



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Eumorfia Klothos

v

Niugini Arabica Pty Limited

(U2024/5164)

DEPUTY PRESIDENT DEAN

CANBERRA, 8 OCTOBER 2024

Application for an unfair dismissal remedy – Small Business Fair Dismissal Code.

[1] Ms Eumorfia (Effie) Klothos (Applicant) was employed by Niugini Arabica Pty Limited (Respondent) until her employment was terminated on 8 April 2024. On 29 April 2024 she made an application pursuant to s.394 of the *Fair Work Act 2009* claiming that she was unfairly dismissed.

[2] The application was heard on 6 August 2024. Ms A Tahhan appeared with permission for the Applicant. Dr Theodore Levantis, a Director of the Respondent, appeared for the Respondent. The Applicant gave evidence on her own behalf and called evidence from Mr Jack Cubley, a former employee of the Respondent. Dr Levantis and Mr Baraciolli-Cox gave evidence for the Respondent.

Background

[3] The Respondent operates a coffee roasting business in the ACT which is owned by three directors. The Applicant commenced employment with the Respondent in March 2020 as a Cafe Manager at its Duffy store. She was also tasked with managing the Respondent’s second cafe in Curtin when it opened in May 2023. The Applicant was the Respondent’s only full-time employee and reported directly to the Directors.

[4] The events leading up to the Applicant’s dismissal began with an email the Applicant received from Dr Levantis on 29 March 2024 (Good Friday) while being on leave over the Easter long weekend. In that email, Dr Levantis indicated that he had received a telephone call from Ms Lovepreet Suman, a casual employee of the Duffy store, who raised ‘serious issues’ about the Applicant. That email read as follows:

“Hi there Effie

I had a very concerning phone call from Lovepreet. She raised serious issues, which in a nutshell, suggested you have ignored our number 1 policy outlined in the attached relating to common courtesy, cooperation and participation. As you should know, I

don't take kindly to any of our staff being treated or spoken to disrespectfully. Lovepreet now refuses to work with you.

All of our staff have my full sport [sic] and I am very impressed with all of them and I won't stand for situations like this, especially from my managerial staff who are supposed to be supporting me. I want this situation rectified next week and never to be repeated. Please don't contact me over the weekend – this is to be resolved during the week.

Thank you
Theo”

[5] On Saturday 30 March 2024 there was a text message exchange between the Applicant and Ms Suman at the instigation of the Applicant, in which Ms Suman stated she had previously discussed with the Applicant the issues she had had working with her which Ms Suman asserted had affected her mental health. Ms Suman said she had quit because she did not see herself being able to continue to work with the Applicant “after a lot of disrespect”. She also stated that: “I don't really think I have to write down all those incidents which have happened in last many months ... I can also skip replying to your message but as you saying you don't know what really happened which makes me think how someone can forget the incidents that make someone quit their work”. The Applicant replied saying the issues Ms Suman had discussed with her related to another employee, and that Ms Suman had never told her she had done anything to upset Ms Suman. In Ms Suman's reply, she said: “long story short I am quitting the work because of you and not anyone else and I don't really have to explain why ...”. The final text message from the Applicant, not all of which was included in the evidence, commences with: “the problem is you could not accept constructive criticism in the workplace. If I am so bad why would I have put up my hand for you and helped you get a pay rise. Thanks for nothing”¹

[6] At 7:30am on Monday 1 April 2024 (Easter Monday), the Applicant sent the following email to Dr Levantis and Mr Satish Chand (another Director of the Respondent):

“Good morning Theo

I am very upset and disappointed that being in charge of HR that you wouldn't have contacted me immediately to rectify this problem. Instead you wanted to wait until next week.

My whole long weekend with my family was ruined because of the email you sent me on Friday. I have been very upset and have been feeling extremely anxious about this situation.

I am very upset that you accused me of doing the wrong thing and not abiding by our protocols after 4 years of being the manager at Niugini Arabica in Duffy.

I expect some support from you or at least be given the opportunity to defend myself. But I wasn't. I feel like I've been attacked and disrespected.

This has affected me immensely on an emotional and psychological level. There are many nights that I cannot sleep and are having panic attacks and anxiety but I still come into work and try my best to keep things calm and peaceful for myself and my co workers.

What I am wanting is why Lovepreet has said I have disrespected her.

Of late she has been coming into work tired and has mentioned that her 17 hour days are making her tired. Her performance has dropped and mistakes are being made. Yes I have spoken to her many times about this but she says that she is fine. So basically the only time I myself have spoken to her about in past weeks is her performance due to her being tired. Apart from that as you have seen when you have been in the café we have been getting along very well.

Please let me know when we can sit down to discuss this further.”

[7] At 6:55pm later that day and after no response to her correspondence was received, the Applicant sent a text message to Dr Levantis informing him that she was unfit to attend work the following day.

[8] Dr Levantis responded to the Applicant at 11:15pm with the following:

“I just saw this message now by luck. Are you going out of your way to sabotage me.”

[9] On 2 April 2024 the Applicant provided Dr Levantis with a medical certificate which certified her unfit for work for the period between 2 April and 5 April 2024.

[10] On 5 April 2024 the Applicant provided a further medical certificate which covered her absence until 12 April 2024.

[11] About two hours after the Applicant submitted her second medical certificate, she received the following email from Dr Levantis with a subject heading of ‘Termination’:

“Dear Effie

Attached is a letter of our intention to terminate your position at Niugini Arabica. The details as to why your position is untenable are outlined in the letter.

We thank you for work for us over the past 4 years and wish you the best in the future.

Theo”

[12] The letter attached to Dr Levantis’ email, dated 4 April 2024, stated:

“Dear Effie

Notice of Our Intention to Terminate Your Employment

I am writing to inform you of our intention to terminate your employment. Before proceeding, I would like to provide you with an opportunity to respond to the matters raised in this letter.

I have scheduled a meeting with you on Monday 8 April 2024 at 5:30pm. You are welcome to bring a support person to the meeting if you wish. If you prefer, we are happy for you to present your case in writing. These things are entirely optional.

We will proceed with termination from Tuesday 9 April 2024, unless you have shown us due cause to decide otherwise.

Before detailing the reasons for your termination, let us reiterate to you that there have been many positive aspects of your work performance in the time you have been with us and we thank you for your commitment and wish you well going forward.

It has come to our attention that you have engaged in serious misconduct in relation to your engagement with the staff of Niugini Arabica. In particular, you have breached our primary code of conduct outlined in our Policy for Team Members document relating to 'Common Courtesy, Cooperation and Participation'. Of particular concern is that the breach includes cases of what may be considered bullying.

Our Policy for Team Members outlines the following:

Being part of a Team is all about active and positive participation. Niugini Arabica is not about what you do as an individual, but about how you integrate into the group. Successful integration into the Team means a person:

- shows common courtesy and respect to fellow Team members
- works with and cooperates with fellow Team members to bring the best out of the Team
- helps fellow Team members in times of need - important when it comes to helping each other with fill-ins for shifts.

The Australian Government through the Fair Work Commission takes a particularly dim view of workplaces in which management engage in bullying or mistreatment of staff. The Directors too do not condone anything other than the proper treatment of our staff. We absolutely cannot have our management working against our clear policy and directives relating to our staff and the workplace laws outlined by the Fair Work Commission.

We are deeply disturbed that this has happened on a personal level as well as from a business perspective. We have worked hard to develop an ethical and community based organisation and this episode damages our standing.

On Friday 30 March 2024 I received a call from our team member Lovepreet. She explained that she could no longer work for us due to the harassment and bullying that she has been victim of. She accused you of a number of things, but the standout accusations relate to her claim that you have derided her on a number of occasions, for

example, by describing her as "stupid". This becomes outright bullying when, as she has accused, you deride her directly to customers while she is right beside you.

Of course, we recognise that this is a one-sided accusation. But upon further investigation, a customer has come forward corroborating her claims. Moreover, we have conducted an internal investigation and, much to our surprise and disappointment, almost all staff that have worked with you have been victim to the same experiences.

This would be unacceptable for any staff member. But for our manager to be doing this is particularly disappointing.

I acknowledge the email you sent on 1 April 2024 outlining your perspective. You point out that by and large you have had good relations with staff. This we accept as being true. However, this does not excuse the above. As a general point, a manager has a one-sided relationship with staff because staff are well aware that their employment can be very much dependent on their relationship with their manager, particularly when they are employed on a casual basis. For this reason, managers need to understand their responsibility in light of this one-sided power. This situation would explain why our investigation has unravelled a broad pattern of harassment and bullying that has been up to now unreported.

You also indicated that you considered that there was no difference between our former employee Jack refusing to work with certain staff and the present situation with Lovepreet. This tells us that you are not fit to work as a manager as you are unable to distinguish between a person who refuses to work with a junior staff because he is lazy, and a person who refuses to work because they feel are being harassed and bullied.

Yours sincerely

Theo Levantis

CEO” (Show Cause Letter)

[13] On 7 April 2024, the Applicant wrote an email to Dr Levantis stating, amongst other things, that she would not attend the proposed meeting on 8 April. That email read:

“To Theo

I will not attend the proposed meeting for Monday the 8th of April... your conduct towards me is belittling and absolute harassment. These trumped up allegations by you are false. To tell me that you will terminate me for something that I have not done has worsened my anxiety and upset me very much. I have a mortgage and commitments and you are engineering to get rid of me clearly to save money. Your bullying has no ends.

I will consult a solicitor to protect my position and legal rights as worker and employee. But I am not prepared to expose myself to you in a meeting. I will talk to my solicitor because I need advice. You are ruining my life. I have worked very hard for you and your fellow directors. To be treated like this is very damaging and just awful.

Effie Klothos”

[14] On 9 April 2024, the Applicant was informed of her dismissal by letter with immediate effect and provided two weeks’ pay in lieu of notice.

[15] The letter of termination read, in part, the following:

“I am writing to confirm our decision to terminate your employment at Niugini Arabica, effective immediately.

I refer to the ‘show cause’ letter of 4 April 2024. You informed us by email on 7 April 2024 that you had no intention of attending the scheduled meeting. You also expressed your innocence in the matters you were accused of. But there was no elaboration or explanation of how the majority of staff and our customers have come forward with the allegations outlined in our 4 April letter. You have not in any way provided us any information, defence, remorse, intention to change, or anything else that could be used to help us alter our decision. Accordingly we are satisfied that you have not shown cause; and termination should proceed.

...

Upon return to work after Easter on Tuesday I investigated the scope of the allegations further. Every staff member I interviewed confirmed that they too were victim of the bullying outlined in the letter of 4 April.

For the directors, these findings were particularly distressing. But we particularly feel for the staff who were subjected to this treatment under our watch. This is very damaging to us.

We appreciate that this course of events is very difficult for you. It is difficult and unwelcome for us also. But we do wish you all the best for the future and thank you for your contribution to our business in your managerial role.”

Case for the Applicant

[16] The Applicant gave evidence that she was shocked and distressed on receiving the email of 29 March 2024 from Dr Levantis about the allegations that were made against her. Prior to this she had never been notified of any allegations or complaints. She stated that she experienced heightened anxiety during the Easter long weekend after the email and in particular because she was told not to contact Dr Levantis during the weekend. She waited until Monday morning to write to Dr Levantis and Mr Satish but did not receive any response from either Director. The message from Dr Levantis suggesting that she was going out of her way to ‘sabotage’ him after learning that she was unfit for work the following day, the Applicant said, caused her further stress and anxiety.

[17] The Applicant said that in her role as a manager she was required to manage staff and provide reasonable directions. She had never received any complaints or allegations that she

had engaged in conduct which constituted bullying and harassment, nor did she recall ever conducting herself in such manner. In her oral evidence, the Applicant sought to explain the allegation of belittlement as teaching someone how to do their job properly.

[18] The Applicant claimed that she had an exemplary employment record during her employment with the Respondent and never had any issues raised about her conduct or performance. Her positive contributions to the Respondent's business were in fact recognised by the Directors who had commended her on her 'excellent work' and she started receiving monthly 'reimbursement' payments, calculated at 5% from about November 2020 of the total operating surpluses generated by the Duffy store and increased to 7% from January 2021. She was also offered a promotion in about June 2023 to assume the additional role of Café Manager at the Respondent's new Curtin store in addition to her role as Café Manager at the Duffy location.

[19] In respect of the complaint made by Ms Suman, the Applicant said that she worked with Ms Suman frequently and they had a great relationship and that they 'talked all the time' and 'laughed a lot'. The Applicant made reference to an incident in the café on the day before Good Friday involving a customer acting aggressively towards her. The Applicant said that when she left the café Ms Suman gave her a hug and said 'have a good weekend. I hope you are okay'. She was therefore shocked to hear about the complaint made against her by Ms Suman the following day. In addition, the Applicant gave evidence that she indeed praised Ms Suman's work to Dr Levantis about two weeks prior to the incident which resulted in her receiving a pay rise.

[20] In respect of the Show Cause Letter, the Applicant contended that it was perplexing as on one hand she was asked to provide a response and on the other hand she was thanked for her contributions. The letter contained no details of the allegations that were made and it was received at a time when she was on personal leave and was not in a fit state to respond.

[21] In addition, she was removed from the Respondent's Work-Based group chat forum on Whatsapp on or about 6 April 2024. This led her to believe that her employment had been terminated prior to the scheduled meeting on 8 April of which she was asked to attend.

[22] The Applicant's case was supported by Mr Jack Cubley, a former employee of the Respondent, who gave evidence in these proceedings. Mr Cubley was employed on a casual basis at the Respondent's Duffy store between September 2021 and October 2023, working 4 to 5 days a week. He said he had never witnessed the Applicant engage in any behaviour that could be considered inappropriate conduct or bullying. He said the Applicant had "very high standards" and was "tough as a manager should be but fair at all times". Mr Cubley also described the Applicant as "direct and to the point with the standards that meant that Niugini Aribaca almost tripled its average daily takings before her arrival". He said: "In my opinion there is a huge difference between a boss that has standards and asks for your best and one that belittles you for not meeting those standards. Effie is the former".

[23] Mr Cubley stated that in a business with the tempo of the Respondent's Duffy café, many new employees who were new to hospitality struggled with the pace of the work and realised that the industry was not for them.

[24] Mr Cubley also gave evidence that problems arose with the Curtin cafe between June and October 2023, at which time Dr Levantis' attitude towards staff changed, he was almost never present, and his attitude toward staff was 'curt'.

Case for the Respondent

[25] Dr Levantis gave evidence that the Respondent is a small business operating on thin margins and has limited capacity for administration. He performs all administrative, book-keeping and human resources functions as well as other operational functions. He said the three Directors of the Respondent established the cafe to showcase Papua New Guinea with the connection being their joint long term academic connections with Papua New Guinea since the 1990's. He said a strong underlying theme is that it is an ethical coffee business, and in 2022 it entered into a partnership with Femili PNG which is a charity that works to support victims of family violence in Papua New Guinea.

[26] Dr Levantis gave the following account pertaining to his telephone conversation with Ms Suman on Good Friday and events shortly thereafter:

“On Good Friday 30 March 2024 I received a call from Ms Lovepreet Suman, an employee of Niugini Arabica who mostly worked with Ms Klothos at the Duffy Café. It was immediately clear in our conversation that Ms Suman was under considerable distress. She explained to me that she could no longer work with Ms Klothos, and if I was unable to reassign her to the Curtin café then she would be forced to resign. She went on to explain to me that the reason for her stance was that she could no longer tolerate the harassment and bullying from Ms Klothos that she had been victim of. She explained that it had taken an emotional toll that was spilling over into her home life. Ms Suman told me that she found herself letting out her work stresses on her children something she had not done before. Ms Suman went on to explain to me that she had been victim to this behaviour for some time and did her best to tolerate it because she was new to her job and valued the opportunity to work at Niugini Arabica. Ms Suman told me that she tried her utmost to be pleasant and accommodating with Ms Klothos in the hope that she would be treated better, however, the abuse did not stop. I asked Ms Suman to specify what the abuse was. She raised an issue where she was operating the espresso machine making coffee shots and Ms Klothos took issue with the way she approached the operation with an angry tirade in which she called her “stupid”. This, Ms Suman explained, was a common daily occurrence, not a first time or a one-off. She then explained to me that it was common practice for Ms Klothos to deride Ms Suman in her conversations with customers while Ms Suman was beside her. It was this practice, she said, that had taken the greatest toll on her emotional well-being.

The Good Friday phone call was very upsetting for me. Before ending the phone call I advised Ms Suman to delay her resignation until we try to resolve the situation when we return to work. I advised that at the very least I would try and find shifts for her at our Curtin cafe.

Immediately after the Good Friday phone call, I sent an email to Ms Klothos advising her of the call I received. I instructed her in her managerial role to rectify this situation. I also instructed her to wait until work returns on Tuesday after the Easter break.”

[27] Dr Levantis said that he found the allegations against the Applicant distressing as he considered good treatment of staff was considered a priority and the primary directive in the Respondent's policy is 'courtesy and respect to fellow team members'. On that basis, Dr Levantis claimed, he sent an email to the Applicant immediately after Ms Suman's telephone call.

[28] Dr Levantis gave evidence that upon return to work on 2 April 2024, he investigated the allegations by interviewing staff that the Applicant had worked with. In this regard, Dr Levantis said:

"All interviews pointed to the allegations holding true. Importantly, not one person interviewed believed Ms Klothos version of the facts to be true. What unravelled in these interviews was that a number of team members experienced the same wilful abusive bullying. It revealed a pattern of behaviour by Ms Klothos. A common practice was belittlement. This would be done both by directly addressing the victim with derogatory comments and, even more concerningly, directly addressing customers with derogatory comments about the staff standing right beside her."

[29] Based on the interviews with the staff members, Dr Levantis claimed that he had reasonable grounds to believe that the Applicant had engaged in serious misconduct which amounted to 'wilful abusive bullying that led to serious harm to staff that she was responsible for supervising'.

[30] Dr Levantis in his witness statement made the following comments concerning staff rostering issues that were claimed to have arisen from the investigation:

"As a result of this behaviour towards team members [by the Applicant], Dr Levantis discovered that it was very difficult to roster staff to replace Ms Suman and work with Ms Klothos. Some staff outright refused to work with her. Others would agree to only very limited shifts working with her. All outlined wilful abusive bullying as the reason. At this point it needs to be recognised that Dr Levantis had been preparing rosters only since November 2023 prior that time Ms Klothos was responsible for rostering. Since November 2023 almost all shifts rostered with Ms Klothos were allocated to Ms Suman".

[31] Dr Levantis further asserted that the unwillingness of staff to work with the Applicant exposed another serious threat to the operation of the business, and that having found the Applicant had indeed engaged in wilful abusive bullying, it was not possible out of a duty of care and on occupational health and safety grounds to hire new team members to work alongside the Applicant. According to Dr Levantis, this left him with two paths forward to avoid the closing down of the Duffy cafe, dismiss the Applicant or 'accept admission and remorse' from the Applicant.

[32] It was Dr Levantis' evidence that he does not dispute that the Applicant had an unblemished employment record. However, he argued that the Directors did not monitor the Applicant's engagement with staff and entrusted her with responsibility over staff and the Directors were 'ignorant of the bullying that was occurring'.

[33] Dr Levantis also said he faced a very difficult dilemma to reconcile given the allegations by Ms Suman and the denial of same by the Applicant. He said he had hoped the allegations would be demonstrated to be untrue as such behaviour “would be at complete odds to the work of our partner charity, Femili PNG. Here Niugini Arabica would be a business condone (sic) abuse whilst partnering with a charity whose work is to support victims of abuse. Such a partnership cannot reconcile”.

[34] Mr Joshua Baraciolli-Cox, a casual employee with the Respondent, gave evidence in support of the Respondent’s case. He said his experience working with the Applicant was not positive, and he didn’t like how she spoke to him which he described as belittling. He said she spoke unkindly about other staff members in his presence, and that working with the Applicant was ‘very intense’. He described working with the Applicant as discouraging and said she was often dismissive of his attempts to learn.

[35] Finally, Dr Levantis contended he had fully complied with the Small Business Fair Dismissal Code because the misconduct was a serious threat to the health and safety of staff, a serious threat to the ability to operate the business, and a serious threat to its partnership with the charity.

Consideration

Was the dismissal unfair?

[36] A dismissal is unfair if the Commission is satisfied on the evidence that the circumstances set out at s.385 of the Act existed. Section 385 provides the following:

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.

[37] There is no dispute that the Applicant was dismissed and the dismissal was not a case of genuine redundancy.

[38] The Respondent is a small business employer and contended that the Applicant’s dismissal was consistent with the Small Business Fair Dismissal Code (the Code) and was therefore not an unfair dismissal.

[39] Section 388 of the Act provides that a person’s dismissal was consistent with the Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Code in relation to the dismissal.

[40] The Code relevantly reads as follows:

Summary dismissal

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

Other dismissal

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

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

[41] Section 12 of the Act defines 'serious misconduct' as having 'the meaning prescribed by the regulations'. Reg 1.07 of the *Fair Work Regulations 2009* provides:

Meaning of serious misconduct

(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

- (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- (b) conduct that causes serious and imminent risk to:
 - (i) the health or safety of a person; or
 - (ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

- (a) the employee, in the course of the employee's employment, engaging in:
 - (i) theft; or
 - (ii) fraud; or
 - (iii) assault;
- (b) the employee being intoxicated at work;
- (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.

[42] In *Pinawin T/A RoseVi.Hair.Face.Body v Domingo*² (*Pinawin*), the Full Bench considered how the summary dismissal section of the Code is to be applied and said:

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

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

and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned.”

[43] *Pinawin* referenced other decisions of the Commission, which makes clear that unlike consideration of a dismissal from a business that is not a small business employer, the function of the Commission in applying the Code is not to determine on the evidence whether there was a valid reason for the dismissal. Rather, the application of the Code involves a determination as to whether there were reasonable grounds on which the Respondent reached the view that the Applicant’s conduct was serious enough to justify immediate dismissal. As such, the determination is to be based on the knowledge available to the employer at the time of the dismissal, and necessarily involves an assessment of the reasonableness of the steps taken by the employer to gather relevant information on which the decision to dismiss was based.³

[44] In other words, the Commission does not have to make a finding as to whether the conduct occurred. The Commission needs to decide whether the employer had a reasonable belief that the conduct of the employee was serious enough to warrant immediate dismissal. It is not necessary for the Commission to determine whether the employer was correct in the belief that it held. In this regard, the employer needs to demonstrate that it made inquiries or investigations to support a basis for holding the belief.

[45] In determining whether the employer had reasonable grounds to hold the belief, consideration must be given to whether there is “the existence of facts which are sufficient to induce that state of mind in a reasonable person”.⁴

Whether the dismissal was consistent with the Code

[46] In this matter, the Respondent contended that it had reasonable grounds to believe that the Applicant engaged in conduct which justified immediate dismissal.

[47] In relation to the applicability of the Code, the Applicant submitted that:

- a. The meaning of ‘reasonable grounds’ in the Code is that the grounds are ‘reasonable’ when viewed from the standpoint of what a reasonable person would conclude as grounds which are credible, sensible, logical, or plausible (*Construction, Forestry, Mining and Energy Union v HWE Mining Pty Limited*).
- b. The Applicant’s four-year employment record with the Respondent was unblemished. The Applicant had not received any warnings or allegations surrounding any prior bullying and harassment allegations. As such, a reasonable person on receiving allegations of bullying and harassment purportedly carried out by the Applicant would consider such conduct as ‘out of character’ or ‘illogical’ in the first instance. This undoubtedly demands further investigation to attain any reasonable grounds.
- c. Having regard to the Applicant’s impeccable employment record, for a reasonable person to be satisfied that the grounds were credible, a reasonable person would be required to make inquiries into both sides of the matter. This necessarily requires obtaining a response from the Applicant as to the accusations against her.

- d. Further to the above, a reasonable investigation necessarily requires inquiries as to the Applicant's response to the allegations against her. Without obtaining that response, the investigation is entirely one sided and flawed.
- e. The Respondent failed to put the accusation to the Applicant. Other than to simply state that accusations and allegations had been made that the Applicant had engaged in bullying and harassment behaviour (which the Applicant denies), the Applicant was not given examples, evidence or a chance to respond to the evidence or inquiries purportedly made by the Respondent prior to her dismissal. Accordingly, the Respondent failed to put the accusation to the employee which, as noted in *Harley v Rosecrest Asset Pty Ltd T/A Can Do International*, leads to a view that there were no reasonable grounds for the belief held by the Respondent.
- f. The Respondent was aware that the Applicant was exercising her entitlement to personal leave and accordingly was absent from the workplace. Therefore, it cannot be said that the Respondent reasonably believed that the Applicant posed an "imminent risk to the health or safety of a person or the reputation, viability, or profitability of the employer's business" such to warrant summary dismissal as required by r 1.07 of the regulations."

[48] The Applicant submitted that accordingly, the Respondent did not carry out a reasonable investigation into the allegations, and absent the Applicant's response to the allegations, the Respondent could not have had reasonable grounds or a basis on which to dismiss the Applicant.

[49] This is a matter which, in my view, reasonable minds may differ. However, having considered the evidence and had the benefit of seeing the witnesses give their evidence, I am satisfied that Dr Levantis held a belief that the Applicant had engaged in conduct that was sufficiently serious to justify immediate dismissal. Further, I am satisfied that the belief was based on reasonable grounds. As a result, and for the reasons set out below, I am satisfied that the dismissal was consistent with the Code.

[50] Before setting out the reasons, it is important to note that this does not mean the Applicant did in fact engage in conduct justifying summary dismissal.

[51] As was found in *Pinawin*, acting reasonably does not require a single course of action. The question is whether the Respondent carried out a reasonable investigation and reached a reasonable conclusion in all the circumstances. The circumstances include the experience and resources of the small business concerned.

[52] The reasons for finding that the dismissal was consistent with the Code are as follows:

- a. The complaint Dr Levantis received from Ms Suman, who told him she could no longer work with the Applicant because of the 'harassment and bullying' she said she had been subjected to, was a serious complaint. There was no reason Dr Levantis had to disbelieve her at that time or consider that she had a reason to fabricate such allegations.

- b. Dr Levantis asked Ms Suman to specify what the alleged harassment and bullying was and was told that the Applicant had called her 'stupid' on many occasions, and 'derided' her in front of customers. There is little detail in the evidence about what 'derided' constituted but it was clear from the evidence of Dr Levantis that he was very concerned about the allegations.
- c. I accept Dr Levantis found the allegations distressing as he considered that good treatment of staff was a priority, and because of the business' partnership with a charity that provides support to people who have suffered from domestic violence. I accept he was particularly sensitive to ensuring what he considered to be appropriate conduct in the workplace.
- d. Dr Levantis made reasonable inquiries having received the complaint by Ms Suman. He spoke with other staff upon returning to work after the long weekend and found that 'what unravelled in these interviews was that other team members experienced the same wilful abusive bullying. It revealed a pattern of behaviour by [the Applicant]'. I am satisfied Dr Levantis believed there was no reason for the current or former employees he had spoken to as part of his investigation to "make it up". He also gave evidence that a customer corroborated what Ms Suman had told him. As a result, I accept he reasonably believed that the conduct the subject of Ms Suman's allegations had in fact occurred.
- e. I would not have considered Dr Levantis' belief to be reasonable had he not sought to validate Ms Suman's allegations by speaking with other current and former staff. It would not have been sufficient simply to take Ms Suman's allegations at face value.
- f. I accept he also formed the view that it would be difficult to roster staff to replace Ms Suman because other staff would only agree to work very limited shifts with the Applicant, and all of them cited bullying as the reason for their unwillingness to work with the Applicant.
- g. Further, I accept Dr Levantis reasonably believed that the unwillingness of staff to work with the Applicant exposed another serious threat to the operation of the business, as it was not possible to hire new staff to work with the Applicant (for safety reasons) given what he then knew.
- h. While the evidence of Mr Baraciolli-Cox supported the evidence of Dr Levantis as to the views of other staff with respect to their interactions in the workplace with the Applicant, the evidence of Mr Cubley was to the contrary. Given Dr Levantis' evidence as to his discussions with other staff, I remain satisfied that it was reasonable for him to form the view he did.
- i. Dr Levantis took steps to understand the legislative environment and his obligations regarding workplace matters, as evidenced by the Show Cause Letter referencing the "dim view" the Commission takes to managers bullying or mistreating employees.

- j. There were no complaints about the Applicant prior to the complaint made by Ms Suman on 29 March and hence no reason to speak with the Applicant about the manner in which she might have engaged with staff prior to that date.
- k. There is no question that inappropriate workplace conduct can cause a serious risk to a person's health or safety and an employer is required to take steps to ensure this risk is minimised.
- l. The process the Respondent undertook was not perfect. For example, while the Show Cause Letter invited the Applicant to provide a response to the allegations, the covering email thanked her for her contribution, suggesting a decision had already been made as to her dismissal. However, the test the Commission is to apply is whether the investigation or inquiries made by the Respondent was 'reasonable' for a small business to undertake and whether there is a reasonable basis for forming the view it did.
- m. I also accept that Dr Levantis did give the Applicant some opportunity to respond, in that he told her of the allegations (albeit with limited specificity) and gave her the opportunity to meet with him to discuss the matter.

[53] I emphasise that this is not a finding that the Applicant engaged in serious misconduct. Again, the focus of the Code in relation to summary dismissal is on the Respondent's reasonably held belief that such conduct had occurred, and not whether the conduct did in fact occur.

[54] Given my finding that the dismissal was consistent with the Code, the application is dismissed.

The image shows a handwritten signature in cursive script to the left of a circular official seal. The seal features the text 'THE SEAL OF THE FAIR WORK COMMISSION' around the perimeter and 'AUSTRALIA' at the bottom. In the center of the seal is the Australian coat of arms, depicting a kangaroo and an emu flanking a shield.

DEPUTY PRESIDENT

Appearances:

A Tahhan of Chamberlains Law Firm for Eumorfia Klothos.

T Levantis for Niugini Arabia Pty Ltd.

Hearing details:

2024.

By video:

August 6.

Printed by authority of the Commonwealth Government Printer

<PR778760>

¹ Exhibit 2.

² [\[2012\] FWAFB 1359](#).

³ See *Narong Khammaneechan v Nanakhon Pty Ltd* [\[2010\] FWA 7891](#).

⁴ See *George v Rockett* [1990] HCA 26.