[29] Exhibit R1, at [23]-[26]

[30] Exhibit A1, Annexure CD-15, Job applications and responses bundle

[31] [2017] FWCFB 3941.

[32] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[33] Ibid.

[34] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[35] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[36] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[37] Ibid.

[38] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[39] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[40] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

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

[42] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[43] *He v Lewin* [2004] FCAFC 161, [58].

[44] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[45] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[46] (1998) 88 IR 21.

[47] [2013] FWCFB 431.

[48] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

[49] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

[50] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

[51] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].