

[2024] FWC 3336 [Note: An appeal pursuant to s.604 (C2024/9265) was lodged against this decision.]



# DECISION

*Fair Work*

*Act 2009*  
s.394—Unfair dismissal

**Roy Sabag**

**v**

**D&T Hydraulics and Engineering Pty Ltd**

(U2024/7256)

DEPUTY PRESIDENT LAKE

BRISBANE, 3 DECEMBER 2024

*Application for an unfair dismissal remedy – serious misconduct – summary dismissal – dismissal harsh and unjust – remedy granted – compensation awarded.*

[1] Mr Roy Sabag (the **Applicant**) made an application to the Fair Work Commission (the **Commission**) seeking a remedy pursuant to s.394 of the *Fair Work Act 2009* (the **Act**) stating that he was unfairly dismissed from his employment with D&T Hydraulics and Engineering Pty Ltd (the **Respondent**).

[2] A conciliation was held on 13 August 2024 and the matter was not resolved. The matter was listed for an in-person hearing on 18 September 2024. The Applicant was self-represented. The Respondent was represented by Mr Craig Joy from Craig Joy Workplace Consulting. Leave was granted for the Respondent to be represented under s.596 of the Act, as the matter is factually complex.

[3] Section 396 of the Act requires satisfaction of four matters before considering the merits. I am satisfied that the Applicant made his application within the 21-day period required by s.394(2) of the Act, earned less than the high-income threshold, is a person protected from unfair dismissal, that his dismissal was not a case of genuine redundancy, and the Small Business Fair Dismissal Code is not applicable as a business with more than 15 employees.

## Background

[4] The Applicant commenced work for the Respondent on 10 August 2023 as a Mechanical Engineer.<sup>1</sup>

[5] The Applicant specialises in 3D modelling and has a technique for 3D automation and 3D modelling called the “Roy Method”.<sup>2</sup> The Applicant had sent the Engineering Manager of

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<sup>1</sup> Form F2, page 3.

<sup>2</sup> Applicant Submissions [65](c)

the Respondent, Mr Kurt Schmidt, a demo video showing his technique via LinkedIn prior to being hired.<sup>3</sup>

[6] The Respondent uses 3D automation and modelling as part of the process for developing cylinders. The Respondent is in the business of repairing and manufacturing hydraulic cylinders.<sup>4</sup>

[7] The Respondent contends that the Applicant was hired so that he could develop a system for the Respondent to use in modelling and teach his method to other staff in the Engineering Department.<sup>5</sup>

[8] The Applicant contends that he was never told to teach others his “Roy Method”.<sup>6</sup> The Applicant also stated in his submissions: “The applicant has already demonstrated and taught his system to his manager Kurt for the purpose of approving it. Kurt fully understood it before approving it and even said ‘it is just Sketch Blocks on a Master Sketch.’”<sup>7</sup>

[9] The Respondent denies that the Applicant was never told to teach others his method. The Respondent points to minutes of meetings with the Engineering team which note that once the Applicant had finished working on the system, he would teach it to others.<sup>8</sup> I accept the Respondent’s evidence that the Applicant knew he would eventually be asked to teach others to use the model.

[10] On 10 October 2023, following the 7 October 2023 attack in Israel, the Applicant requested leave to go to Israel, where he was born and where a number of his family members reside.<sup>9</sup>

[11] The Respondent approved leave for a 5-week period however, due to flight cancellations, the Applicant was unable to return until 8 January 2024.<sup>10</sup>

[12] A further period of leave was requested on 23 April 2024 to return to Israel following the death of a close family relative of the Applicant.<sup>11</sup> This was also granted. During these two leave periods the Applicant continued to work remotely.<sup>12</sup> The Applicant states that he only took two days off work in this period.<sup>13</sup> There is some evidence to suggest that the Respondent authorised the Applicant’s absence begrudgingly. The Respondent found the seven-hour time difference difficult, as the Applicant’s role requires collaboration.<sup>14</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Employment Agreement, clause 18.4.

<sup>5</sup> Kurt Schmidt Second Witness Statement [6]-[10].

<sup>6</sup> Applicant Reply Witness Statement [6].

<sup>7</sup> Applicant Submissions 65[b]

<sup>8</sup> Kurt Schmidt Second Witness Statement [8].

<sup>9</sup> Form F2, page 5.

<sup>10</sup> Ibid page 6.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Applicant Submissions [9](c)

<sup>14</sup> Respondent Submissions [4].

*Meeting on 29 May 2024*

[13] The Applicant returned to the workplace on 29 May 2024 and was part of the engineering team meeting with Mr Marty Pike, Mr Stiaan Labuschagne, Mr Dennis Li and Mr Kurt Schmidt.<sup>15</sup>

[14] The topic was about clarifying the department's goals.<sup>16</sup> The meeting involved discussion over how the Roy Method could be implemented. There was discussion over whether, using the Roy Method, multiple engineers could work on a 3D model simultaneously.<sup>17</sup>

[15] The Applicant stated that this discussion devolved into a "professional argument".<sup>18</sup> The Applicant put the position forward that having multiple people access and work on the model simultaneously would cause greater potential issues for the software as there are many moving pieces during the design phase.<sup>19</sup> The Applicant argued that, for consistency and robustness of the model, one person should be responsible end to end. The Applicant claims that he attempted to diffuse the situation by asking to speak to Mr Schmidt in private.<sup>20</sup>

[16] The Respondent has put forward a different account of the meeting. The Respondent states that the Applicant was aggressive during the meeting. The Respondent submitted a record of the meeting from Mr Labuschagne taken by Ms Kristin Dee, HR Manager for the Respondent.<sup>21</sup> Mr Labuschagne states that the Applicant indicated that he wanted to be the only one to do the modelling.<sup>22</sup> Mr Labuschagne states that the Applicant told Mr Labuschagne that he did not trust him to do the modelling.<sup>23</sup> The Applicant also reportedly questioned the credentials of other members of the engineering department, asking if Mr Pike and Mr Schmidt had even done Solidworks Automation and telling Mr Li: "you don't understand what you are talking about, you are not even part of this meeting."<sup>24</sup> Finally, the Applicant questioned Mr Schmidt, asking if Mr Schmidt was "against him".<sup>25</sup>

*War Room*

[17] The following day, on 30 May 2024, Mr Schmidt brought the team together again.

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<sup>15</sup> Form F2, page 7.

<sup>16</sup> Kurt Schmidt First Witness Statement

<sup>17</sup> Ibid.

<sup>18</sup> Applicant Reply Witness Statement [11].

<sup>19</sup> Applicant Reply Witness Statement [11].

<sup>20</sup> Applicant Reply Witness Statement [12].

<sup>21</sup> Record of meeting with Stiaan Labuschagne regarding Incident occurring 29.05.2024 with Roy Sabag during team meeting.

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Witness Statement of Mr Kurt Schmidt; Record of meeting with Stiaan Labuschagne regarding Incident occurring 29.05.2024 with Roy Sabag during team meeting.

<sup>25</sup> Record of meeting with Stiaan Labuschagne regarding Incident occurring 29.05.2024 with Roy Sabag during team meeting.

[18] Mr Schmidt had set a goal for the engineering department in December 2023 to draft the top 50 cylinders on Solidworks by June 2024.<sup>26</sup> Mr Schmidt wanted the department to focus all their attention on that goal. He proposed to do this by setting up a “war room”, meaning all the members of the engineering department would move their desks into one office for the next two months.

[19] Following the discussion, the team members began to move their desks into the war room except for the Applicant who indicated that it was not a good idea and did not support the concept.<sup>27</sup> The Applicant was offended by the term “war room”, noting his connection to the ongoing Israel-Palestine conflict. The Applicant reportedly stated, “you’re making a big mistake, and I don’t like it, this is not a good idea.”<sup>28</sup>

[20] The following day, on Friday, the Applicant had a rostered day off.

[21] On Monday morning, Mr Schmidt noted that the Applicant had not moved his desk into the “war room”.<sup>29</sup>

*Termination Meeting on Monday, 3 June 2024*

[22] The Applicant had a meeting on Monday, 3 June 2024 with Mr Schmidt.

[23] In this meeting, the Applicant’s behaviour in the previous week was raised by Mr Schmidt. Mr Schmidt discussed the Applicant’s conduct in the meeting on 29 May 2024, as well as the Applicant’s refusal to move his desk into the war room.<sup>30</sup>

[24] Mr Schmidt states that the Applicant became aggressive and accused Mr Schmidt of lying.<sup>31</sup> Mr Schmidt told the Applicant that his behaviour was contrary to company values.<sup>32</sup>

[25] Following a period of argument, Mr Schmidt advised the Applicant that his employment would be terminated.

[26] The Applicant claims that he was told that he could either stay for three months and do a three-month performance improvement plan or otherwise the Respondent would pay him one month’s notice.<sup>33</sup> The Applicant did not accept this plan and Mr Schmidt informed the Applicant that he was fired. The Applicant was then escorted from the building by Mr Schmidt.<sup>34</sup>

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<sup>26</sup> Kurt Schmidt First Witness Statement

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Kurt Schmidt Second Witness Statement [23].

<sup>31</sup> Ibid [24]

<sup>32</sup> Record of meeting with Kurt Schmidt regarding Incident occurring 03.06.2024 with Roy Sabag dismissal.

<sup>33</sup> Form F2, page 8.

<sup>34</sup> Record of meeting with Kurt Schmidt regarding Incident occurring 03.06.2024 with Roy Sabag dismissal.

[27] Following the meeting, the Applicant contacted the HR Manager, Ms Dee. Ms Dee informed the Applicant that she would speak to the engineering team about what had happened and would advise of the outcome. Ms Dee took brief statements from the Applicant, Mr Schmidt, Mr Li and Mr Labuschagne.

[28] On the same day, Ms Dee emailed the Applicant a termination letter which indicated that he was terminated for serious misconduct, and he was paid one week's notice. The letter noted two reasons for the Applicant's dismissal:

- *Caused serious and imminent risk to the health and safety of a person/s Fellow co workers felt unsafe by the aggressiveness nature in which you were engaging.*
- *You refused to carry out a lawful and reasonable instruction that was given to you by your manager, to move office space to sit with the team.*

[29] The Applicant lodged his unfair dismissal application on 26 May 2024.

#### *Underlying concerns*

[30] The evidence suggests that the Respondent had concerns about the Applicant's performance in the months before he was terminated.

[31] The Applicant had been remotely working from Israel for a significant period of his employment and Mr Schmidt had concerns that the work the applicant was performing was not achieving the goals set for the Applicant.

[32] Mr Schmidt states that the Applicant was not able to work collaboratively with others while overseas, which was an important aspect of his engineering role.<sup>35</sup>

[33] The performance review of the Applicant dated 2 May 2024 shows that Mr Schmidt was concerned that while the Applicant was skilled in modelling, he had limited competency in other areas of mechanical engineering.<sup>36</sup> Mr Schmidt stated that the Applicant would need to work on developing other competencies to maintain his "value add".<sup>37</sup>

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

[34] Section 387 of the Act provides the criteria and considerations the Commission must take into account when deciding if the dismissal was harsh, unjust or unreasonable. As required by the Act, I consider the following:

- (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);*

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<sup>35</sup> Respondent Submissions [4].

<sup>36</sup> Probationary Performance Review dated 2 May 2024, page 2

<sup>37</sup> Ibid

[35] A valid reason for dismissal should be “sound, defensible or well founded” and should not be “capricious, fanciful, spiteful or prejudiced.”<sup>38</sup> As summarised by Deputy President Asbury in *Smith v Bank of Queensland Ltd* a “dismissal must be a justifiable response to the relevant conduct or issue of capacity”.<sup>39</sup> The Commission must consider the entire factual matrix in determining whether an employee’s termination was for a valid reason.<sup>40</sup>

[36] The Respondent raised two reasons for dismissal:

- *Caused serious and imminent risk to the health and safety of a person/s Fellow co workers felt unsafe by the aggressiveness nature in which you were engaging.*
- *You refused to carry out a lawful and reasonable instruction that was given to you by your manager, to move office space to sit with the team.*

#### *Serious and Imminent Risk to Health and Safety*

[37] The Respondent claims that the Applicant’s behaviour on 29 May 2024 was an imminent threat to the Applicant’s coworkers and that the Applicant was aggressive to the point that his co-workers felt unsafe.

[38] The testimony and evidence indicate the Applicant was vigorous in his pursuit of his argument and asked very confronting questions to those that argued for the alternative view. By all accounts, the Applicant was ardent, strident and forceful in his communication.

[39] However, in spite of the robustness of the discussion, there was no evidence there was any personal invective used or personal threats. It was a professional disagreement over a technical matter. The Applicant was highly defensive of the “Roy Method” and reacted strongly to any suggestions of defects in the method.

[40] The Respondent claims that the Applicant’s behaviour posed an imminent threat to health and safety. I am unconvinced by this claim.

[41] The Applicant’s behaviour during the meeting was undoubtedly unprofessional. The Applicant was disrespectful towards Mr Schmidt and his coworkers, questioning their credentials by asking what made them qualified to question his view. This behaviour is confronting and hurtful, but it is not threatening if the person is, in fact, qualified.

[42] The Applicant has pointed to the fact that Mr Schmidt directed the Applicant to attend another team meeting the following day. The Applicant also claims that Mr Schmidt offered to drive the Applicant home at the end of the day. It was not contested that the Applicant finished his day of work and attended another team meeting the following day, about the “war room”. This weighs against a finding that the Applicant’s behaviour was truly a serious and imminent risk to health and safety.

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<sup>38</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

<sup>39</sup> [2021] FWC 4 at 118.

<sup>40</sup> *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [2016] FWC 4185, [46], citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, 413.

[43] I note the Applicant states that he suggested that the matter be discussed privately with Mr Schmidt. I have some questions about the veracity of this statement, which is contradicted by the statements of eyewitnesses.

[44] If the Applicant's behaviour had been an imminent threat, the appropriate course of action would have been to shut the meeting down as soon as the Applicant became agitated, and following that, the Respondent could have sent the Applicant home or issued a warning.

[45] I am not satisfied that the Applicant's behaviour posed a "serious and imminent risk" to health and safety. While there is potential risk to health and safety through subjecting the other engineering employees to psychological stress as a result of the argument, this risk was not serious and imminent. The risk was also manageable. The appropriate course of action would have been to send the Applicant home.

[46] Accordingly, I am not satisfied that the Applicant's behaviour during the 29 May 2024 meeting rose to the level of serious misconduct.

[47] I find that the Applicant's behaviour during the meeting on 29 May 2024 was not a valid reason for dismissal. I find that the behaviour warranted disciplinary action instead.

*Refusal to comply with lawful and reasonable direction*

[48] The second reason for termination was that the Applicant refused to carry out a lawful and reasonable instruction to move his desk to the "war room".

[49] Mr Schmidt had decided to focus the team's efforts on one drafting project. To do this, Mr Schmidt had a meeting to discuss the approach of co-locating the team in one room.

[50] Following the meeting, Mr Schmidt asked the Applicant for his view. The Applicant replied that he was not in support of the approach. The Applicant did not move himself into the "war room". The following day on Friday was the Applicant's day off and on the Monday the Applicant returned to his desk and did not move it but continued to work.

[51] The request for the Applicant to move his desk was lawful and entirely reasonable. However, calling the room a "war room" was poor phrasing. The Respondent was fully aware that the Applicant had recently returned from Israel. The Applicant was offended by the term, and I find this contributed to his refusal to move his desk.

[52] I note that failure to follow a lawful and reasonable directive is one of the examples of serious misconduct given in the Regulations.<sup>41</sup>

[53] Considering the entire factual matrix of the Applicant's conduct during the previous few days, including his refusal to move his desk, refusal to teach others the Roy Method and the questions that management had about whether his work was achieving the engineering department's objectives, there was a valid reason for dismissal.

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<sup>41</sup> *Fair Work Regulations 2009 1.07*

[54] I accept the Respondent's evidence that the Applicant's role required him to work collaboratively with the other engineers. The Applicant had engaged in a pattern of conduct which demonstrated his unwillingness to work respectfully with his colleagues towards achieving the engineering team's goals. In Mr Schmidt's words:

*The reality of engineering work is such that companies will not hire anyone who refuses to collaborate with other employees, or who would refuse to train or teach other employees. Such conduct renders the employment of that individual untenable.*<sup>42</sup>

[55] This weighs against finding that the dismissal was harsh, unjust or unreasonable.

*(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*

[56] The Applicant was notified of the reasons for dismissal after his dismissal and was not given an opportunity to respond as he was summarily dismissed.

[57] The Applicant was told by Mr Schmidt on Monday, 3 June 2024 that he was terminated and he was escorted from the building. Immediately, a hasty investigation was instigated by human resources and a termination letter was issued to him late that afternoon.

[58] At the moment of his termination, the Applicant was not told specifically of the reason and further had no opportunity to respond. This weighs in favour of finding that the dismissal was harsh, unjust or unreasonable.

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

[59] The Applicant could not have requested to have a support person present and therefore there was no unreasonable refusal by the employer.

[60] Accordingly, this factor is a neutral consideration.

*(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*

[61] As the Applicant was terminated for misconduct this factor is not relevant.

[62] This factor weighs neutrally.

*(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*

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<sup>42</sup> Kurt Schmidt Second Witness Statement [18].



[63] The parties did not submit that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise did not have an impact.

*(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*

[64] The Respondent did have a human resources manager. There was some expertise within the organisation. I find this a neutral factor.

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

[65] A relevant factor I consider is determining whether summary dismissal was a proportionate response to the Applicant's conduct.<sup>43</sup>

[66] Mr Schmidt had concerns the work the Applicant was performing was not achieving the goals set for the Applicant. The Applicant had been working remotely from Israel for 123 out of 291 days of his employment.<sup>44</sup>

[67] Upon the Applicant's return from Israel, the Applicant demonstrated an inability to accept that Mr Schmidt wanted the team to be able to utilise the Applicant's system and work on models simultaneously.

[68] The Applicant refused to cooperate and discuss how best to go about implementing the system.

[69] The Applicant's refusal to move offices gave Mr Schmidt significant concerns that the Applicant was not a team player and not able to follow his direction.

[70] After a few days of conflict and confrontational behaviour by the Applicant, Mr Schmidt terminated the Applicant on the spot. I find this harsh. The Applicant had no process afforded to him. If there had been a proper process in place, including a show cause notice, the Applicant may have reconsidered his conduct and adapted his behaviour in the future.

[71] The Respondent decided to label the Applicant's behaviour during the meeting on 29 May as serious misconduct and a "serious and imminent risk to health and safety" to support the summary dismissal. This was unjust, as that allegation is not supported by the evidence of those present in the meeting.

## **Conclusion**

[72] The dismissal was harsh given the Applicant was dismissed summarily following a heated argument where no physical threats were made. The Applicant was not afforded a proper

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<sup>43</sup> *Sydney Trains v Hilder* [2020] FWCFB 1373 at [32].

<sup>44</sup> Applicant Reply Witness Statement [4]

process where he could have been counselled regarding his approach in the meeting and how he should conduct himself in future meetings. This was unjust.

[73] However, the dismissal was not unreasonable. By all accounts the relationship was showing signs of stress. Mr Schmidt was questioning whether the work that the Applicant had done in developing a modelling system was going to be of benefit to the company. This was combined with the fractures in the relationship caused by the Applicant's belligerent attitude.

[74] The dismissal was harsh and unjust. Therefore, the Applicant is entitled to an unfair dismissal remedy. I now consider remedy.

### **Remedy**

[75] Given that I have found that the Applicant's dismissal was unfair, it is necessary to consider the question of remedy. The Applicant has made an application under s. 394 of the Act seeking remedy for unfair dismissal.

[76] Pursuant to section 390 of the Act, this Commission may order:

#### **“390 When the FWC may order remedy for unfair dismissal**

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
  - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.”

[77] The Applicant did not wish to consider reinstatement as a remedy. Given the matter history and the breakdown of the parties' relationship, I do not find this to be an appropriate remedy.

[78] Section 392 sets out the considerations for awarding compensation:

#### *“Compensation*

- (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

*Criteria for deciding amounts*

- (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
- (a) the effect of the order on the viability of the employer's enterprise; and
  - (b) the length of the person's service with the employer; and
  - (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
  - (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
  - (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
  - (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
  - (g) any other matter that the FWC considers relevant.

*Misconduct reduces amount*

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

*Shock, distress etc. disregarded*

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

*Compensation cap*

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
- (a) the amount worked out under subsection (6); and
  - (b) half the amount of the high income threshold immediately before the dismissal.
- (6) The amount is the total of the following amounts:
- (a) the total amount of remuneration:
    - (i) received by the person; or
    - (ii) to which the person was entitled; (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
  - (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.”

[79] The established approach to assessing compensation in unfair dismissal cases was set out in *Sprigg v Paul Licensed Festival Supermarket*,<sup>45</sup> and has been applied and developed by Full Benches of the Commission.<sup>46</sup>

[80] The assessment of compensation involves a four-step process. however, this is not a substitute for the words in the Act:

“Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost). I am also required to consider the length of service with the employer<sup>47</sup> and the ability to find a new role as a relevant factor in calculating compensation per s392(2).

Step 2: Deduct monies earned since termination.<sup>48</sup>

Step 3: Discount the remaining amount for contingencies.<sup>49</sup>

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount they would have received if they had continued in their employment.”

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

[81] The Applicant worked with the Respondent for one year. The evidence suggests that the Applicant was likely to continue working for the Respondent. However, I note that he recently declined an offer to increase his working hours from 38 to 60 hours a week in exchange for a salary increase.

[82] The Respondent most likely would have dismissed the Applicant within three months as not only were there issues with the Applicant’s brusque style of communication, but there were also issues with the work the Applicant was responsible for. I think it is likely that the Applicant would have been dismissed within 12 weeks.

[83] The Applicant’s last payslip shows that his weekly pay at the time of dismissal was \$2,500 gross plus superannuation.

[84] Thus, I find that the maximum compensation that the Applicant would have received is 12 weeks which amounts to \$30,000.00 gross plus superannuation.

Step 2: Deduct monies earned since termination.

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<sup>45</sup> (1998) 88 IR 21.

<sup>46</sup> *Bank of Sydney Ltd T/A Bank of Sydney v Repici* [2015] FWCFB 7939.

<sup>47</sup> *Fair Work Act 2009* (Cth) s392(2)(b) -(c) and s392(2)(g).

<sup>48</sup> *Ibid* s392(2)(e).

<sup>49</sup> *Ibid* s392(2)(a), (d) and (f).

[85] The Applicant provided evidence of his job search following his dismissal, including what he claims are over 200 applications for jobs on Seek. I am satisfied that the Applicant has taken steps to attempt to mitigate his losses.

[86] The Applicant states that he has not found alternative employment and did not indicate that he had earned any other income during the period from his termination, I will not make any deductions under this step.

Step 3: Discount the remaining amount for contingencies.

[87] I have made a deduction for contingencies on the basis that there was a possibility of the Applicant engaging in future misconduct. The Applicant had engaged in misconduct by refusing to comply with a lawful and reasonable instruction and demonstrated a pattern of obstinate behaviour.

[88] Further, I note there was a possibility that the Applicant would resign or be terminated if he elected to travel to Israel again. The Respondent had indicated that they were not happy with the Applicant working remotely. The Applicant alluded to the fact that he may travel again.<sup>50</sup>

[89] I have deducted 4 weeks for contingencies. This reduces the total payable to the Applicant to 8 weeks or \$20,000.00 gross plus superannuation.

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.”

[90] In *Bowden v Ottrey Homes Cobram and District Retirement Villages*,<sup>51</sup> the Full Bench noted that in relation to the fourth step, the usual practice is to settle a gross amount and leave taxation for determination. I will leave the issue of taxation for determination by the Respondent.

Viability

[91] No issues of viability were raised by the Respondent.

**Order**

[92] The Respondent is ordered to pay the sum of \$20,000.00 gross plus superannuation within 21 days upon issuing this Order to the Applicant’s nominated bank account that was on payroll.

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<sup>50</sup> Applicant notes from 4 June 2024

<sup>51</sup> [2013] FWCFB 431

[93] I Order accordingly.



*Appearances:*

Mr Roy Sabag appearing self-represented as the Applicant.

Mr Craig Joy appearing for the Respondent from Craig Joy Workplace Consulting.

*Hearing details:*

18 September 2024

Brisbane

Hearing via Microsoft Teams

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