# DECISION

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

**James Francis Camenzuli**
**v**
**Companion Systems Pty Limited**
(U2023/5840)

COMMISSIONER HUNT BRISBANE, 17 MAY 2024

*Application for an unfair dismissal remedy*

**[1]** On 30 June 2023, Mr James Francis Camenzuli made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (the Act) alleging that he had been dismissed from Companion Systems Pty Limited (the Respondent), and that his dismissal was harsh, unjust or unreasonable.

**[2]** On 14 August 2023, the Respondent filed a *Form F3 Employer Response* to the application. It did not raise a jurisdictional objection.

**[3]** Directions were issued for the filing of evidence and submissions, and the matter was listed for hearing on 19 October 2023. A second day was required on 2 November 2023. Mr Camenzuli was granted permission to be represented by Mr C Watters of counsel, instructed by Ms Rachel Davenport of Affinity Lawyers. The Respondent was granted permission to be represented by Ms Gemma Adams of GLR Law.

**[4]** The following people gave evidence and were cross-examined:

- Mr Camenzuli;
- Mr Rod Killick, General Manager;
- Mr Terry Nay, Operations Manager; and
- Mr Gabriel Alkan, Principal Consultant of Specialist HR.

**[5]** I granted leave for Mr Camenzuli and the Respondent to be represented on account of the complexity of the matter. I was satisfied that granting leave would assist with the efficiency of the matter being heard, and that it was sufficiently complex to warrant representation.

**Relevant Legislation**

**[6]** Section 394 of the Act provides:

"**394 Application for unfair dismissal remedy**

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) whether the person first became aware of the dismissal after it had taken effect; and

(c) any action taken by the person to dispute the dismissal; and

(d) prejudice to the employer (including prejudice caused by the delay); and

(e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position."

**[7]** Further, ss.385 & 387 provides as follows:

"**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."

"**387 Criteria for considering harshness etc**.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC 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."

**[8]** The dismissal of Mr Camenzuli canvasses, to some degree, a purported or potential redundancy. A person is not protected from unfair dismissal if the dismissal was a case of genuine redundancy. Genuine redundancy is defined under s.389 of the Act which provides as follows:

"**389 Meaning of genuine redundancy**

(1) A person's dismissal was a case of genuine redundancy if:

(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer."

## EVIDENCE AND SUBMISSIONS OF THE APPLICANT

### Evidence of Mr Camenzuli

**[9]** Mr Camenzuli commenced employment with the Respondent on 17 August 2009, initially engaged as IT Support and Customer Service. Near the end of his employment, Mr Camenzuli held the role of Platform Experience Manager. His salary was $127,323 plus superannuation.

**[10]** Mr Camenzuli's day-to-day tasks included, *inter alia*:

- Marketing and communications supervising;
- Issuing marketing material;
- Updating customer lists;
- Liaising with developers;
- Product development;
- Connecting with clients to provide assistance, and obtain feedback; and
- Conducting and participating in gap analysis meetings.

**[11]** The Respondent sells software in the construction industry to allow clients to maximise their project management objectives. When he commenced working for the Respondent, the business was a small operation with only approximately three other employees. In the nearly 14 years he worked for the Respondent, he worked his way up from an introductory support role to a training and supervisory role, to a position in the management team towards the end of his employment.

**[12]** Mr Camenzuli considered that he demonstrated a high calibre of skill which brought value to the Respondent. He was considered the face of the company to most of the Respondent's client due to the face-to-face experience, training and selling products to clients over a significant number of years.

**[13]** To the best of his knowledge, there are now around 25 to 30 full-time employees. There are no dedicated HR employees within the Respondent's business.

**[14]** Mr Camenzuli had a good record of employment with the Respondent and was at no time the subject of any warnings in relation to his employment.

**[15]** The Respondent is owned by Mr Matthew Camenzuli who is the cousin of Mr James Camenzuli's father. Accordingly, Mr Camenzuli and Mr Matthew Camenzuli are first cousins, once removed. In answering questions from me, Mr Camenzuli, the applicant, speculated that there had been a falling out between his father and Matthew regarding political matters, but he was not able to prove it.[1] Mr Camenzuli stated that Matthew's views are anti-COVID, anti-lockdowns, and he disapproves of people working from home.

**[16]** In December 2022, Mr Camenzuli and his wife relocated from Sydney to the Gold Coast with their young family. The move had been contemplated for around one year, and Mr Camenzuli had sought Mr Killick's permission to be able to work from that location. He was told by Mr Killick that Matthew had approved the relocation, so long as Mr Camenzuli could attend the Parramatta office three to four times per year.

**[17]** It is noted that Mr Matthew Camenzuli chose not to give evidence as to the reasons for the dismissal.

*5 June 2023*

**[18]** On 5 June 2023, Mr Killick rang Mr Camenzuli and asked him to attend a meeting with Mr Alkan, the Respondent's external HR Consultant on 7 June 2023. Mr Killick also sent the following email:

> "Dear James,
>
> As discussed, we are currently having one of our consultants reviewing business operations in light of current market trends and industry downturn.
>
> The intension (sic) is to meet and consult staff to understand their role in the organisation.
>
> For this reason, can you make yourself available at 12pm or 3pm this Wednesday at Zarraffa's Coffee near your residential.
>
> Please confirm your time preference back via email and I will pass on.
>
> You will be meeting with Gabriel Ph [redacted]
>
> Thanks
>
> Rod"

**[19]** It became clear in the hearing that Mr Alkan had drafted the email for Mr Killick to send to Mr Camenzuli, as Mr Alkan repeatedly misspelt the word 'intention' in his written correspondence.

*7 June 2023*

**[20]** Mr Camenzuli attended the meeting with Mr Alkan on 7 June 2023 at a nearby coffee shop very close to his home. He and Mr Alkan had briefly worked on a recruitment project some years earlier, which Mr Camenzuli described as them not parting on good terms. In evidence, Mr Camenzuli stated that if he had known the meeting was planned to propose his position being made redundant, he would have liked his wife to have attended as his support person, and he would not have agreed to the meeting taking place at his local coffee shop.[2]

**[21]** During the meeting, the following points, *inter alia*, were discussed:

- the Respondent was experiencing a downturn, and Mr Camenzuli's job was at high risk;
- Mr Camenzuli was offered an additional $5,000 payment if he accepted a voluntary redundancy;
- he would be provided a Deed of Settlement and Release, which would need to be accepted by 9 June 2023;
- he was to return office property, including the laptop and mobile phone and the phone number (which he has been using in his personal capacity for at least 10 years);
- at the end of the meeting, he was provided the opportunity to either continue working or stop working and return home;
- he responded that he wished to continue working as he had a number of client matters on foot;
- he was asked to check his calendar to confirm his availability for a follow up meeting on 9 June 2023 at approximately 12:30pm; and
- while he checked his calendar on his phone to confirm he could attend the meeting with Mr Alkan, he noted that his access had been cut off. Mr Alkan said that is the process, so go home and clean the laptop and they would meet on 9 June 2023.

**[22]** In oral evidence, Mr Camenzuli stated that he informed Mr Alkan that he'd be prepared to take a pay cut to stay with the business as he wanted to grow old with the company. Mr Alkan responded:[3]

> "Look, you know, if you want to take a pay cut what would you consider a pay cut? What, five per cent? 10 per cent? 20 per cent? That's not much of a pay cut. You're a cost cutting exercise."

**[23]** Mr Camenzuli realised at that point that the Respondent wanted all of his wage gone. A break was called in the meeting where Mr Camenzuli contacted his wife and his father. Mr Alkan also made a phone call.

**[24]** In oral evidence and in answering questions from me, Mr Camenzuli said that Mr Alkan stated that he should go buy a new phone and go home and clean off the laptop. That evening, he spoke with a friend who suggested he should buy an Aldi SIM card.

**[25]** During the meeting, Mr Camenzuli considers that he was outspoken in respect of the company-issued mobile phone. He informed Mr Alkan that he would need more time than a day and a half to purchase a new phone and new SIM card. When Mr Camenzuli returned home to commence cleaning off the laptop, he discovered he had been locked out of the Respondent's systems. He rang Mr Alkan who was surprised at this news.

**[26]** At 4:15pm that afternoon, Mr Alkan sent the following email to Mr Camenzuli:

> "Hi James,
>
> As discussed in today's meeting, please see **attached**.
>
> Although you have agreed verbally today, if you still wish to proceed with the voluntary redundancy package kindly return the **attached** to me signed today and ensure the company items are handed over to me by Friday afternoon.
>
> Note as an alternative to the above as relayed today, the company will consider your feedback and I will meet you at 12pm Friday 9 June 2023 at the same Café to discuss your possible options and the formal outcome in respect to possible redundancy of your role.
>
> Regards,
>
> Gabriel Alkan | Principal Consultant"

**[27]** The attached was a document titled "Deed of Settlement and Release" dated 7 June 2023. It had been signed by Mr Killick, purportedly as a Deed and said to be signed pursuant to s.127 of the *Corporations Act 2001*. As it turns out, Mr Alkan had prepared the purported Deed and asked Mr Killick to execute it on 7 June 2023. Mr Killick is not a Director or Company Secretary of the Respondent and does not have capacity to execute a deed pursuant to s.127 of the *Corporations Act 2001* unless the Respondent's constitution otherwise permits that to occur.[4]

**[28]** The purported Deed provided recitals, including, incorrectly that Mr Camenzuli and a company representative (consultant) met on 7 May (sic) 2023 to discuss the consultation process of Mr Camenzuli's role being made redundant. The recitals note that Mr Camenzuli has voluntarily opted for his role to be made redundant.

**[29]** The recitals further note company-issued property will be returned by Mr Camenzuli and states that he had agreed to return the company-issued laptop and phone.

**[30]** The terms provide for the following payment within seven days of execution of the Deed in exchange for a mutual release of all claims:

- 12 weeks' redundancy pay;
- 4 weeks' pay in lieu of notice;
- $5,000; and
- all statutory entitlements.

**[31]** The terms state the following:

> "6.1 The Employee acknowledges that before signing this Deed, he has been advised by the Company that he should seek independent legal advice in relation to the terms of this Deed."

**[32]** He was also issued with an indicative payout figure if he were to be made redundant. The 12 weeks' redundancy pay and 4 weeks' notice was a value of around $39,000.

**[33]** Mr Camenzuli noted that whilst the Deed provided that he could obtain independent legal advice, Mr Alkan's correspondence sought the Deed to be signed and returned that day. It had been sent to him late in the afternoon. He was also expected to return company property by lunchtime, two days later. Mr Camenzuli considered this was not a reasonable amount of time.

**[34]** On 7 June 2023 at 4:36pm, Mr Camenzuli sent the following text message to Mr Matthew Camenzuli:

> "Hi Matt, I rung to discuss getting access to my laptop to remove all personal effects and applications – if you could give me a call to discuss that would be appreciated."

**[35]** Mr Camenzuli did not receive a return call or text response.

**[36]** In oral evidence it became apparent that Mr Camenzuli spoke with Mr Killick on the telephone that evening. In Mr Killick's oral evidence, he said that Mr Camenzuli wanted to discuss the issue and he replied that he was happy to discuss it with him 'later', but could he please go through Mr Alkan.[5] Mr Killick agreed that Mr Camenzuli did not call him again.

*8 June 2023*

**[37]** On 8 June 2023, Mr Camenzuli went to JB Hi-Fi at 9:00am and purchased a new phone. He had not needed to buy a phone for himself in around a decade as he had been permitted to use the company-issued phone for personal use, including when travelling overseas. The cost of the phone was $750. He then purchased an Aldi SIM card. He then commenced 'cutting-over' which means to transfer contacts into the new phone, deal with two-factor authentications and letting contacts know of his new, personal mobile phone number.

**[38]** He had to inform his children's school and daycare of his new number. Mr Camenzuli lives in a gated community and access is by way of a resident's phone number. If visitors wish to enter the gated community, a phone call is made to Mr Camenzuli's telephone and that of his wife (he is not sure in which order). This all needed to be organised in order to be permitted into the community and to allow invited guests into the community.

**[39]** On the morning of 8 June 2023, Mr Alkan sent Mr Camenzuli the following email, titled "Redundancy Consultation Meeting":

> "Dear James,
>
> As discussed with you yesterday, the business is experiencing a downturn whilst also facing a troubling economy. As a result the business is forced to review operations.

The business is strongly considering a cost saving initiative involving the potential restructure of its operations. We are also exploring options pertaining to the breakdown of the various tasks performed and the redistribution of those tasks and duties amongst other existing roles within the team.

A preliminary decision has been reached by the business to action the cost saving initiative and therefore your employment with the business may be made redundant however **a final decision has not yet been reached** as the business has allowed for the consultation to take place yesterday, time to review your feedback before a final decision is made.

As discussed yesterday and further confirmed via email I will meet you tomorrow at 12pm (Friday 9 June 2023) at same Café. You are entitled to have a support person attend the meeting.

We take this opportunity to bring to your attention and remind you that the information which you have acquired, or to which you have had access during, or in the course of your employment is strictly confidential and must not be divulged in any manner whatsoever.

You have been privy to confidential and sensitive information whilst working in the Company, and the data that you have had access to should be treated with the highest confidentiality and not be breached in any manner whatsoever or used for personal gain outside of the Company without the explicit written permission of the Management.

Your employment sets out your employment obligations in relation to confidentiality, acknowledgements, inventions and non-competition.

Should your position be made redundant you must forthwith return to us any employer property in your possession including, office door pass, lift key [redacted], mobile phone & charger, laptop and dock [redacted], any local external hard drives or storage that contains information related to Companion Systems.

Considering our discussions to date I note you have indicated hesitation to return company property, specifically the laptop and mobile phone. Please note these are to be on your procession during the scheduled meeting tomorrow and ready to handover in the event your role is made redundant.

As discussed with you yesterday failure to handover these items if required by me tomorrow may warrant summary termination of employment. In the event you do not attend tomorrow's meeting the decision will be emailed to you.

Mr Gabriel Alkan
HR Consultant
Acting for and on behalf of Companion Systems Pty Ltd"

**[40]** Mr Camenzuli was surprised to read the email he had been sent, including the threat of summary termination of employment if he did not hand over company items by midday the following day, or attend the meeting. In oral evidence he stated the following:

> Mr Camenzuli: And I rung him and said, 'Mate, what's going on?' I said, 'Everything's just proceeding forward and like I only just received this yesterday afternoon.' I was running around. I've just purchased all the phone and everything like that as you've suggested and I've still got to set it up, cut it over and deal with cutting over to this new phone.'
>
> …….
>
> ……that was where a lot of my time was chewed up. I rung Gabriel to tell him as such and that I wanted to sign the voluntary redundancy. I made – I stressed that several times to him. But in the deed it specifically said for me to seek legal advice. And I said I still hadn't had a chance to ring around for any lawyers or anything like that. So I was basically – just sort of said, 'Look, that's the process. That's the process effectively.' So I ended up hanging up from that phone call. Kept setting up got the bulk of it, the phone set up and operational. You know enabling the SIM and all that sort of stuff. You know it's now just after lunch and then I sort of stopped cutting over and then I actually started ringing lawyers to find anyone available to have a chat with.

**[41]** Mr Camenzuli stated that he was able to obtain a 30-minute consultation with Mr Angus Gordon, Managing Director of Affinity Lawyers on 9 June 2023.

**[42]** In oral evidence given during the hearing, Mr Camenzuli stated that Mr Matthew Camenzuli had travelled to the Gold Coast on 7 June 2023, and Mr Killick on 8 June 2023, as they had an important meeting with a client on 8 June 2023. They were approximately 15 minutes away from Mr Camenzuli. In answering questions from me, Mr Camenzuli gave the following evidence:[6]

> Mr Camenzuli: ……if that was to happen I would have expected that Rod and Matt would have – you know – come and told me since they were already up here on the Thursday anyway. They were visiting a client.
>
> Commissioner: Where? Sorry. Tell me more about that. On Thursday 10th – sorry, Thursday 8 June?
>
> Mr Camenzuli: Yes, which was my birthday. Rod and Matt had flown up to see a client. I believe it was GemLife who are located 15 minutes down the road from me. You know? And that's probably – you know – since they were already up here, rather than – you know – sending this third party person who we'd never used in this

capacity before. We've only had one – I've only ever had one dealings with him just prior which was – let's just say a very bad experience – and, you know, I would have expected that – you know – they could have – you know, since Matt was or probably – I think Matt flew up the day before. You know?

Commissioner: You think he flew up on the 7 June?

Mr Camenzuli: I believe so. He normally tends to fly the day before so there's never any issues. Just to have the Sydney company – the company practise to say that he – you know – surprises with air lines and that sort of stuff. You know, then pulling me aside and telling me this. You know? So I could – you know – deal with them directly or hear it from them directly probably would have yielded much different results.

Commissioner: In somewhere other than a café?

Mr Camenzuli: Yes. That would have been nice. But look, I am work from home. So, the options would have been at my house. You know? Or somewhere else public. Like I don't know where.

Commissioner: Or a serviced office?

Mr Camenzuli: Look, we - - -

Commissioner: They could have hired a service office and met with you privately, couldn't they?

Mr Camenzuli: Look, they – honestly – yes, look they could have. I'm a very practical person. I probably wouldn't waste the money on something like that myself. Right? But, look, there are a lot of different ways that it could have gone about. Let's just put it down to that.

**[43]** Mr Camenzuli stated that he tried to obtain an extension to returning the mobile phone by midday Friday, but Mr Alkan refused the extension.

**[44]** Frustrated at dealing solely with Mr Alkan, a HR consultant, and having been refused an extension by Mr Alkan to return the telephone later than midday Friday, Mr Camenzuli sent the following email to Mr Matthew Camenzuli and Mr Killick at 6:00pm on 8 June 2023:

"Matt/Rod,

A Deed of Settlement and Release has been issued to my personal email at 4:15pm yesterday Wednesday 7 June 2023 following a meeting with Gabriel Alkan of Specialist recruitment yesterday at 12pm.

> In the meeting Gabriel has advised me that he is authorised to act on behalf of Companion Systems.
>
> In the meeting I was advised that my position with Companion Systems was at high risk of being made redundant and an offer was made for me to accept a voluntary redundancy package by COB or to meet on Friday 12pm to discuss the possibility of redeployment within the business. I was advised that this decision was made due to a downturn of business in the building industry and the current performance of the company. During the meeting no information was provided for the option of redeployment. Upon attempting to check my Calander during the meeting my access was already terminated and upon arriving home to log into my computer, my local computer access had already been terminated also.
>
> After the meeting with Gabriel at 12pm. I have attempted to contact you both to request an extension of time to:
>
> - consider my options;
> - seek legal advice in accordance with Clause 6.1 of the Deed of Settlement and Release; and
> - cut over all my banking access, property access (to get into my gated community) and other multifactored authenticated accounts linked to the phone.
>
> Given my 14 Year long tenure with this company, I am taken aback to receive a phone call from Gabriel advising that no extension of time will be considered, that any further attempts by me to request an extension will be deemed harassment and will put at risk the settlement.
>
> Can you confirm that everything above is correct and that no extension will be granted?
>
> If the company wants the return of the hardware (excluding the phone) in the interim, it can be picked up from my home address at a mutually arranged time on [redacted].
>
> Kind Regards,
> James"

**[45]** Neither Mr Matthew Camenzuli nor Mr Killick contacted Mr Camenzuli.

*9 June 2023*

**[46]** Mr Camenzuli met with Mr Alkan at midday at the same café near his home. During this meeting, Mr Camenzuli was informed that there were no other opportunities for redeployment and he would be made redundant in the circumstance he returned all company property.

**[47]** Mr Camenzuli provided the cleaned laptop to Mr Alkan. His evidence is that he had reset the laptop to factory settings as he did not want the Respondent to have access to any of his personal data which had been stored on the computer, including photos, bank details and other personal information. Mr Camenzuli knew that this method was safe and would not

damage any intellectual property. The intellectual property on the laptop was stored remotely in OneDrive and accordingly, the Respondent was not at a loss when the laptop was reset. He had already been cut off from accessing material on the laptop – this occurred on 7 June 2023.

**[48]** Mr Camenzuli has previously reset his laptops on two occasions when they had the 'blue screen of death'. His evidence that it would take at most a couple of hours to set it back up. This is because all the technical and access configuration are stored on the server or in the Network Admin's OneNote notebook.

**[49]** He informed Mr Alkan that he needed more time to return the mobile phone.

**[50]** Mr Alkan informed him that he had been dismissed.

**[51]** Later that afternoon, Mr Alkan sent correspondence to Mr Camenzuli by way of email entitled "Separation of Employment". The correspondence is extracted in full below:

> "Dear James,
>
> This letter is provided to you in addition to the redundancy consultation meeting held with you on the 7 June 2023 and subsequent consultation letter emailed to you on 8 June 2023.
>
> As expressed previously, the business is experiencing a downturn. As a result the business is forced to review business operations and costs. Please note this decision is not a reflection of your performance.
>
> The business notified you on 5 June 2023 that a meeting would take place on 7 June 2023.
>
> On 7 June 2023 I made clear in our meeting that your position was at risk of being made redundant and that a final decision would take place on 9 June 2023.
>
> I note that during our consultation process you did request the business create a new role for you, unfortunately this suggestion was not accepted by management. In addition a list of alternative roles could not be provided to you as the business was not recruiting given the circumstances stated above.
>
> As per my letter to you on 8 June 2023 I wrote about your reluctance to return company items, specifically the laptop and mobile phone. I also stressed your employee obligations.
>
> During the meeting held on 9 June 2023, you were advised that after consultation, consideration of your feedback and redeployment, unfortunately there were no alternative roles that we could offer you.
>
> During our meeting today 9 June 2023 you refused to hand over the company mobile phone. I informed you to reconsider as the potential consequence could result in summary dismissal. After a short break you decided to not hand over your mobile phone.

Please note that due to your actions we now reserve the right to reclassify or relabel the separation of employment. After speaking with management we have decided to consider the following:

- assessing the employment separation terms/reclassification of termination
- provide you until COB 14 June 2023 to have the company mobile phone returned to the Parramatta Office (note if you decide to take up this offer kindly email me back the express post tracking number)
- refer this matter to the police in respect to company property theft
- readjust your payout amount in line with separation terms/classification

Moving forward I will now handover to management all the other company items you returned to me to ensure no misuse is identified.

To be clear, had all company items been returned and handed over to me, the intension (sic) of today's meeting was to continue with the redundancy process and classify the separation of employment and your role as redundant. This being said we now as mentioned above reserve our right to reclassify or relabel the separation of employment. We intend to inform you of the final label/classification no later than 16 June 2023.

If you have any question in regards to this letter you can contact me directly on my mobile.

Once again we remind you of your post-employment restrictions as made clear to you verbally and in writing.

Finally we thank you for your valuable contribution during your employment with us.

Mr Gabriel Alkan
HR Consultant
Acting for and on behalf of Companion Systems Pty Ltd"

**[52]** At 10:41pm that evening, Mr Camenzuli sent the following email to Mr Mathew Camenzuli and Mr Killick:

"Matt/Rod,

I have met with Gabriel Alkan of Specialist Recruitment today at 12pm as instructed.

Following on from our meeting today, I have received the Separation of Employment letter via email this afternoon. The letter advises that the business had notified me on Monday 5th of June 2023 that a meeting would take place on Wednesday 7th June 2023. I would like to make it clear that I was not made aware of the real intention of the meeting until it took place on the 7th of June.

In the Separation of Employment letter, it is stated that I requested that the business create a new role for me, this is factually incorrect. I was informed that the business was

considered how it could redeploy me (in line with the best practices) and I was asked for my thoughts and feedback.

The letter also states I was relucent to hand over company items and I refused to hand over my mobile phone. For sake of clarity, I expressed intentions to return all items to the company, I simply requested more than the 24hrs that was given to me. I note that the phone service has been terminated, this was brought to my attention this afternoon when I returned home and I was unable to enter through the gate of my complex.

My understanding of the Separation of Employment letter is that:

- I have not been made redundant today;
- I have not been terminated today; and
- that you are currently considering whether you will provide an extension of time to COB 14th of June to return the phone

On the later point please advise by COB Monday 12th June if the company has considered and agreed to allow me to return the phone by COB 14th of June, so I can send this via registered post as requested on Tuesday morning. However, please note that this will be at your own risk, if you wish to arrange other more secure means of transport, please advise by COB Monday 12th June.

During this whole process I have offered the desire to negotiate and to request a short extension to handing over the phone. I offered to make myself available to the business, though these claimed difficult times to further assist the business, as required and at no additional/reoccurring cost. Understand that a lot of intellectual property is tied up inside me due to my longevity of employment, the variety of roles and projects that I had held / been involved with. Gabriel again advised me he is acting on direct orders from the business and claimed that there was no negotiation and no extension allowed.

Please be advised all requested company items have been returned to Gabriel in working order. Gabriel has confirmed in our meeting today that he was satisfied with what has been provided to him today with the exception of the mobile phone.

On a final note, it is disappointing that Companion Systems would treat a valuable and performing employee in such a distressing way as this. Where this employee has not only been there from such an early moment in the company's history but who has gone above and beyond for the business time and time again. After 14 years of loyal and valued service, I am not afforded any opportunity of a farewell, not offered any thanks or gratitude from the business and no opportunity to say my farewells.

Kind Regards,
James"

**[53]** Mr Camenzuli did not receive a response from Mr Matthew Camenzuli or Mr Killick.

*12 June 2023*

**[54]** On 12 June 2023, Mr Camenzuli attempted to call Mr Nay through Facebook Messenger. He then sent him the following message:

> "Hi Terry, let me know when is a good time to give you a buzz on messenger?"

**[55]** Mr Nay agreed to a call. They spoke for 12 minutes. During this call, Mr Camenzuli informed Mr Nay that the company laptop has been reset and said words to the effect of:

> "I know that when an employee's leaves, you are required to look through the device … When you log into the device, you will have unrestricted access to my Google Drive's which contains all my personal and sensitive information as well as my logged in browser account which contains all my passwords."

*13 June 2023*

**[56]** On 13 June 2023, Mr Camenzuli sent the following message to Mr Nay:

> "Hi Terry,
>
> The files that I'm after from my OneDrive are;
>
> In "James Work" I have the following:
> *Personal Development (has all the notes and things we went through)
> * 1-1 James Camenzuli
> * Agile (I believe this has my notes on Agile processes0
>
> In the main level of my OneDrive:
> *Photography course notes (OneNote)
> *Please delete "zHome Backup" (this is my home nas that I had backed up to OneDrive – 175gb)

**[57]** Mr Nay responded:

> "I can't action this yet. I am under strict instructions not to do anything without Matt's approval. You need to request anything like this through Matt or Gabriel."

*14 June 2023*

**[58]** At 12:56pm on 14 June 2023, Mr Camenzuli went to an Australia Post outlet with his wife and sent by registered post the mobile phone to the Respondent's Parramatta office. At 7:13pm that night he sent the following email to Mr Matthew Camenzuli and Mr Killick, attaching the Australia Post receipt and tracking number:

> "Matt/Rod,
>
> I never heard back about anything stated in my below correspondence, including about if you wanted to arrange any other more secure means of transporting the mobile back to the office.

I have posted the mobile phone via registered post today. Please find attached a copy of the Australia Post receipt with the tracking number.

Kind Regards,

James"

*15 June 2023*

**[59]** On 15 June 2023, at 10:43am, Mr Alkan sent the following letter to Mr Camenzuli by way of email, titled "Separation of Employment by way of Summary Dismissal":

"Dear James,

I wrote to you on the 9 June 2023 detailing the separation of employment.

As per my letter to you on 8 June 2023 I wrote about your reluctance to return company items, specifically the laptop and mobile phone. I also stressed your employee obligations.
During our meeting today 9 June 2023 you refused to hand over the company mobile phone. I informed you to reconsider as the potential consequence could result in summary dismissal. After a short break you decided to not hand over your mobile phone.

In my letter to you on 9 June 2023 I explained that the company reserves it's the right to reclassify or relabel the separation of employment. I also listed the four considerations management would be making as per the below:

- assessing the employment separation terms/reclassification of termination
- provide you until COB 14 June 2023 to have the company mobile phone returned to the Parramatta Office (note if you decide to take up this offer kindly email me back the express post tracking number)
- refer this matter to the police in respect to company property theft
- readjust your payout amount in line with separation terms/classification

Unfortunately we did not receive the company mobile phone back at the Parramatta office by COB 14 June 2023, in addition you did not provide a tracking number as requested. I note you have emailed Rod and Matt after COB 14 June 2023 indicating a tracking number attached however that has come up as malware.

Please note on 14 June 2023 I handed over all company items to management. Upon a desktop assessment it was identified that you have reset the laptop and erased all company intellectual property. In addition management was informed by Terry that you contacted him on 12 June 2023 explaining that you have reset the laptop. You also wrote to Terry via Facebook requesting certain material.

> I now write to you informing you of management decision to label the separation of employment conducted on 9 June 2023 as summary dismissal based on your serious misconduct highlighted above.
>
> You will be paid out all statutory entitlements which includes annual leave and long service leave.
>
> As I have made clear to you management have requested that I manage all correspondence with you in respect to this matter, as such if you have any questions in regards to this letter or previous letters you can contact me directly on my mobile.
>
> Considering you have breached your employment and post-employment restrictions we reserve our right to have this matter referred to our legal team for further action and if necessary the police.
>
> Mr Gabriel Alkan
> HR Consultant
> Acting for and on behalf of Companion Systems Pty Ltd"

***Mitigation***

**[60]** Mr Camenzuli commenced new employment on 28 August 2023. His salary is $105,000 excluding superannuation.

**[61]** On 28 September 2023, he was approached by the HR Manager of his new employer. The HR Manager informed him that she had received a telephone call from Ms Megan Macallister of Specialist HR. Ms Macallister wanted to know the HR contact, their contact details, asked for confirmation of Mr Camenzuli's employment status and salary, and declared that Mr Camenzuli had given permission for Specialist HR to request this information of his new employer.

**[62]** Mr Camenzuli noted that the HR Manager asked him:

- Who is Megan Macallister?
- What is Specialist HR?
- Why are they asking for confirmation of your employment status and salary?
- Did you provide consent for Specialist HR to contact our office to request confirmation about your employment status and salary?

**[63]** Mr Camenzuli responded:

> "Specialist HR represent my previous employer in a Fair Work matter.
>
> I did not give them any permission to involve my new job in any of this. I have been very intentional in keeping my new life completely separate (even avoiding providing my new number) from anything to do with this matter."

**[64]** At 11:54am that day, the HR Manager received the following email from Ms Macallister:

> "Hello [name],
>
> I write on behalf of Specialist HR, based in Sydney, and I am seeking to confirm some details for James Camenzuli who has given his permission for us to contact you.
>
> Specifically, would you please confirm the following:
>
> 1. Title of position that James currently holds with [company].
> 2. The date that he commenced employment with [company].
> 3. James' current salary.
> 4. Please specify whether the salary is a base salary or a salary package.
>
> Thank you so much and I appreciate your prompt response."

**[65]** Mr Camenzuli was upset by the actions of Specialist HR in contacting his new employer and falsely claiming that it was with his permission. He had only been with his new employer for one month, was within his probationary period and had to reveal this litigation.

**[66]** After hearing from Mr Alkan during the hearing, I directed the Respondent to produce evidence of correspondence between Mr Alkan and Ms Macallister. The material demonstrates the following.

**[67]** Ms Macallister has her own HR consulting business in Cairns. On 25 September 2023, Mr Alkan sent Ms Macallister the following email:

> "Hi Megan,
>
> It's me again!
>
> Could I outsource a reference check to you?
>
> Below are details:
>
> Employee name: James Camenzuli
> Position: ANZ Key account manager
> Company: [name]
>
> I would like position, start date with company and current salary confirmed through their HR department."

**[68]** On 27 September 2023, Ms Macallister acknowledged the email, apologised there had been a power outage and asked if that was all of the information Mr Alkan wanted. He replied:

> "Hi Megan,

Not a problem. Yes just a basic reference for this one."

**[69]** On 28 September 2023, Ms Macallister emailed Mr Alkan:

"Hi Gabriel,

Just updating you. The HR department is proving tricky to get through to. After leaving several messages, I have been given an email address to send the request to. I am hoping to receive a response today."

**[70]** At 1:39pm that day, and despite falsely having informed the HR Manager that she had Mr Camenzuli's permission to contact his new employer, Ms Macallister sent the following email to Mr Alkan:

"Hi again,

They want James' approval in writing to disclose confidential information. Do you have that please?"

**[71]** Mr Alkan responded:

"Hi Megan

I don't have that.

It appears they aren't making it easy, let's just leave it for now.

Feel free to charge me for your time."

**Mr Camenzuli's submissions**

**[72]** Mr Camenzuli submitted that the dismissal was an unfair dismissal pursuant to s.385(b) of the Act in that the dismissal was harsh, unjust and/or unreasonable, taking into account the considerations under s.387 of the Act.

**[73]** The Respondent terminated Mr Camenzuli for purported serious misconduct because it alleges that:

"…the Applicant's actions in relation to the company laptop and smartphone is self-evidently a wilful and deliberate theft which posed a serious threat to the reputation, viability or profitability of the Respondent's business, and indeed to continuation of the employment".

**[74]** Mr Camenzuli submitted that the Respondent did not provide a lawful and reasonable direction regarding the return of the company property in that the Respondent did not afford him reasonable time to remove his personal information and property from the devices.

**[75]** Mr Camenzuli noted that an employer must have a valid reason for dismissing an employee, related to the employee's capacity or conduct. A valid reason is one which is:

> "…sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of 170DE(1) [now 387(a)]."[7]

**[76]** The Briginshaw principle has established, *inter alia*, that findings of serious misconduct require stronger evidence, and that "…inexact proofs, indefinite testimony, or indirect references…" are insufficient to reach such a conclusion.[8]

**[77]** An employee dismissed for alleged unsatisfactory performance must be given a warning and it is not a warning at law unless it satisfies the following:

> "… The purpose of a warning about unsatisfactory performance must be to identify the performance that is of concern and must make it clear that a failure to heed the warning places the Applicant's employment at risk. Such a warning gives an employee an opportunity to improve in those areas identified as requiring improvement. **An integral part of such a warning must be to clearly identify the areas of deficiency, the assistance or training that might be provided, the standards required and a reasonable timeframe within which the employee is required to meet such standards**."[9]

**[78]** Mr Camenzuli submitted, in respect to the considerations under s.387 of the Act, as follows:

- on the basis of the factual matrix, there was no valid reason for his summary dismissal;
- he was not notified of a valid reason because there was no valid reason;
- he was not provided with any proper opportunity to respond;
- section 387(d) was circumvented by the Respondent and denied to him;
- at the time of the dismissal, there was no lawful or reasonable warning about unsatisfactory performance, nor was there any warning that complied with the test set out above in *McCarron v Commercial Facilities Management Pty Ltd T/A CFM Air Conditioning Pty Ltd* [2013] FWC 3034;
- the Respondent was large enough to engage specialist HR representatives and accordingly, there is no reason that the Respondent should have contravened the unfair dismissal protections; and
- section 387(g) of the Act is not applicable as this is a large company that engaged a HR representative.

**[79]** It was submitted that the conduct of the Respondent is such that it is self-evident that it had falsely contrived a manner of making Mr Camenzuli redundant, and thereafter opportunistically summarily terminated his employment. Mr Camenzuli does not believe that

the summary dismissal was warranted in the circumstances where he had demonstrated repeated attempts to return the mobile phone and laptop upon extraction of his own personal data.

**[80]** Further, Mr Camenzuli maintained his belief that the demands made by the Respondent were an outrageous affront and were a disgraceful and opportunistic attempt to avoid paying redundancy payout and his termination entitlements.

*Sham Redundancy*

**[81]** Mr Camenzuli takes issue with the Respondent's submissions in respect of the redundancy consideration on the basis that the Respondent has not provided any evidence:

- of its claims that it had been affected by "economic headwinds and market conditions which were beginning to affect the commercial viability of the business";
- that it conducted an operational review or plans for a restructure aside from the mere conjecture that such a review had occurred;
- that it "immediately" consulted with Mr Camenzuli upon the occurrence of some purported operational review; and
- that it properly considered redeploying Mr Camenzuli within the company.

**[82]** In *Harby*, Beaumont DP expressed the following relevant principles in respect of the Respondent's obligations:

> "WA Shed Commercial bears the onus of providing on the balance of probabilities that the redundancy was due to changes in operational requirements. If it is wrong to describe there being an onus of proof on WA Shed Commercial, which I do not consider to be the case, it remains that there must, in any event, be material before me which satisfies me that there were genuine operational reasons for WA Shed Commercial no longer requiring Mr Harby's job to be performed by anyone.
>
> While the redundancy letter of 1 July 2019 speaks of the '[C]ompany's decision to restructure its operations' to 'ensure the future success of the business,' there is no other evidence before me apart from the assertion in the letter.
>
> It is unnecessary to labour the point further. WA Shed Commercial has not presented any documentary or other evidence to this Commission in response to Mr Harby's application. In these circumstances, the only conclusion open to me is that Mr Harby's dismissal was not a case of genuine redundancy. Therefore, I turn to consider whether his dismissal was unfair."

**[83]** On the above basis, it is submitted that the Respondent's submissions fail to prove on the balance of probabilities that the redundancy was genuine in the absence of evidence to prove that Mr Camenzuli's job was made redundant.

**[84]** In *Robert Walker McInnes v WGC Crane Group Pty Ltd* [2023] FWC 2062, it was expressed at [45] that:

> "…There must be an appropriate evidentiary basis for the Commission's findings and the relevant facts are usually peculiarly within the knowledge of the employer respondent rather than the dismissed employee…"

**[85]** To this end, it is submitted that the Respondent has failed to demonstrate in any evidentiary or substantive capacity that Mr Camenzuli's job was no longer required to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

**[86]** Mr Camenzuli argued that the case of *Bizzaca v Westelect Services Pty Ltd T/A Westelect Services* [2018] FWC 4842 assists with defining the standard of change to operational requirements which is necessary to establish that a job is no longer required within a workplace. In *Bizzaca*, the Explanatory Memorandum of the *Fair Work Bill 2008* was also relied upon to provide examples of a downturn in trade:

> "To be satisfied the dismissal was a case of genuine redundancy, the Commission must be satisfied the role was no longer required to be performed by anyone in the business because of operational requirements.
>
> The Act does not define the term 'operational requirements'. It is a broad term that permits consideration of many matters including the state of the market in which the business operates and the application of good management to the business. Further examples include a downturn in trade that reduces the number of employees required, and the employer restructuring the business to improve efficiency, including the redistribution of tasks done by a particular person between several other employees resulting in the person's job no longer existing."

**[87]** Moreover, Beaumont DP in *Bizzaca* refers to the case in *Kekeris v A. Hartrodt Australia Pty Ltd T/A A. Hartrodt* [2010] FWA 674, which outlines the test to be followed:

> "…The test is not however whether the duties survive. Paragraph 1548 of the Explanatory Memorandum makes clear that it can still be a 'genuine redundancy' where the duties of the previous job persist but are redistributed to other positions. The test is whether the job performed by the applicant still exists".

**[88]** The case of *Ulan Coal Mines Ltd v Howarth* [2010] FWAFB 3488 was also referred to in *Bizzaca*, to affirm the test that "it should be noted it is the 'job' that is no longer required to be performed, rather than the 'duties'."

**[89]** Mr Camenzuli further cites the case of *Mohanan v China Southern Airlines Limited* [2015] FWC 6421, where Sams DP provides:

> "…possible examples of a change in the operational requirements of an enterprise:
>
> - a machine is now available to do the job performed by the employee;

- the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or
- the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists."

**[90]** With respect to an obligation to consult, Mr Camenzuli submitted that the *Business Equipment Award 2020* (the BE Award) was applicable to his position based on the duties described in Schedule A of the BE Award being consistent with the duties performed by him, including:

"• manage personal work priorities and professional development;
- provide leadership in the workplace;
- establish effective workplace relationships;
- facilitate work teams;
- manage operational plans;
- manage workplace information systems;
- manage quality customer service;
- ensure a safe workplace;
- promote continuous improvement;
- facilitate and capitalise on change and innovation;
- develop a workplace learning environment;
- manage the establishment and maintenance of a workgroup network;
- manage meetings;
- plan or review administration systems; and
- manage business document design and development."

**[91]** The BE Award's consultation process for major workplace change is outlined under clause 29, which is produced below:

"**29. Consultation about major workplace change**

**29.1** If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

**(a)** give notice of the changes to all employees who may be affected by them and their representatives (if any); and

**(b)** discuss with affected employees and their representatives (if any):

**(i)** the introduction of the changes; and

**(ii)** their likely effect on employees; and

**(iii)** measures to avoid or reduce the adverse effects of the changes on employees; and

**(c)** commence discussions as soon as practicable after a definite decision has been made.

**29.2** For the purposes of the discussion under clause 29.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

**(a)** their nature; and

**(b)** their expected effect on employees; and

**(c)** any other matters likely to affect employees.

**29.3** Clause 29.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

**29.4** The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 29.1(b).

**29.5** In clause 29 significant effects, on employees, includes any of the following:

**(a)** termination of employment; or

**(b)** major changes in the composition, operation or size of the employer's workforce or in the skills required; or

**(c)** loss of, or reduction in, job or promotion opportunities; or

**(d)** loss of, or reduction in, job tenure; or

**(e)** alteration of hours of work; or

**(f)** the need for employees to be retrained or transferred to other work or locations; or

**(g)** job restructuring.

**29.6** Where this award makes provision for alteration of any of the matters defined at clause 29.5, such alteration is taken not to have significant effect."

**[92]** In the alternative, Mr Camenzuli submitted that the *Clerks Private Sector Award 2020* (the Clerks Award) is applicable based on the duties described in Schedule A of the Clerks Award being consistent with the duties performed by him:

"• providing specialised advice and information on the organisation's products and services;

- responding to clients, the public or suppliers' problems within own functional area utilising a high degree of interpersonal skills;
- applying computer software in order to:
    (i) create new files and records;
    (ii) maintain computer based records management systems;
    (iii) identify and extract information from internal and external sources; or
    (iv) use advanced word processing or keyboard functions;
- applying specialist terminology and processes in professional offices;
- exercise some discretion and judgement in the selection of equipment, services or contingency measures;
- work within known time constraints;
- provide multiple specialised services to customers (including complex sales, service advice for a range of products or services, and difficult complaint and fault inquiries); and
- exercise a limited amount of leadership over less experienced employees."

**[93]** Clause 38 of the Clerks Award provides the consultation process in respect to major workplace change:

"**38. Consultation about major workplace change**

**38.1** If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

**(a)** give notice of the changes to all employees who may be affected by them and their representatives (if any); and

**(b)** discuss with affected employees and their representatives (if any):

**(i)** the introduction of the changes; and

**(ii)** their likely effect on employees; and

**(iii)** measures to avoid or reduce the adverse effects of the changes on employees; and

**(c)** commence discussions as soon as practicable after a definite decision has been made.

**38.2** For the purposes of the discussion under clause 38.1(b) , the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

**(a)** their nature; and

**(b)** their expected effect on employees; and

**(c)** any other matters likely to affect employees.

**38.3** Clause 38.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

**38.4** The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 38.1(b).

**38.5** In clause 38 significant effects, on employees, includes any of the following:

**(a)** termination of employment; or

**(b)** major changes in the composition, operation or size of the employer's workforce or in the skills required; or

**(c)** loss of, or reduction in, job or promotion opportunities; or

**(d)** loss of, or reduction in, job tenure; or

**(e)** alteration of hours of work; or

**(f)** the need for employees to be retrained or transferred to other work or locations; or

**(g)** job restructuring.

**38.6** Where this award makes provision for alteration of any of the matters defined at clause 38.5, such alteration is taken not to have significant effect."

**[94]** In *Piper v Pacific Coast Contractors Pty Ltd T/A Hope Estate Wine Group* [2014] FWC 2891, Mr Camenzuli noted the Commission examined the consultation provisions of the applicant's relevant award and found:

> "It was not sufficient for an employer to simply inform an employee of its decision; there must be a genuine discussion directly with the employee, with particular reference to the nature of the changes, its expected effects and how any adverse impacts on an employee, could be mitigated."

**[95]** Further, in the 2001 decision of *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Vodaphone Network Pty Ltd*, PR911257, it was demonstrated that:

> "Consultation is not perfunctory advice on what is about to happen, consultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision marker."

**[96]** Mr Camenzuli also made reference to the Full Bench decision in *Consultation Clause in Modern Awards* [2013] FWCFB 10165, where the Full Bench provided guidance on the meaning of the word "consult":

> "The word 'consult' means more than the mere exchange of information. As Young J said in *Dixon v Roy*: 'the word "consult" means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response."

**[97]** Mr Camenzuli submitted that there is a required standard to be met in respect of consultation and the Respondent failed to meet those standards in the circumstances where Mr Camenzuli offered to accept a pay cut or be redeployed.

**[98]** The kind of topics which should be addressed in consultation was outlined in the decision of *Snooks v Blake's Feast* [2023] FWC 113:

> "Consultation should include:
>
> (a) business structure;
> (b) the number of employees in senior leadership positions;
> (c) roles required;
> (d) tasks to be undertaken;
> (e) client books for the next 5 months; and
> (f) forecast revenue over the next 5 months."

**[99]** It was submitted that the Respondent had failed to consult with Mr Camenzuli in accordance with the relevant Award and had failed to consult in general to the required standard.

**[100]** Mr Camenzuli submitted the Respondent had targeted him as he was the only employee whose position was allegedly redundant. The Respondent has demonstrated that it did not properly consult with Mr Camenzuli on the basis that there have been other employees hired to work for the Respondent in the few months since Mr Camenzuli's employment was terminated.

**[101]** With respect to redeployment opportunities, it was submitted that the Respondent did not properly consider his offer for a pay decrease or to be redeployed within the company.

*Unreasonable directions and summary dismissal*

**[102]** Mr Camenzuli submitted that he did not refuse to return the devices but was rightfully requesting reasonable time to be able to extract his own data, purchase a new phone and SIM plan, and reconfigure the programming of the new phone to gain access to his home in a gated community. In light of the above, the logical finding is that there would be an intermixing of data on the devices between Mr Camenzuli's information and the company's information including that there was a combination of personal and professional contacts stored on the phone and SIM card.

**[103]** Mr Camenzuli submitted it is reasonable to expect that the above steps would take time to implement and that the Respondent's deadlines were not reasonable in the following circumstances:

- he was directed not to work and therefore was cut off from his access to the devices to remove his data;
- he had to take time to purchase new devices;
- he was contemporaneously attempting to seek legal advice; and
- he was in shock and upset by the sudden behaviours and attitude of the Respondent after his 14-year employment.

*Closing submissions*

**[104]** In written closing submissions, it was noted that in evidence given to the Commission, Mr Alkan stated that the dismissal took effect on 9 June 2023 and it was a summary dismissal, yet Mr Killick gave evidence that he was made redundant on 9 June 2023 which was converted to a summary dismissal on 15 June 2023.

**[105]** Mr Camenzuli noted that the Respondent had assumed that he had sent malware by email to the Respondent on 14 June 2023, when in fact he had supplied the Australia Post tracking number of the mobile phone he had posted, as requested.

**[106]** Mr Camenzuli further noted that in oral evidence it was revealed that both Mr Matthew Camenzuli and Mr Killick were on the Gold Coast, approximately 15 minutes away from Mr Camenzuli's home on 8 June 2023, during the same time that they were refusing to communicate with Mr Camenzuli about his departure from the Respondent after 14 years of dedicated service.

**[107]** It was submitted that Mr Matthew Camenzuli's failure to give evidence in these proceedings amounts to a failure of the Respondent to call a material witness, and the Commission is entitled to draw an adverse inference from the failure to call Mr Matthew Camenzuli as set down in the High Court decision in *Jones v Dunkel*.[10]

**[108]** Mr Camenzuli argued that much of the failed redundancy negotiations and consequent unfair dismissal occurred because of the conduct of Mr Alkan. Among other reasons, this is because Mr Alkan gave advice to the Respondent about the meeting with Mr Camenzuli in a coffee shop to inform him about a pending redundancy. Further, Mr Alkan refused to grant an extension for Mr Camenzuli to seek legal advice concerning execution of the Deed and/or extension to allow Mr Camenzuli time to purchase and transfer data to a new mobile phone from his work mobile phone.

**[109]** Mr Alkan gave evidence that Mr Camenzuli was dismissed on 9 June 2023 for not returning his company phone, even though Mr Killick authorised an extension of time to return the phone until 14 June 2023. Under cross-examination, Mr Alkan described Mr Camenzuli's behaviour on 7 and 9 June 2023, whilst discussing the potential redundancy, as hostile. That evidence does not appear in Mr Alkan's statement, nor in the Respondent's submissions, nor was it put to Mr Camenzuli during cross-examination by the Respondent's representative. Accordingly, it is submitted that Mr Camenzuli was deprived of an opportunity to respond to

the claim that he displayed 'hostility' and contrary to the rule in *Browne v Dunn* (1893) 6 R 67 at 70.

**[110]** Mr Alkan gave further evidence that:

> "…the employee spent all of the 8th trying to break into his laptop that had been suspended, suspended his access, why he would spend all the 8th clearing the laptop rather than genuinely work on trying to transfer contacts and any (indistinct) authentications from his company mobile phone to another mobile phone."

**[111]** Mr Camenzuli submitted that such evidence is completely contrary to the Respondent's own and privately engaged IT expert who provided a written report that Mr Camenzuli spent a total of 41 minutes between 11:39am and 12:20pm on the laptop on 8 June 2023 - not the whole day.

**[112]** In closing submissions, Mr Camenzuli was critical of Mr Alkan's evidence to the Commission and his conduct in instructing Ms Macallister to make enquiries with his new employer under the guise of a reference check. He submitted that Mr Alkan acted dishonestly and vexatiously, a matter relevant to costs in litigation of this type.

*Remedy*

**[113]** Mr Camenzuli asserted that the evidence adduced during the hearing shows that but for the Respondent unfairly dismissing him, Mr Camenzuli would have agreed to, signed, and been paid a voluntary redundancy amounting to 12 weeks salary (tax free), 4 weeks (taxed) and $5,000.00 voluntary redundancy incentive.

**[114]** That did not occur, and accordingly, Mr Camenzuli submitted that given 14 years of service as an exemplary employee, and having established that he was unfairly dismissed, he is entitled to the statutory maximum cap of 26 weeks salary calculated to be: $63,661.52 gross plus superannuation of $6,360.60 (total $70,022.12).

## EVIDENCE AND SUBMISSIONS OF THE RESPONDENT

### Evidence of Mr Rod Killick

**[115]** Mr Killick is the General Manager of the Respondent and was directly involved in the processes surrounding the termination of Mr Camenzuli.

**[116]** Mr Killick stated while the Respondent's business had been operating for some time, the housing industry sector has been facing considerable economic headwinds and market conditions. This has caused businesses across the sector to re-evaluate their business models, to rationalise their business operations, and to cut overheads where possible. The Respondent's business is no different in this regard.

**[117]** The Respondent conducted an operational review at the start of June 2023, and concluded Mr Camenzuli's position was potentially redundant. The Respondent did not proceed with redundancy immediately, and instead sought to handle Mr Camenzuli with care, both to

see if there were any other options available, and otherwise to see what Mr Camenzuli's views would be prior to taking any conclusive action.

**[118]** The Respondent instructed Mr Gabriel Alkan of Specialist HR as the Respondent's HR/IR Consultant to commence consultation with Mr Camenzuli. Mr Killick stated the Respondent remained informed of the ongoing events by way of Mr Alkan's updates, and at all times the Respondent duly considered all material being provided before instructing Mr Alkan on what steps to take next.

**[119]** Mr Killick noted in the Respondent's field, the Respondent largely operates upon the value of its services and intellectual property. The Respondent therefore expressed to Mr Alkan the extremely important need to secure, and otherwise control the flow of and access to sensitive and propriety company information and systems.

**[120]** Mr Killick considered one of the most dangerous threats in such circumstances to be a disgruntled employee (especially one as senior as Mr Camenzuli) destroying or leaking such propriety data. He considered such an event could constitute a security and privacy breach, which could become an existential threat to the company.

**[121]** He considered such events not uncommon in the field, and so the Respondent had an obligation to take steps to avoid such a threat. In the Respondent's field, the simplest way to ensure this is to lock down system access to the given employee and to give them paid leave during the consultation process. System integrity is therefore ensured, and access can therefore be restored or removed completely depending on the outcome. Mr Killick noted that securing the system in this way is in no way a final decision and can be reversed if the employee is to be retained after consultation.

**[122]** Mr Killick was not present, but he was informed by Mr Alkan that when he met with Mr Camenzuli on 7 June 2023, Mr Camenzuli broadly did not react positively. Mr Killick considered that while this is perhaps to be expected given the difficult news being given, Mr Camenzuli was allegedly particularly outspoken in expressing his views on the matter surrounding his ongoing use of the company devices for personal use.

**[123]** As part of this process, the Respondent authorised Mr Alkan to enter negotiations over terms of a potential voluntary redundancy package. Draft terms of this package were reviewed and executed by Mr Killick himself, to be presented to Mr Camenzuli for his consideration.

**[124]** As was discovered during the hearing of this matter, and the later production of documents at my request, Mr Alkan sent the prepared deed to Mr Killick at 3:51pm on 7 June 2023. Mr Killick signed and returned it to Mr Alkan at 4:12pm and requested Mr Alkan inform him when the deed had been signed by Mr Camenzuli.

**[125]** Over the following days, Mr Killick was kept abreast of developments, including the various correspondence. Mr Killick considered it was important to the Respondent, and indeed in line with Mr Alkan's advice, that the Respondent ensure that all communication was made in an orderly and structured manner and in writing, for the protection of all parties including Mr Camenzuli.

**[126]** During the hearing it became evident that Mr Killick had spoken with Mr Camenzuli on the phone on the evening of 7 June 2023. In cross-examination, Mr Killick stated that he would have been 'happy' to discuss with Mr Camenzuli issues 'later'. I then had the following dialogue with Mr Killick:

| | |
|---|---|
| Commissioner: | Mr Killick, your evidence, earlier, was that you also said to him, on that night, 'I'm happy to discuss with you later'? |
| Mr Killick: | Yes, well, James is wanting to go into all sorts of other events, right, that are possibly outside this matter, right, that I'm not in a position for him to make - what was coming out of his mouth was not a matter for me to be discussing at that particular time. I had to be able to close that phone call off. |
| Commissioner: | When could he discuss with you later, he's dismissed by Friday, isn't he, and you won't answer his emails? |
| Mr Killick: | No, I clearly said to him we would answer through Mr Alkan. |
| Commissioner: | This is your evidence that you gave earlier, I wrote it down, you said, 'I'm happy to discuss with you later'? |
| Mr Killick: | Yes, not - there was a lot in that - there was a lot in that phone - - - |
| Commissioner: | Okay. Was it meant to mean only through a third party but not through you again? |
| Mr Killick: | He was wanting to - look, James was very upset at the time of - - - |
| Commissioner: | I'm just interested in your statement to him? |
| Mr Killick: | Yes, my statement to him was, could we please communicate through Mr Alkan, and I will communicate - - - |
| Commissioner: | But you also said, 'I'm happy to discuss with you later'. Were you? |
| Mr Killick: | If he wanted to discuss something personal with me later, that was that - that's what that was about. |
| Commissioner: | What's more personal that, 'I've lost my job. I'm about to lose my job'? |
| Mr Killick: | He may want to be able to speak to me in relation to a reference. Many times I've had staff, people that are made redundant, that I've been a reference for. |

| | |
|---|---|
| Commissioner: | Okay, so after he's dismissed, is that what he is meant to conclude from that statement? So you weren't happy to - - -? |
| Mr Killick: | No, through this process, through this process. Through this process. |
| Commissioner: | But you were saying that he's harassing Mr Matthew Camenzuli, because he's calling him. So he's not allowed to call you, is he? |
| Mr Killick: | I answered his call - - - |
| Commissioner: | Yes, but any more - - -? - |
| Mr Killick: | - - - to help - yes, I answered his call and asked, if it's in relation to this matter could it go through Mr Alkan. |
| Commissioner: | Yes. But if your evidence to the Commission earlier is, 'I'm happy to discuss with you later', you didn't want to have any oral discussions with him later, did you? |
| Mr Killick: | In relation to this matter, I wanted it to all go through Mr Alkan. |

**[127]** Mr Killick's evidence is that the Respondent did not appreciate Mr Camenzuli seeking to regularly ignore the Respondent and Mr Alkan's instructions to the point of emailing the Respondent 'day and night with his various concerns.' When the Respondent received correspondence from Mr Camenzuli, it would be forwarded to Mr Alkan and he was instructed to inform Mr Camenzuli to only go through him.

**[128]** Mr Killick considered that Mr Camenzuli involving several senior managers in the process (and leaving Mr Alkan out) had the potential to cause miscommunication and misunderstandings and may have led the Respondent to give incorrect advice. Mr Killick considered that the Respondent was always acting to ensure communications was confined to ensure proper and clear understanding.

**[129]** During the hearing it became evident that Mr Killick and Mr Camenzuli were 15 minutes away from Mr Camenzuli on 8 June 2023 while they were on the Gold Coast visiting a client. When asked if it would have been appropriate to meet with Mr Camenzuli given the 7 June 2023 meeting the day before, Mr Killick said it would not be appropriate to meet with 10 people to discuss redundancy if he was not going to make 10 people redundant.[11]

**[130]** During the hearing, Mr Killick was asked what he thought of the 8 June 2023 email Mr Camenzuli had sent him at [44] where Mr Camenzuli had:

- Stated that there had not been, to-date, any discussion regarding redeployment;
- Stated that he has attempted to contact both Mr Killick and Mr Matthew Camenzuli;
- Sought an extension of time to consider his options;

- Sought an extension of time to seek legal advice in accordance with the terms of the proposed deed;
- Sought an extension of time to cut over his banking access, property access to his gated community and other multifactored authenticated accounts linked to his phone;
- Sought confirmation that no extension will be granted and advised he was taken aback to learn that his request will be deemed harassment;
- Offered to return all items other than the telephone in the interim.

**[131]** Mr Killick stated that he skim read the email and forwarded it to Mr Alkan.[12]

**[132]** Mr Killick considered the matter on the morning of 9 June 2023 with all the information he had to date. The Respondent reviewed the matter as a whole, including primary considerations as follows:

- The economic and operational needs of the business;
- The findings of the Respondent's operational review;
- That Mr Camenzuli's role was becoming unnecessary;
- That there were no suitable opportunities for Mr Camenzuli so far as redeployment was concerned; and
- Mr Camenzuli's input and feedback, including:
    - His comments at the various meetings;
    - His desire to remain with the business;
    - His concerns regarding his personal devices; and
    - His other demands as communicated by email and messages.

**[133]** The Respondent was also presented with:

- Mr Alkan's input and feedback, such as his observations of Mr Camenzuli's conduct and behaviour, and his professional views regarding the Respondent's obligations; and
- That by this point, the Respondent had noted that Mr Camenzuli's conduct was becoming increasingly unstable, and that he was not complying with the Respondent's various directions.

**[134]** The Respondent concluded that Mr Camenzuli would need to be made redundant pending his return of all company assets, or Mr Camenzuli otherwise would possibly be subject to summary dismissal due to theft. Mr Killick instructed Mr Alkan to attend the meeting scheduled for later that day to present the Respondent's findings to Mr Camenzuli.

**[135]** Mr Alkan informed Mr Killick that the meeting with Mr Camenzuli went 'quite poorly' and that Mr Camenzuli had refused to return his company smartphone, among other concerns. Mr Killick then instructed Mr Alkan to terminate Mr Camenzuli's employment, and to correspond with him to the effect of giving Mr Camenzuli a final chance to return the property before further escalatory action.

**[136]** The letter of 9 June 2023 at [51] was sent to Mr Camenzuli by Mr Alkan. It provided the Respondent's pondering for Mr Camenzuli to return the mobile phone by COB 14 June 2023 to the Parramatta office and provide the express post tracking number. The letter postured that the Respondent might report the matter to the police for theft and not make a termination payment.

**[137]** At 10:41pm that evening, Mr Camenzuli sent an email to Mr Killick and Mr Matthew Camenzuli at [52]. Mr Killick described the email as 'highly bitter and unpleasant' and ignoring ongoing instructions to correspond with Mr Alkan on HR matters. Mr Killick forwarded the email to Mr Alkan to be addressed. In cross-examination, Mr Killick conceded that there was nothing unpleasant about Mr Camenzuli's email.[13]

**[138]** The email, in fact, called for Mr Killick and Mr Matthew Camenzuli to respond if they did want the phone to be sent back by mail by 14 June 2023, or if they would prefer a more secure means of transport, and if so, could that be communicated to Mr Camenzuli by 12 June 2023.

**[139]** The email further put to Mr Killick and Mr Matthew Camenzuli that there had been matters in the 9 June 2023 letter sent by Mr Alkan, namely:

- Mr Camenzuli had not been made aware of the nature of the 7 June 2023 meeting; and
- Mr Camenzuli had not requested that a new role be made for him.

**[140]** In cross-examination, Mr Killick confirmed Mr Camenzuli's concerns were correct, but he wanted him to raise them with Mr Alkan and not with himself.

**[141]** In evidence given during the hearing, Mr Killick originally said that he understood that Mr Camenzuli wanted to keep the company-issued mobile phone. The following evidence was given:[14]

| | |
|---|---|
| Commissioner: | Just on that, I notice the evidence you gave earlier, Mr Killick, I wrote it down, it's on transcript, he wanted to keep his personal devices. Is that what you think - do you mean forever? |
| Mr Killick: | At that time, when this was all happening? |
| Commissioner: | You've now given evidence twice that he wanted to keep his phone? |
| Mr Killick: | Yes. At the day of Wednesday, when this is happening, I understand that he wanted to keep his phone. |

Commissioner: What does that mean? What did you understand it to mean?

Mr Killick: That he wanted – for James to keep the device and the phone number.

Commissioner: Do you mean for all of time?

Mr Killick: For all of time.

Commissioner: Is that what you believed?

Mr Killick; At that time.

Commissioner: When did you believe otherwise?

Mr Killick: As to further consultation and/or communication went on.

Commissioner: Well, when and what did you then believe? If you believe that he wanted to keep the actual phone unit and the phone number, at what point did you think otherwise?

Mr Killick: Probably in one of the emails that I got that very next day, where James was saying, 'Look, I want to be able to keep my phone, I want to be able to transfer the data', and then I knew, okay, he doesn't want the phone, he doesn't want the phone number, he wants time to be able to get the data.

Commissioner: So by 8 June, by the evening of 8 June you know that he doesn't want to keep the phone forever, is that right?

Mr Killick: That's right, yes.

Commissioner: It's just disturbing that you have twice now said that he wants to keep the phone. So you've now said by the evening of 8 June you know that it's just for a little bit longer, is that right?

Mr Killick: Yes. So in my mind I've, when this is happening on the Wednesday, I understood that he wanted to keep, physically, the phone forever, and that phone number, of which I understand that we communicated to him, 'No, we need the device' and it was - I said to Mr Alkan, 'Didn't you communicate this to him at the lunchtime thing?', and he said, 'Yes, right, I put it in writing to him, right, that we wanted the device back'. I said, 'Yes, it's the phone number and the contacts and the information that's not recorded in our backup systems that could be on that device that we need'.

Commissioner: Then when do you correct yourself?

Mr Killick: I believe I'm corrected in - on probably, still in the process, probably the next day that the email comes through and I'm saying to Gabriel, 'Look, please communicate and work this out. We want the device back for our intellectual property. He can have his personal data'. Personal data is not relevant. Get him to download the data, download any of his personal stuff, delete that off, we're interested in the phone calls from customers and the communication that's had with customers that may not be in our systems.

Commissioner: Right. So is it by 8 June, in your evidence, that you now understand he doesn't want to keep his phone forever?

Mr Killick: Yes, I think when James sent through one of the emails that I forwarded on to Gabriel.

Commissioner: This is the one that you skimmed over?

Mr Killick: That's correct. Yes.

Commissioner: Well, my question to you is when did you understand that he didn't want to keep the phone unit forever?

Mr Killick: I'm unsure, somewhere within those three days. I can't give you a particular time, but I was aware, by the consultation process, on the morning of Friday, right, that he was intending to give the phone back, just at a later date.

Commissioner: Okay. So you knew that, on the morning of Friday the 9th?

Mr Killick: Yes, and I'm making the decision.

Commissioner: Thank you?

Mr Killick: That's why we gave him the extension of the time, in relation to the phone.

**[142]** By 9 June 2023, even though Mr Camenzuli had been dismissed, he was afforded until 14 June 2023 to return the mobile phone.

**[143]** Mr Nay was instructed to review the laptop that had been returned by Mr Camenzuli. Mr Nay reported to Mr Killick that the laptop had been wiped and returned to factory settings.

**[144]** Mr Nay also informed Mr Killick that Mr Camenzuli had made various demands of him to undertake actions. Mr Killick informed staff not to accept or oblige Mr Camenzuli's demands.

**[145]** Mr Killick's evidence in respect of the 14 June 2023 email containing the Australia Post tracking notification at [58] is as follows:

> "On the evening of 14 June 2023, the Applicant emailed me and Matthew Camenzuli with an email purporting to contain an AusPost tracking receipt. However, our SAAS email security system blocked the attachment on the basis that it detected malware. I forwarded this to Mr Alkan for his attention and consideration."

**[146]** It is noted that Mr Killick's witness statement is dated 27 September 2023.

**[147]** Mr Camenzuli's first witness statement, dated 11 September 2023 provided a copy of the email sent by him on 14 June 2023, containing the Australia Post tracking receipt as an attachment.

**[148]** In cross-examination, the following evidence was given in respect of Mr Killick's assertion that Mr Camenzuli sent the Respondent malware on 14 June 2023:[15]

| | |
|---|---|
| Mr Watters: | What's the evidence of that? |
| Mr Killick: | Popping up and saying it was malware. |
| Mr Watters: | Well, I suggest to you, sir, that it didn't tell you it was malware at all? |
| Mr Killick: | That's incorrect. |
| Mr Watters: | I suggest that your system raised an alarm and put the item in quarantine. What do you say to that? |
| Mr Killick: | It was on my email. I opened up the email, read the email. I went to open the attachment and I got a warning. |
| Mr Watters: | Yes. That warning said the item had been placed in quarantine? |
| Mr Killick: | I just got the warning. I didn't go into where it was. |
| Mr Watters: | I suggest to you that that warning did not use the word or tell you that it was malware? |
| Mr Killick: | It says on it. |
| Mr Watters: | Okay, well you show me where? |
| Mr Killick: | It says on the screen. |
| Mr Watters: | No, where is it in your evidence? Surely you will have that in your evidence. It's something critical that you rely on, that James |

Camenzuli was sending his former employer malware. That's a serious allegation, sir, you must know that?

Mr Killick: What I'm saying is that's one part of my evidence. I'm trying to give all the detail of the whole process, and in receiving that, right, it's popped up with that of which I forwarded it straight on to Gary Bruil(?) and forwarded it straight on to Terry Nay, right, saying, 'Look, this is what's popped up. I haven't opened it.'

Commissioner: It's at page 260 of the court book.

Mr Watters: Thank you, Commissioner. There it is.

Commissioner: Mr Killick, by the time that you write your witness statement Mr Camenzuli's written his witness statement some weeks earlier, and he's provided evidence of the email that he sent to you and Mr Matthew Camenzuli, and the Australia Post attachment. Did you read that when you created your witness statement?

Mr Killick: I've read - I have read James's. I don't know the timing around it, but I read it.

Commissioner: Well, let's be very clear. He makes his statement on 11 September. You make your statement on 27 September?

Mr Killick: Yes, so I would have read - I would have read James's for sure.

Commissioner: Go to page 67, or 66?

Mr Killick: Yes.

Commissioner: At 66 he says that he sent you and Mr Matthew Camenzuli an email. At 30, five days later he follows it up and he says, 'I've posted the mobile phone.' This is on 14 June. And he attaches the Australia Post receipt. Now, did you read any of that before you made your statement?

Mr Killick: Yes, I would have read that.

Commissioner: I will leave that to you then. Thank you.

Mr Watters: Did you skim read it?

Mr Killick: So - - -

Mr Watters: No. Please answer the question. Did you skim read it?

Mr Killick: His evidence?

Mr Watters: Yes, that statement of evidence, did you skim read it? You've told us earlier that you skim read the 8 June email?

Mr Killick: Yes, that's right.

Mr Watters: So did you skim read this, that's my question. There's no harm in skim reading something if that's your evidence. Just tell me?

Mr Killick: Look, I read it - I read it. I read the email. I'm not disputing that he didn't try to send me a receipt, if that's the question you're asking.

Mr Watters: Well, let's go back to page 260 of the court book as identified by the learned Commissioner. You show me in that document where it tells you there was malware?

Mr Killick: So we've got the date.

Mr Watters: Yes?

Mr Killick: We've got my email address, separation (indistinct) letter to Gabriel, 'Is there a problem?' (Indistinct). And then it has mobile grey 32, whatever that is. And then a quarantine alert SAS Defence text.

Mr Watters: That's what I put to you in cross-examination, sir. I told you that the communication you got was that the item had been put in quarantine. The item did not say to you, 'This contains malware'?

Mr Killick: Okay. Now I'm clearly understanding where you're going with this. So I understand it.

Mr Watters: So that's agreed. Contrary to your statement the email alert you got didn't say it contained malware. It said - - -?

Mr Killick: No, I'm assuming that it was malware because of the quarantine alert. Now I understand.

Mr Watters: Okay. So you assumed malware; yes?

Mr Killick: I assumed that the quarantine alert surfaced said that there's an issue with it.

Mr Watters: Do you now accept that what Mr Camenzuli did was to send you an Australia Post receipt, a tracking notice for the return of the phone; do you accept that?

Mr Killick: I accept that's exactly what he was trying to send me.

Mr Watters: Well, hang on, not what he was trying to send you, I'm putting it to you that that's what he did. He got - - -?

Mr Killick; By the evidence I saw on Monday that's exactly right. He said that's what he sent.

Mr Watters: And in fact that's what he was told to do, wasn't it?

Mr Killick: No, he was told to have it back in our possession here, and he didn't. He sent this receipt. It didn't come back to us by the time it was meant to come back. It came back days later.

**[149]** I asked Mr Killick the following questions in relation to when he read the 14 June 2023 email sent by Mr Camenzuli:

Commissioner: When did you become aware of his 14 June text message attaching the Australia Post receipt?

Mr Killick: The email you mean?

Commissioner: Yes?

Mr Killick: I opened the email on the morning that I came to work after it was sent.

Commissioner: So you could read - - -?

Mr Killick: I found - and then I forwarded it - I forwarded it on to Mr Alkan.

Commissioner: You could read the email part of it, could you? So go to page 47?

Mr Killick: Yes, here's an email from James. Opened up the email, and then I went to open the attachment because (indistinct) expecting - - -

Commissioner: Go to page 47. Could you read that email, could you, where it says, 'Matt, Rod, I never heard back about anything.' It concludes with - - -?

Mr Killick: Sorry, I thought you - - -

Commissioner: Because he's emailed you on the night of 9 June saying, 'Can you get back to me by 12 June about how you want this phone returned.' He does that at page 48. And you don't get back to him, and then - - -?

Mr Killick: No, I referred to Mr Alkan.

Commissioner: I know you sent it to Mr Alkan, but he's asking you a question and you don't get back to him. Tell me, page 47, were you in receipt of this email, were you able to read it where he says that he's posted it by registered post today?

Mr Killick: Yes, I can read that, yes.

Commissioner: No. Did you receive that? That wasn't quarantined, was it?

Mr Killick: No, that wasn't quarantined.

Commissioner: So you read that?

Mr Killick: Yes.

Commissioner: And you still sent the letter of 15 June, the next day?

Mr Killick: When was the mobile phone due to be back in our office? The mobile phone wasn't back. He's saying, 'I sent a receipt.'

Commissioner: He sent you an email the night of 14 June saying, 'I have posted the mobile phone by registered post today, and here's the receipt.' And you still sent him the 15 June - I didn't appreciate you had received and been able to open this email. That's your evidence, you read that, and you still sent the 15 June letter. Is that right?

Mr Killick: Yes, that's right.

**[150]** Mr Killick's evidence is that given Mr Camenzuli's increasingly belligerent conduct and non-compliance, the decision was made to characterise Mr Camenzuli's termination as a summary dismissal. The Respondent accordingly instructed Mr Alkan to write to Mr Camenzuli to advise as such, which occurred on 15 June 2023.

**[151]** Mr Killick considered that Mr Camenzuli's employment should be summarily terminated due to:

- Essentially stealing the company smartphone, with no reputably displayed intention to actually return it at the time;
- Damaging and interfering with the company laptop;
- Failing to abide by the Respondent's various instructions regarding his conduct, communications, and participation in the process; and
- Subsequent email of Malware to the Respondent.

**[152]** Mr Killick gave the following evidence as to when Mr Camenzuli was dismissed:

Mr Watters: When do you say he was dismissed?

Mr Killick: As a summary dismissal?

Mr Watters: As any dismissal. When do you say he was terminated? Do you know when he was terminated?

Mr Killick: Yes. So my understanding of our events was a meeting on the Wednesday to be able to consult with him; on the Friday being made redundant, and there we learnt that he didn't come back with - he came back with the laptop, he didn't come back with the phone. So further then our instructions were to write to him to give him an extension of time to get it back all undamaged. But what we found when both items come back that they'd both been completely wiped of all our company data. So there was a meeting then carried out once we received the laptop and then the phone. The decision then - was given advice from Mr Alkan what our options were, and that through that group then - through this continued process it was decided then to take away the redundancy and take it into a dismissal.

Mr Watters: When was that?

Mr Killick: The Wednesday morning after reviewing the laptop, after reviewing - our meetings after reviewing the laptop.

Mr Watters: Just so I've got this right, you say he was made redundant on Friday the 9th. Is that your evidence?

Mr Killick: On Friday's meeting back at Zarraffa's - - -

Mr Watters: Yes?

Mr Killick: We were working with him to - we made him redundant, yes.

Mr Watters: And then that was changed - - -?

Mr Killick: No longer a staff member. Yes, no longer a staff member.

Mr Watters: That was changed and went to a summary dismissal the following week. Is that your evidence?

Mr Killick: That's right.

Mr Watters: Would it interest you to know that Mr Alkan has given evidence to this tribunal that he was summarily dismissed on the Friday 9 June? Have you got any comment on that?

Mr Killick: That's incorrect.

Mr Watters: That's incorrect, is it?

Mr Killick: He was made redundant on the Friday, right, of which all of his entitlements in relation to redundancy were to be forwarded to him. Unfortunately James didn't bring back his laptop and his phone. An instruction was to give him further time to be able to do that, right, and due to it coming back being completely wiped and/or - and the phone being blocked and/or (indistinct), we could only understand - we couldn't understand why he would damage our property like that.

**Evidence of Mr Gabriel Alkan**

**[153]** Mr Alkan is the Principal Consultant of Specialist HR, an HR/IR consultancy retained by the Respondent.

**[154]** Given Mr Alkan's involvement in the HR/IR matters of the Respondent, he was the primary point of contact between Mr Matthew Camenzuli, Mr Killick and Mr Camenzuli throughout these events.

**[155]** He was not directly involved in the Respondent's business decision making but was aware broadly that it was facing some operational difficulties due to its involvement in the building sector. Likewise, while he was not directly involved in the Respondent's operational review, he was broadly aware that such a review took place, and that it concluded restructuring was required.

**[156]** The Respondent instructed him to commence consultation with Mr Camenzuli regarding his future with the company as a potentially affected employee.

**[157]** Mr Alkan is aware that on 5 June 2023, Mr Killick wrote a letter (though it later became clear that Mr Alkan had drafted the communication for Mr Killick to send) to Mr Camenzuli informing him the Respondent:

- was facing the above-referenced market trends and industry downturn;
- was conducting an operational review of the business, as performed by an external consultant;
- required Mr Camenzuli to attend a meeting with Mr Alkan which was to occur that Wednesday 7 June 2023; and
- asked Mr Camenzuli to respond advising of his timeslot preference.

**[158]** On 7 June 2023, Mr Alkan met with Mr Camenzuli at a café near to Mr Camenzuli's home, during which time he informed Mr Camenzuli that:

- the Respondent was facing economic difficulties which had prompted an operational review;

- the outcome of that review was that a restructuring and redistribution of duties would be necessary to reduce overheads;

- a preliminary (but in no way final) view had been formed;

- this was not a reflection upon his performance, but rather a response to the difficult economic realities the business was facing; and

- the Respondent sought and would value his thoughts and feedback regarding the proposed changes, and that another meeting would be scheduled for June 9 to formally review the situation and make a final decision.

**[159]** During the meeting, Mr Alkan advised Mr Camenzuli that the sensitive nature of the Respondent's business was such that:

- his system access would temporarily be disabled as a security measure, and that he was consequently permitted to take the following days off on paid leave; and

- Mr Camenzuli would be required to return all company property immediately and as a matter of priority upon termination, if that occurred.

**[160]** In cross-examination, Mr Alkan described Mr Camenzuli's behaviour as 'hostile' during this meeting, but had not earlier put it in his witness statement, so Mr Camenzuli was not afforded the opportunity to give evidence as to whether he was hostile. I further questioned Mr Alkan as to why, if Mr Camenzuli was hostile on 7 June 2023 in a public space near to his home, would Mr Alkan wish to again meet with him in the same public space on 9 June 2023? Mr Alkan agreed, in hindsight, it would have been appropriate for the Respondent to have found a serviced office for the meetings to occur.

**[161]** In cross-examination, Mr Alkan denied that Mr Camenzuli had offered to take a pay cut.[16]

**[162]** During the meeting, Mr Camenzuli agreed to consider a voluntary redundancy package, with terms to be negotiated. Later that afternoon, Mr Alkan sent Mr Camenzuli what he describes in his evidence as a 'draft' deed for his consideration. The deed was, in fact, executed by Mr Killick and Mr Camenzuli was requested by Mr Alkan to sign and return it that same day.

**[163]** Mr Alkan described Mr Camenzuli's response to the events discussed with him in his nearby café as shock and disagreement. Mr Alkan noted that Mr Camenzuli seemed as concerned regarding his ongoing use of his assigned company laptop and smartphone, as of his ongoing employment.

**[164]** On 8 June 2023, Mr Alkan sent Mr Camenzuli another letter, entitled "Redundancy Consultation Meeting", reproduced at [39]. The letter documented the points discussed in the 7 June meeting, and also reminded Mr Camenzuli that:

- he was entitled to have a support person present at the 9 June meeting; and
- he had contractual obligations and duties including those regarding intellectual property, confidentiality of commercially privileged information, and return of company assets; and
- he must bring all company property to the scheduled meeting to be handed over (including specifically his company laptop and company mobile phone, as well other assets such as access cards and hard drives) due to their sensitive nature, should the decision be made to make him redundant; and
- he was obliged to comply with these lawful directions to return the property despite his hesitation to do so, and that failure to do so may warrant summary dismissal; and
- these serious matters had been discussed several times to date (including the 6 June phone call and at the 7 June meeting).

**[165]** In cross-examination, Mr Alkan conceded that he did not speak with Mr Camenzuli prior to 7 June 2023, so his evidence in respect of a phone call on 6 June 2023 was incorrect.[17]

**[166]** It is noted that Mr Alkan did not give any notice as to what was discussed in the phone call conducted by Mr Killick on 5 June 2023. There were no serious matters discussed, simply an invitation to meet.

**[167]** Mr Alkan learned that Mr Camenzuli had responded to this letter by attempting to contact Mr Killick and Mr Matthew Camenzuli, bypassing Mr Alkan, despite being instructed that he was to be the primary point of contact for such concerns.

**[168]** On the morning of 9 June 2023, Mr Alkan was instructed by the Respondent to proceed with the scheduled meeting with Mr Camenzuli, and to 'offer' him a separation of employment. This was to be characterised as a redundancy, pending Mr Camenzuli fulfilling all requirements of his employment contract and of returning all company equipment.

**[169]** At midday on 9 June 2023, he again met with Mr Camenzuli in the café near Mr Camenzuli's home. He informed Mr Camenzuli that management had concluded that there were no other opportunities for redeployment, and that they were minded to categorise the separation as a redundancy, pending Mr Camenzuli's full return of all company property. Mr Camenzuli then returned his assigned company laptop, which he had factory reset without informing the Respondent. Mr Camenzuli refused to hand over the company smartphone, despite having it on his person.

**[170]** Mr Alkan advised Mr Camenzuli repeatedly that refusing to hand over the company property may be considered theft and therefore a serious breach of his employment, and that

this may jeopardise the nature of his termination and subsequent entitlements. Mr Camenzuli acknowledged this but still refused to hand over the property.

**[171]** Mr Alkan provided Mr Camenzuli with a short break to reconsider and for him to otherwise avoid making a reckless decision "in the heat of the moment". During this time, Mr Camenzuli made phone calls outside, presumably to seek advice.

**[172]** With Mr Camenzuli still refusing to return all company property, the meeting arrived at an impasse. Mr Alkan advised him that official separation of employment would now take place, that he was no longer an employee of the Respondent, and that he would receive communication via email.

**[173]** Later that afternoon, Mr Alkan sent Mr Camenzuli the letter entitled "Separation of Employment" at [51]. This letter provided Mr Camenzuli with an extension until 14 June 2023 to return the company mobile phone via tracked registered mail.

**[174]** Mr Alkan learned that Mr Camenzuli had responded to this letter by again attempting to contact Mr Killick and Mr Matthew Camenzuli directly while bypassing him.

**[175]** On 10 June 2023, Mr Alkan sent Mr Camenzuli an email instructing him to limit correspondence to himself and, according to Mr Alkan, 'not to continue harassing the Respondent's management.' In fact, the email reads as follows:

> "Hi James
>
> It has come to my attention that you may have questions regarding my most recent correspondence to you.
>
> As I've made clear to you verbally and in writing, if you have any questions feel free to call me on [number] and I will be happy to answer."

**[176]** There was no suggestion that Mr Camenzuli was considered to be harassing the Respondent's management.

**[177]** Mr Alkan is informed that Mr Camenzuli messaged another co-worker, Mr Nay.

**[178]** On 14 June 2023, Mr Camenzuli sent Mr Killick and Mr Matthew Camenzuli an email which Mr Alkan describes as Mr Camenzuli 'ostensibly containing a registered post tracking receipt for the smartphone', which he claimed to have then posted as per the Respondent's instructions. Mr Killick forwarded Mr Alkan the email that day, showing that the attachment had been flagged by the Respondent's SAAS cyber-defence system as potentially being malware.

**[179]** In oral evidence given to the Commission, noting that Mr Camenzuli had, in his witness statement filed to the Commission and served on the Respondent, included both the email of 14 June 2023 and the Australia Post tracking receipt (in hard copy), and noting that Mr Killick later gave evidence that he had read the email of 14 June 2023 where Mr Camenzuli had declared he had posted the phone that day, Mr Alkan said the following:[18]

Mr Watters: With respect, witness, had he been granted the extension of time that he sought to seek legal advice and transfer the data from his phone and laptop, we wouldn't be here today, would we?

Mr Alkan: No, that's incorrect. We provided that extra week extension. I made that clear in my letter on the 9th that the company has decided to offer him an extension of one week.

Mr Watters: And he complied, didn't he?

Mr Alkan: Absolutely not.

Mr Watters; No?

Mr Alkan: My letter on the 15th specifies that. And I made sure that I didn't draft this letter on the 14th. I made sure it was drafted on the 15th because I thought, just in case, even though he didn't send it by the close of business 14th, and I was there. I made sure. I said I won't set the letter today, the close of business 14th, I'll send it on the 15th, there was - - -

Mr Watters: The 12th was a public holiday, have I got that right?

Mr Alkan: I can't recall but it could be.

Mr Watters: So, on the 14th he sends the telephone by registered post, that's correct, isn't it?

Mr Alkan: No, it's very clear, sir, that he sent this malware on the 14th. We received no phone. I was there the close of business on the 14th. We'd received no phone to the company.

Mr Watters: That's not my question. I said to you it's true, isn't it, that on the 14th he sent the phone via registered post?

Mr Alkan: No, that's not correct.

Mr Watters: All right - - -?

Mr Alkan: We were there on the 14th, waiting.

Mr Watters: I'm sorry, excuse me a moment.

Commissioner: That's not the question you were asked?

Mr Alkan: Sorry, Commissioner.

Commissioner: You were asked if he sent it on the 14th?

Mr Alkan: No, Commissioner, he did not send it on the 14th. We received - - -

Commissioner: How do you know that?

Mr Alkan: He sent an email to the company with malware, a virus.

Commissioner: Forty-seven and 49 - - -?

Mr Alkan: And we've attached a copy of that.

Mr Watters: Let me take you to page 49 of the court book?

Mr Alkan: Forty-nine. Yes.

Mr Watters: You'll see there an Australia post tracking device, tracking notice and receipt which is dated the 14th and it was sent to your client, that is the respondents, on that date, the 14th, then after which he was accused of trying to transmit malware?

Mr Alkan: I'm looking at the receipt - - -

Mr Watters: Have you never seen that before?

Mr Alkan: On the 49th(sic). No, it - - -

Mr Watters: Why not?

Mr Alkan: I can't see – I can't see a – is there somewhere that it's addressed to the company just confirming that this is the phone being sent to the company?

Mr Watters: Well, it's a tracking receipt. Do you think he sent a tracking receipt from something else to the company when he's been asked to return the phone?

Mr Alkan: No. What I'm saying is, there's nothing to – because we were there and no phone had been received on the 14th. It is showing this, and I'm just asking whether it's addressed to Companion Systems, the company.

Commissioner: Well, that's the applicant's evidence?

Mr Alkan: That's the applicant's evidence, okay. I can't confirm if that is – that's correct or not because we had not received that on the 14th. And I wouldn't – I wouldn't understand why he would wait till

> the very last day at 12.56 on the 14th after being provided one week, when you've just mentioned that he wanted just a further 24 hours. So, he's been given one week and you said he just wanted 24 hours, so I'm a little bit perplexed by that.
>
> Mr Watters: Wait on. The additional request was made on the 9th. That's the day he was terminated according to you. The 10th is a Saturday. The 11th is a Sunday. The 12th is a public holiday. The 13th is – on his evidence he's still completing the transfer of his data and setting his new phone, and then he sends - - -

**[180]** On 15 June 2023, Mr Alkan sent Mr Camenzuli a letter entitled "Separation of Employment by way of Summary Dismissal" at [59]. According to Mr Alkan's evidence, this letter noted the following:

- the smartphone had not been returned by the stipulated deadline;
- Mr Camenzuli had continued to attempt to contact and harass staff;
- Mr Camenzuli had attempted to send the Respondent malware;
- Mr Camenzuli had factory reset the laptop, and in so doing had wiped it of the Respondent's intellectual property; and
- Mr Camenzuli was engaging in a spiralling and escalating course of serious misconduct against the Respondent.

**[181]** The letter dated 15 June 2023 does not suggest that Mr Camenzuli was harassing staff, nor does it state that Mr Camenzuli was engaging in a spiralling and escalating course of serious misconduct against the Respondent. This evidence is simply made up.

**[182]** On 27 September 2023, Mr Alkan sought an independent examination of the company laptop by Mr Gabriel Acosta, a self-employed IT professional with over 20 years' experience. 29. Mr Acosta's report:

- confirms that Mr Camenzuli appears to have reset the company laptop around midday on 8 June 2023; and
- affirms that it was modified on 14 June 2023 which is when the laptop was reviewed by Mr Nay.

**[183]** The report provided the following advice:

> "…In my opinion the computer was reset on the 8/06/23. There are two ways in which this can be done. A person can reset their settings through Windows, or the user can reset the computer from initial boot up and pressing a function key."

**[184]** Mr Alkan decided it was necessary to include the following opinions of Mr Camenzuli in his witness statement:

- "prior to this occasion, I found him to be generally amenable and competent in his role and dealings";
- "I noticed that when discussing matters relating to him personally, such as the possible restructuring, his behaviour being called into question, or where he otherwise held strong views, he had a tendency to become quite vocal and stubborn";
- "Throughout the course of these events, I also found that the Applicant held a rather high opinion of himself and his professional abilities. He would often rely upon this self perceived superiority to conflict and denigrate with the views of others."; and
- "I experienced this first hand, for example where he would regularly seek to undermine me by appealing to the Respondent's management "behind my back", despite being expressly instructed not to do so on multiple occasions."

**[185]** Mr Alkan's in-person dealings with Mr Camenzuli were, as it has earlier been stated, at a café where he was being informed he was being considered for redundancy, and in the second meeting, dismissed and warned of theft.

**Evidence of Mr Terry Nay**

**[186]** Mr Nay is the Operations Manager of the Respondent. Mr Nay stated he was not directly involved in the processes surrounding the conclusion of Mr Camenzuli's employment but considered himself to be broadly familiar with events as they occurred, and provided the following context regarding his own experiences so far as they were relevant.

**[187]** Mr Nay stated that on 12 June 2023, after Mr Camenzuli had been dismissed, Mr Camenzuli contacted him through the Facebook Messenger app. They spoke for 12 minutes on 12 June 2023. Mr Nay considered that during that call, Mr Camenzuli seemed notably aggrieved and agitated regarding his circumstances, but no more than anyone who has just been let go. Mr Camenzuli stated he could not believe it and did not understand why it was happening.

**[188]** Mr Nay stated Mr Camenzuli confessed to having reset the devices. He did not justify it to Mr Nay, nor did Mr Nay challenge him, as the damage had been done. Mr Nay reported it to management the next day.

**[189]** Mr Camenzuli asked him to access the office computer data system (OneDrive) to retrieve or delete various documents and files which he said were personal in nature. Mr Nay asked him to email exactly what he wanted. Mr Nay wanted this to go through management before actioning. To this last point, Mr Nay advised him that he would need to make the request in writing to management.

**[190]** The two messaged each other on 13 June 2023; those messages are produced at [56] and [57].

**[191]** In cross-examination, the following evidence was given:

Mr Watters: I'm instructed that you're known as a stickler for the rules around the company, would you agree with that?

Mr Nay: I follow the rules.

Mr Watters: I'm told that you're someone that plays with a straight bat, if you'll forgive the colloquialism. Do you know what that means?

Mr Nay: I think so.

Mr Watters: Well, you're a straight up, honest guy and you'll always follow the policy and the procedure and do what's right. That's what I'm suggesting to you?

Mr Nay: That's my intent, yes.

Mr Watters: And it's your practice, do you agree with that?

Mr Nay: Yes.

Mr Watters: Okay. So if someone was going to try and get around the rules they probably wouldn't come to Terry Nay, would they?

Mr Nay: Probably not.

Mr Watters: If someone had been with the company 14 years and knew Terry Nay and his reputation, they wouldn't come to Terry Nay and say, 'Can I get around the side door to do A or B', that's not - that's not what someone would do, right?

Mr Nay: No.

Mr Watters: No. If someone came to you they'd know that you would always do the right thing, that's right, isn't it?

Mr Nay: Yes.

Mr Watters: And that if management had to be contacted or it needed management approval, that's where you'd go, that's right, isn't it?

Mr Nay: That's right.

Mr Watters: Okay. Now, at paragraph 9, it's on page 2 of your statement, page 277 of the court book, you tell us there's a phone call from the applicant, James Camenzuli, to yourself and that during that phone call you noted

that he was aggrieved and agitated regarding the circumstances, you see that?

Mr Nay: Understandably.

Mr Watters: And you say ‘understandably’, don’t you?

Mr Nay: Yes.

Mr Watters: Because - well, you tell us why, why was it understandably?

Mr Nay: Because he’d just been dismissed and that’s a pretty tough thing to hear, to have happen.

Mr Watters: Right. Especially in the case of someone that’s been 14 years with the company, right?

Mr Nay: Yes.

……

Mr Watters: Okay. At paragraph 10 you say, ‘He confessed to having reset the devices’, you see that?

Mr Nay: Yes.

Mr Watters: What actually happened was he told you, ‘Well, I’ve reset the laptop to factory settings’, that’s what he told you, wasn’t it?

Mr Nay: Pretty much, yes.

Mr Watters: Okay. And you say that, ‘He didn’t justify that to me, nor did I challenge it’, see that in your evidence?

Mr Nay: That’s right.

Mr Watters: Well, could I suggest to you, while he might not have justified it, he told you that he had a range of personal data on that laptop, bank accounts, photos, family issues, information about debts and that he wanted to remove that before the laptop went back to the company, he told you that, didn’t he?

Mr Nay: He might have. As soon as he said he wiped it, my mind went into that’s - what are the consequences of that and I was thinking about that.

Mr Watters: Okay. And tell me, what were the consequences?

Mr Nay: What were the consequences?

Mr Watters: Yes?

Mr Nay: I passed that information back to management.

Mr Watters: Okay. But, ultimately, his action in returning the laptop to factory settings and removing his own personal data, that didn't damage the laptop, did it?

Mr Nay: Physically, no.

……

Mr Watters: Okay. He asked you, didn't he, you confirm this in your affidavit, at paragraph 11, he wanted to get some material off the One Drive, he said it was material of a personal nature, you recall that?

Mr Nay: I do.

Mr Watters: And you said to him, 'Mate, I'll need management', or words to this effect, 'I'll need management approval, put that to me in writing and I'll see what I can do', words to that effect?

Mr Nay: That's correct.

Mr Watters: That's right, isn't it?

Mr Nay: Yes.

Mr Watters: And, indeed, you went to management, didn't you?

Mr Nay: That's right.

Mr Watters: And you told them, 'I've had confirmation from James, the laptop has been returned to factory settings, he's cleaned it', or words to that effect, right?

Mr Nay: Yes.

Mr Watters: Right. Now, when you said to him, 'Well, put it to me in writing what you want', he, in fact, did put it in writing, didn't he? The following day he sent you an email which set out, 'I want this, this and this', right?

Mr Nay: That's right.

Mr Watters: And the things he wanted were, essentially, personal items, you agree with that?

Mr Nay: I do.

Mr Watters: There was stuff about his personal development, stuff about his photography, do you agree with that?

Mr Nay: I do.

Mr Watters: Did you see any of that data?

Mr Nay: I didn't look at it.

Mr Watters: You didn't look at it, but you identified that it was there?

Mr Nay: I knew it was there.

Mr Watters: Was it returned to him?

Mr Nay: No.

**[192]** With respect to how long it would take the Respondent to set a laptop back up, Mr Nay gave the following evidence:

Mr Watters: Okay. At paragraph 19 you tell us, in respect of the laptop device, that:

*Data had been lost, including, vitally, the various technical and access configurations which are complex in nature and otherwise time consuming to set them back up.*

Right?

Mr Nay: Yes.

Mr Watters: Did you draft that?

Mr Nay: Did I draft that?

Mr Watters: Yes, did you draft this statement?

Mr Nay: No.

Mr Watters: Okay. So you sat down and worked with someone, or you put down some instructions and the statement was prepared and sent back to you, or just talk me through that?

Mr Nay: The statement was sent to me and I did modify some of it, but that one was whatever was on there, I don't know now.

Mr Watters: For example, can I just confirm this, where you assisted me earlier, at paragraph 9, telling us that the applicant seemed notably aggrieved and agitated regarding his circumstances, did you modify that to identify that, let's say, 'notably aggrieved', that is that you understood what was going on?

Mr Nay: Yes, I modified that one.

Mr Watters: Right. And this one, where we just were, I'm sorry to jump around, paragraph 19, tell me if I've got this wrong, but the position is this, isn't it? Mr James Camenzuli returned the laptop to the factory settings. You may or may not know how the laptop was returned to the company, but it was handed, as it turns out, to Mr Alkan. And, as you've told us, subject to the backup on the system, on the corporate systems, the laptop can be reconfigured and put back into operation as needed. That's right, isn't it?

Mr Nay: Whatever was on the laptop isn't in a backup somewhere else, it was only on that laptop.

Mr Watters: Okay. So can I confirm this, that there are things then on the One Drive that weren't on the laptop, that is, personal things belonging to Mr Camenzuli, is that correct?

Mr Nay: Correct.

Mr Watters: Okay. You tell us, at paragraph 20, that subject to the applicant's resetting or wiping or cleaning, whatever we might call it, it would take time to reset and reconfigure the device, you agree with that, don't you?

Mr Nay: Yes.

Mr Watters: How long?

Mr Nay: To set it back to something usable, you need about half a day to try and put it back in any application settings that may have existed on there that we had for clients, I don't know because I don't know what they were.

**[193]** In cross-examination, Mr Nay confirmed that there was no evidence of any illicit material, pornography, or contracting with another company outside of work on the laptop.

**The Respondent's Submissions**

**[194]** The Respondent acknowledged that Mr Camenzuli was dismissed on 9 June 2023. The Respondent submitted the dismissal was not an unfair dismissal as it was initially a case of a genuine redundancy that became a summary dismissal.

**[195]** The Respondent submitted that throughout the early half of 2023, the Respondent became increasingly aware of economic headwinds and market conditions which were beginning to affect the commercial viability of the business. At the start of June 2023, the Respondent performed an operational review, and reluctantly concluded that Mr Camenzuli's position was potentially redundant as part of a restructure in response to these emerging concerns.

**[196]** Once this was discussed with its external HR Consultant, the Respondent immediately commenced consultation with Mr Camenzuli as a potentially affected employee.

**[197]** The Respondent submits that as a gesture of goodwill in recognition of Mr Camenzuli's valued history of service, the Respondent and Mr Camenzuli agreed on 7 June 2023 to consider a voluntary redundancy package. Mr Camenzuli expressed interest and further discussions took place to determine the potential terms of such a package.

**[198]** It was submitted that Mr Camenzuli sought to deliberately circumvent Mr Alkan and the proper HR process by appealing to senior management.

**[199]** On 9 June 2023, the Respondent came to the conclusion that, pending all company property being returned, Mr Camenzuli's position would be made redundant.

**[200]** The Respondent preferred to categorise the separation as a redundancy pending Mr Camenzuli's full return of all company property, however in the event Mr Camenzuli refused to hand over company property the Respondent reserved the right to label the separation as a dismissal. Accordingly, the Respondent instructed Mr Alkan to attend the meeting and to inform Mr Camenzuli of this outcome.

**[201]** At the meeting of 9 June 2023, Mr Camenzuli refused to return the phone. The meeting concluded. Later that afternoon, the Mr Alkan emailed a letter to Mr Camenzuli entitled "Separation of Employment". The letter repeated the above assertions of the Respondent and reiterated that the Respondent would terminate Mr Camenzuli instead of making him redundant if he did not return the smartphone by 14 June 2023. The letter also threatened to refer Mr Camenzuli to the police.

**[202]** Mr Camenzuli persisted in emailing Mr Killick and Mr Matthew Camenzuli.

**[203]** Mr Camenzuli performed a factory reset on the laptop in advance of the 9 June 2023 meeting. It was submitted that it remains open to reasonably conclude that the factory reset was due to potentially incriminating or inappropriate material. I note, however, that no questions were put to Mr Camenzuli in cross-examination of this nature and the submission by the Respondent is inappropriate to make.

**[204]** Mr Alkan emailed a final letter to Mr Camenzuli entitled "Separation of Employment by way of Summary Dismissal" informing Mr Camenzuli that he was summarily dismissed for the delay in returning the phone, accusing Mr Camenzuli of sending the Respondent malware (despite this being untrue), attempting to contact staff and factory resetting the laptop.

**[205]** The Respondent maintains that Mr Camenzuli was unreasonable in "delaying the phone's postage" despite the Monday being a public holiday. The Respondent maintains that the time the Respondent had to undertake to reset the devices for usage is a significant detriment which justifies the summary dismissal.

**[206]** The Respondent asserts that the refusal of management to engage with Mr Camenzuli and directing Mr Alkan to direct Mr Camenzuli to only address Mr Alkan was reasonable due to the "modest size of the employer".

**[207]** The Respondent submits that Mr Camenzuli was summarily dismissed due to his "clear pattern of belligerent behaviour" and formatting the company laptop and phone, and requests the application be dismissed.

**Respondent's closing submissions**

**[208]** The Respondent submitted that the application ought to be dismissed. The Respondent referred to its earlier submissions, but wished to address the following matters that arose at hearing.

*Mr Camenzuli's use and failure to return the company devices*

**[209]** The Respondent maintained that, to whatever extent this personal use was permitted as a privilege, this use was not a right, and the devices remained entirely company property, subject to direction and use as the Respondent saw appropriate. It was submitted that Mr Camenzuli appeared to have 'abused this privilege' by have personal banking, personal files and other private content on the devices.

**[210]** It was submitted that Mr Camenzuli could have owned a personal mobile phone, or if there was any hardship in obtaining a phone at short notice, he could have obtained one for $300.

*Damage sustained to the company devices*

**[211]** It remains the Respondent's consistent position that the overwhelming causes of the summary dismissal was the damage sustained to the data and information on the company laptop and company phone assigned to Mr Camenzuli. It was submitted that Mr Camenzuli has made no apologies in admitting to having caused the damage to the devices but has attempted to justify his conduct primarily with the goal of protecting his personal information.

**[212]** It is submitted that this position cannot be sustained as being in good faith upon a full view of the circumstances. It was submitted that if Mr Camenzuli was acting in good faith, the phone would have been ready to provide either in person at the Friday meeting, or at the absolute latest, first thing in the post on the Monday morning.

**[213]** Mr Killick provided evidence to the effect that:[19]

- the devices both passively collected useful business information over time such as call logs, records or texts or communications with clients, and other such metadata; and
- these records are vital to the business, especially with regard to client management in being able to refer to previous correspondence and messages; and
- due to its nature, such data is only stored on the devices in question, and cannot be backed up to the server or cloud;
- consequently, all of this information was lost when Mr Camenzuli intentionally wiped the devices.

**[214]** Mr Nay provided similar evidence regarding the isolated nature of certain types of data which would have been lost in the event of the local machine being reset. Mr Nay also noted that it would take approximately half a day of work alone to restore the laptop to proper business functionality.

**[215]** Mr Killick also noted that the phone had not only been returned in a factory reset state, but it had essentially been "bricked" to the extent that it had to be returned to the Telstra retailer for repair. For these reasons, the Respondent notes specifically that, in resetting the devices, Mr Camenzuli:

- caused materially valuable company data to be irreparably lost; and
- caused the Respondent to spend additional time and resources that it otherwise would not have; and
- reset the devices in an excessive and further damaging manner.

**[216]** The Respondent notes established precedent such as *Chalk v Ventia Australia*[20] or *Hyde v Secro Australia*[21] to the effect of supporting its reliance upon the various matters which would emerge subsequent to Mr Camenzuli's dismissal, such as that of the wiped state of the laptop.

*Reasonableness of the delegation of the HR duties to Mr Alkan*

**[217]** It was submitted that given the size of the Respondent and how busy Mr Killick was, it was reasonable in all of the circumstances for the redundancy communication to have been outsourced to Mr Alkan, and Mr Camenzuli's attempts to bypass him were unreasonable and inappropriate.

**Consideration**

**[218]** A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[22]

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer act, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences

> for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

**[219]** I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.[23]

***s.387(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)***

**[220]** When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

> "In its context in s.170DE(1), the adjective 'valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1) At the same time the reasons must be valid in the context of the employee's capacity or conduct or based on upon the operational requirements of the employer's business. Further, in consideration whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly'."

**[221]** However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[24]

**[222]** Why and when was Mr Camenzuli dismissed*?*

**[223]** Mr Killick and Mr Alkan have both given evidence that they consider Mr Camenzuli was dismissed on 9 June 2023. Mr Alkan considers it was a summary dismissal with the potential for a conversion, of sorts, to be rebadged as a redundancy later, if Mr Camenzuli returned the phone.

**[224]** Mr Killick's evidence is that the dismissal was a redundancy on 9 June 2023.

**[225]** The Respondent's evidence is that by 5 June 2023, there was some consideration as to whether Mr Camenzuli might be made redundant. There was no definite decision.

**[226]** Mr Killick's evidence is that the business was conducting a review by early June 2023. There was no material evidence of this review; no report prepared, no emails sent. It seems that the review might have simply been discussions between Mr Killick and Mr Matthew Camenzuli. Mr Killick's evidence is that Mr Alkan did not conduct a review.

**[227]** Yet, in the correspondence sent by Mr Killick to Camenzuli on 5 June 2023, drafted by Mr Alkan, Mr Camenzuli was told the following:

> "As discussed, we are currently having one of our consultants reviewing business operations in light of current market trends and industry downturn.
>
> The intension (sic) is to meet and consult staff to understand their role in the organisation."

**[228]** This ought to have been known by Mr Killick to be untrue. It ought to be known by the author of the email, Mr Alkan to be untrue. Further, the meeting between Mr Alkan and Mr Camenzuli was not one to consult staff and understand their role in the organisation; Mr Alkan was tasked with presenting to Mr Camenzuli a proposed voluntary redundancy. Not a single other employee had a meeting with Mr Alkan.

**[229]** I find it incredulous that Mr Alkan considered it appropriate to meet with Mr Camenzuli at his local café to inform him that the Respondent was considering making him redundant, would offer him an extra $5,000 if he'd release the Respondent from all claims, and was obligated to return company items two days later. For an employee of Mr Camenzuli's standing, having 14 years' service and being the first cousin once removed of the owner of the business, I consider that it was callous and unprofessional.

**[230]** I am not surprised that Mr Camenzuli was shocked to learn of the proposal and remonstrated about how he might need a reasonable period of time to hold onto the company-issued mobile phone to be able to get his life in order if he was required to return the phone. Mr Alkan's evidence of Mr Camenzuli's alleged hostility was uncomfortable to hear; Mr Alkan made out he was one of the worst people he had ever dealt with in his 18 years of industrial relations experience. He had not, however, saw fit to include such evidence in his witness statement to allow Mr Camenzuli to rebut his oral evidence.

**[231]** Mr Camenzuli was presented with a deed executed by the Respondent on the afternoon of 7 June 2023. Nowhere in any of the written communication issued to him does it instruct him that he is only permitted to communicate with Mr Alkan.

**[232]** The deed expressly provides for Mr Camenzuli to obtain independent legal advice. Yet Mr Alkan's email late that afternoon requested he sign and return it that same day. Where Mr Alkan's evidence suggests that it was a draft deed, it was not. There was no suggestion to Mr Camenzuli that the terms could be negotiated. He was requested to sign it and return it that day, despite the terms within permitting him to review and obtain advice.

**[233]** He had also been instructed by Mr Alkan in the meeting of 7 June 2023 to promptly purchase a mobile phone so that he could return the phone on 9 June 2023 if he was to be made redundant.

**[234]** It is not surprising at all that Mr Camenzuli sought to contact Mr Killick and Mr Matthew Camenzuli to inquire about what was going on. I consider it reasonable in all of the circumstances for him to have made inquiries as to the 'hired gun' in Mr Alkan; whether he did, in fact, have authority to discuss matters with him, why the urgency, and to essentially speak with his direct manager.

**[235]** Mr Camenzuli was rebuffed in his phone call that evening with Mr Killick. Mr Killick's evidence in this matter is entirely unsatisfactory. He had worked with Mr Camenzuli for over four years and Mr Camenzuli was the only employee being considered for redundancy. It is not as though there were scores of people at varying levels of seniority for whom Mr Alkan had to consult with. Mr Killick's rebuffing of Mr Camenzuli was rude, offensive and insincere. In evidence to the Commission, he stated that he would be happy to speak with Mr Camenzuli later, but when pressed by me as to what that meant, it was clear that he might be prepared to give him a reference once he had been dismissed. He did not wish to speak with Mr Camenzuli at all about the questions he had regarding the discussions with Mr Alkan and the prospect of being made redundant two days later.

**[236]** Mr Camenzuli could not gain an audience in Mr Matthew Camenzuli either. He made a perfectly reasonable request to ask for a return call to discuss how he could get access to remove all personal effects and applications from the company-issued laptop. In evidence, we learned that Mr Camenzuli was nearby, having travelled to the Gold Coast on 7 June 2023 in preparation for a client meeting on 8 June 2023. He did not see it fit to return Mr Camenzuli's call.

**[237]** In oral evidence we learned that Mr Camenzuli was busy on 8 June 2023, purchasing a mobile phone and SIM card, resetting the laptop to factory reset, and attempting to obtain legal advice. Meanwhile, Mr Killick and Mr Matthew Camenzuli were approximately 15 minutes away and chose not to reach out to Mr Camenzuli to discuss the proposed redundancy.

**[238]** I consider the failure of Mr Killick and Mr Matthew Camenzuli to reach out to Mr Camenzuli to be spectacularly callous. Mr Killick's evidence that he skim read Mr Camenzuli's email of 8 June 2023 before forwarding it to Mr Alkan is disrespectful and unforgivable.

**[239]** I am satisfied that Mr Camenzuli held concerns in respect of the laptop and the private information he had stored on it for many years, with permission. He was, at this time, locked out and unable to extract the personal information that he would reasonably require. I understand the Respondent's evidence is that he should have returned the laptop and trusted the Respondent to return any personal information to him.

**[240]** As is evident by the Respondent's conduct, it could not even return to him benign personal information stored on its OneDrive following his dismissal. Mr Camenzuli's request was reasonable but not met by the Respondent. He had asked for a way forward, had been ignored, and in my view, quite reasonably, reset the laptop to factory settings.

**[241]** Much has been made out of the fact that he reset the laptop to factory settings. On the evidence before the Commission, it takes less than half a day to restore relevant applications and systems. If there has been any proprietary information lost, in my view, the Respondent has itself to blame, and I do not consider that Mr Camenzuli acted in any way maliciously or with wilful intent to cause harm to the Respondent. In my view, he was entitled to protect his personal interests in the face of obstinance from the Respondent. I have earlier determined that I do not accept that Mr Camenzuli did or likely had any illicit activity, pornography or evidence of relations with competitors on the laptop.

**[242]** When the executed deed was sent to Mr Camenzuli late in the afternoon of 7 June 2023, Mr Alkan stated that as an alternative to the voluntary redundancy, the Respondent will consider

his feedback and meet with him on 9 June 2023 to discuss possible options and the formal outcome. That reads to me that there would not be a decision made by 9 June 2023 to make his position redundant. It would, in all of the circumstances, be too short a period of time, especially when the Respondent had not made a definite decision to make him redundant. Discussing possible options on 9 June 2023 means just that; there would be discussions about possible options.

**[243]** On the morning of 8 June 2023, Mr Camenzuli received email correspondence from Mr Alkan confirming that the Respondent had not made a definite decision to make him redundant. Yet in the same letter he was informed that between the meeting of 7 June 2023 and 9 June 2023, the Respondent would consider his feedback.

**[244]** I accept Mr Camenzuli's evidence that he did offer, in the 7 June 2023 meeting, a pay reduction to stay with the business, and I do not accept Mr Alkan's evidence on this point. This offer was never relayed to Mr Killick or Mr Matthew Camenzuli.

**[245]** The 8 June 2023 communication from Mr Alkan is incredibly disturbing to read; the Respondent may make Mr Camenzuli redundant on 9 June 2023, but if he failed to return company property that same day, he may be summarily dismissed. It is one of the most bizarre things I have ever read.

**[246]** The Respondent's evidence as to what was occurring over 7, 8 and 9 June 2023 is a hysterical exaggeration of Mr Camenzuli's attempts to reasonably speak with Mr Killick or Mr Matthew Camenzuli or have them respond. On one hand, when pressed by me, Mr Killick's evidence is that he was satisfied by 8 or 9 June 2023 that Mr Camenzuli did not want to retain the company-issued telephone for all of time, but wanted more time. Yet, one of the reasons Mr Killick concluded that the employment must come to an end on 9 June 2023 is because Mr Camenzuli's conduct was being 'increasingly unstable and he was not complying with the Respondent's various directions.'

**[247]** Mr Camenzuli's email to Mr Killick and Mr Matthew Camenzuli on 8 June 2023 was entirely reasonable and he asked appropriate questions. He told them that he had been offered a voluntary redundancy, or to meet on Friday to discuss redeployment within the business. Neither recipient sought to respond and suggest that redundancy might actually occur on Friday.

**[248]** Further, Mr Camenzuli's email makes it clear he had sought an extension of time to obtain legal advice and time to move information onto a new phone. All reasonable requests. Again, he was ignored and informed that if he further requested an extension, it would be deemed harassment.

**[249]** He asked his direct manager and owner of the business if that was correct and was Mr Alkan correct in that no extension would be granted to him. Instead, he was ignored by them. The Respondent, in my view, capriciously and spitefully ignored Mr Camenzuli. It is not entitled to wave him away like an annoying child and say to him only deal with Mr Alkan. It might be a lawful course of action, but it is not a reasonable course of action.

**[250]** Mr Camenzuli was not unstable, nor was he engaging in harassing behaviour.

**[251]** As I understand it, if Mr Camenzuli had returned the phone on 9 June 2023, he would have been made redundant because Mr Killick considered that his role was becoming unnecessary and there were no suitable opportunities for redeployment. If that had been necessary to determine, which it is not on account of the summary dismissal, I do not consider I would have been satisfied that all of the criteria in s.389 of the Act would have been met. There are significant flaws in the Respondent's evidence on all three limbs of s.389, and it would be the Respondent's burden to satisfy the Commission that all of the considerations at s.389 had been met.

**[252]** There is presently no evidence that the Respondent no longer required Mr Camenzuli's job to be performed by anyone because of changes in the operational requirements of the enterprise other than for Mr Killick's evidence as to how he felt on 9 June 2023 which is unfortunately infected by his evidence in relation to his feelings in respect of Mr Camenzuli's conduct.

**[253]** If there was an examination required as to a relevant award applying, and if one did apply, the consultation objections would not have been satisfied. Firstly, because the consultation obligations require the employer to have made a definite decision to make major changes, and consultation must then follow. With no definite decision made, it seems, until the morning of 9 June 2023, consultation did not follow. Further, the consultation period would have been entirely inadequate given Mr Camenzuli's length of service and seniority.

**[254]** The redeployment considerations would equally not be satisfied given Mr Alkan's failure to report to Mr Killick and Mr Matthew Camenzuli the offer made by Mr Camenzuli to take a pay reduction, and his written communication that he expected a meeting of 9 June 2023 to canvass redeployment opportunities. That is before we hear evidence as to whether the Respondent has any associated entities, and without Mr Matthew Camenzuli giving evidence, that remains unknown as to his various business interests.

**[255]** The Respondent's reason for the dismissal on 9 June 2023 is curiously not aligned between the evidence given by Mr Killick and Mr Alkan. Mr Killick considers the dismissal on 9 June 2023 was a redundancy; Mr Alkan says it was a summary dismissal because the phone was not returned. They both gave emphatic evidence that the employment ended that day.

**[256]** The Respondent can't have a bob each way. The letter to Mr Camenzuli of 9 June 2023, is as equally bizarre as the letter of 8 June 2023. If Mr Camenzuli's employment ended on 9 June 2023, it ended for a particular reason. If the phone was returned by 14 June 2023, the Respondent would be entitled to exercise its discretion to make a payment to Mr Camenzuli equal to the redundancy payment, if it wished, but it does not change what happened on 9 June 2023.

**[257]** So, we come back to why was Mr Camenzuli dismissed on 9 June 2023? He was dismissed because he did not return the phone and Mr Killick incredulously considered that he was engaging in harassing and unstable conduct.

**[258]** It had nothing to do with the condition of the laptop, because the termination was communicated during the meeting at the café. The Respondent had not reviewed the condition of the laptop at that point in time.

**[259]** I will reflect on all other post-9 June 2023 conduct in my considerations in s.387(h) of the Act.

**[260]** Having determined that the reason for the dismissal on 9 June 2023 was because Mr Camenzuli did not return the phone on that date, and he was considered to be engaging in harassing and unstable conduct, I am not satisfied that there was a valid reason for the dismissal.

**[261]** For all of the reasons given above, I consider it was reasonable for Mr Camenzuli to request an extension of time in respect of the return of the mobile phone. Mr Killick was satisfied by 8 June 2023, or the morning of 9 June 2023 that Mr Camenzuli did intend on returning it and did not wish to retain it for all of time.

**[262]** I do not accept that it was a lawful and reasonable instruction given by the Respondent for Mr Camenzuli to return the mobile phone by 12:00pm on 9 June 2023 on account of the length of time he had used the company-issued mobile phone for personal use and the actions he needed to take to cut-over and attend to multi-factor identification.

**[263]** I am satisfied that Mr Camenzuli was not engaging in harassing and unstable conduct.

**[264]** Accordingly, I am not satisfied that there was a valid reason for the dismissal.

***s.387(b) – whether the person was notified of that reason***

**[265]** Mr Alkan informed Mr Camenzuli at the meeting of 9 June 2023 that if he did not return the mobile phone, it would be considered theft. He made a phone call to Mr Killick and returned to inform Mr Camenzuli that his employment was terminated and he would receive a letter.

**[266]** It's likely that Mr Alkan informed Mr Camenzuli at that meeting that he was being dismissed for failing to return the mobile phone. He did not inform Mr Camenzuli of the other reason for the dismissal; that the Respondent considered he was engaging in harassing and unstable conduct.

**[267]** In the written communication of 9 June 2023, Mr Alkan then informed Mr Camenzuli the Respondent would then reconsider reclassifying or labelling the dismissal as a redundancy if he returned the mobile phone by 14 June 2023. The letter included the Respondent considering a course of action to contact the police for theft of company property, even though Mr Killick's evidence is that he was aware that Mr Camenzuli was not going to retain the phone.

**[268]** The letter of 9 June 2023 is incredulous and ridiculous. I am not satisfied that Mr Camenzuli was notified of all of the reasons for the dismissal.

***s.387(c) – whether there was an opportunity to respond to any reason related to the capacity or conduct of the person***

**[269]** Mr Camenzuli was attempting to communicate with his employer but he was being ignored and instead forced to deal with Mr Alkan. I have found that Mr Alkan did not pass on all of the Mr Camenzuli's inquiries or suggestions.

**[270]** Mr Camenzuli was never informed that he was considered to be harassing Mr Killick or Mr Matthew Camenzuli. He was never informed in writing that he must not make any attempts to communicate with Mr Killick or Mr Camenzuli.

**[271]** I am satisfied that Mr Camenzuli was requested to return the mobile phone on 9 June 2023, so he was afforded an opportunity to respond in respect of that request.

***s.387(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***

**[272]** 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.

**[273]** There is no positive obligation on the employer to offer an employee the opportunity to have a support person. The Explanatory Memorandum, *Fair Work Bill 2008*, at [1542] states the following:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."

**[274]** In the circumstances, I find that the Respondent did not unreasonably refuse to allow Mr Camenzuli to have a support person present.

***s.387(e) – was there a warning of unsatisfactory work performance before dismissal***

**[275]** The written communication to Mr Camenzuli dated 8 June 2023 informed him that if he did not return the phone at the meeting on 9 June 2023, if he was indeed going to be made redundant on that day, it may warrant summary termination of his employment.

***s.387(f) – whether the respondent's size impacted on the procedures followed and s.387(g) – whether the absence of a dedicated human resource management specialist impacted on the procedures followed***

**[276]** The Respondent had engaged Mr Alkan, a HR Consultant to assist in the redundancy discussions with Mr Camenzuli.

**[277]** The Respondent placed its faith in Mr Alkan in the absence of an internal HR function. I consider the astonishingly poor advice given by Mr Alkan impacted on the procedures followed by the Respondent.

**s.387(h) – other matters**

**[278]** I consider it necessary to have regard for the post-dismissal conduct of Mr Camenzuli, noting the High Court decision in *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21 (4 June 1931), [(1931) 45 CLR 359 at pp. 373, 377–378] (*Shepherd*). *Shepherd* is authority for the proposition that facts justifying dismissal, which existed at the time of the dismissal, should be considered, even if the employer was unaware of those facts and did not rely on them at the time of dismissal.

**[279]** I wish to make it clear that in examining the post-dismissal conduct of Mr Camenzuli it will be necessary to traverse the post-employment conduct of the Respondent and Mr Alkan, but in doing so, it shall bear no weight on my consideration at s.387(h) of the Act. My only consideration with respect to s.387(h) is whether any post-dismissal conduct of Mr Camenzuli adds to the consideration as to whether the dismissal was harsh, unjust or unreasonable.

**[280]** Following the 9 June 2023 meeting and the letter issued to Mr Camenzuli, while he was threatened with being reported to the police for theft (all the while Mr Killick considered he would return the phone after he had finished doing what he needed to do), Mr Camenzuli was informed that the Respondent was *considering* allowing him until COB 14 June 2023 to return the mobile phone.

**[281]** Mr Camenzuli communicated by email late that night to Mr Killick and Mr Matthew Camenzuli, requesting they advise him by COB 12 June 2023 if the company has, indeed considered and allowed him to return the phone by COB 14 June 2023. The way it had been put by Mr Alkan in the 9 June 2023 letter was equivocal, so Mr Camenzuli was looking for a concrete answer. None was provided because Mr Killick and Mr Camenzuli failed to respond to him. When the email was forwarded to Mr Alkan and he communicated with Mr Camenzuli on 10 June 2023, he didn't answer Mr Camenzuli's reasonable question either.

**[282]** Not even Mr Camenzuli's notation of how he had been a loyal employee and had not been afforded a farewell could elicit a response from Mr Killick or Mr Matthew Camenzuli.

**[283]** On 12 June 2023 and 13 June 2023, Mr Camenzuli corresponded with Mr Nay, a notorious stickler for the rules. I am satisfied that Mr Camenzuli was not trying to obtain inappropriate material through the back door; he was aware that Mr Nay would seek approval before releasing any personal information to him. The information he sought was all clearly personal and should have appropriately been provided to Mr Camenzuli. If Mr Killick and Mr Matthew Camenzuli were ignoring him, he appropriately used some ingenuity to request that Mr Nay seek approval on his behalf.

**[284]** The Respondent curiously submitted that Mr Camenzuli harassed several employees at this time. The only evidence is that of Mr Nay, and I consider that Mr Nay's evidence was most helpful to Mr Camenzuli to demonstrate that Mr Camenzuli was not acting inappropriately at all. Mr Nay is to be commended for his fair and balanced evidence.

**[285]** Having not heard back from the Respondent, at around lunchtime on 14 June 2023, Mr Camenzuli attended an Australia Post outlet with his wife. His evidence is that she filmed him placing the mobile phone in the sachet and the phone was sent to the Respondent.

**[286]** Admittedly, beyond COB, Mr Camenzuli sent an email to Mr Killick and Mr Matthew Camenzuli, advising that he had posted the mobile phone by registered post that day, and he noted that he attached the Australia Post tracking number to the email.

**[287]** What happened next is nothing short of shocking. Mr Killick's evidence before the Commission, including after receipt of Mr Camenzuli's witness statement and hard copy of the Australia Post tracking receipt is that Mr Camenzuli sent the Respondent malware in the email of 14 June 2023. Mr Killick repeated it in his witness statement, it was in the Respondent's submissions, it was in the 15 June 2023 letter, and Mr Killick gave oral evidence that Mr Camenzuli had sent malware.

**[288]** Curiously, in oral evidence, Mr Killick stated that he did read the email of 14 June 2023 on 15 June 2023, but considered that it contained malware because of a quarantine notification.

**[289]** How Mr Killick could persist in giving evidence to the Commission on 2 November 2023, when Mr Camenzuli filed his witness statement on 11 September 2023, attaching the Australia Post tracking receipt is beyond comprehension. It only became clear to him in cross-examination, when it was pointed out to him that it had simply been a quarantine notification that he conceded that he had incorrectly assumed it was malware.

**[290]** Mr Alkan gave similar, combative evidence that Mr Camenzuli had sent malware to the Respondent. He gave the following oral evidence on 19 October 2023:

> "No, it's very clear, sir, that he sent this malware on the 14th……"
>
> ……
>
> "He sent an email to the company with malware, a virus."

**[291]** It appears to me that it had not dawned on Mr Alkan to read all of Mr Camenzuli's attachments to his first witness statement. He appeared to me to learn in the witness box that Mr Camenzuli had been to the post office on 14 June 2023 and sent the mobile phone. He was incredibly fixated on the phone not having been received by the Respondent on 14 June 2023, but gave no credit whatsoever to Mr Camenzuli for having sent the mobile phone by registered post on 14 June 2023, informing the Respondent of the fact and as per the Respondent's request attaching a tracking number.

**[292]** In the 15 June 2023 letter sent from Mr Alkan, Mr Camenzuli was accused of sending malware and not providing a tracking number.

**[293]** I am satisfied that Mr Camenzuli did not send malware to the Respondent, and he did send a tracking number. The mobile phone was sent on 14 June 2023 and reached the Respondent one or two days later. In respect of my s.387(h) consideration, the fact that the phone reached the Respondent one or two days late is not material. New South Wales enjoyed a public holiday on 12 June 2023, and there is no guarantee that even if he had sent the phone on 12 or 13 June 2023, it would have reached the Respondent's offices by 14 June 2023.

**[294]** The fact that the phone has been set to factory settings is also not material, despite the Respondent's submissions. Mr Camenzuli had made concerted efforts to request an extension of time to obtain all relevant information from his phone and it had been cut off by Friday, 12 June 2023. He had insufficient time to do everything that was necessary to remove his personal information from the phone, noting that he had, in that short window of time been buying a new phone, a SIM card, corresponding with the Respondent and attempting to obtain legal advice. If the Respondent had provided a reasonable extension to him, as per his request, I am satisfied that he would have obtained the personal information he wished to extract and would have handed the phone to the Respondent without the need to have it set to factory settings.

**[295]** In respect of the laptop being reset to factory settings, again, I do not consider this weighs in favour of inappropriate conduct now known to the Respondent following the dismissal. Much ado has been made of the laptop being reset to factory settings. It is expected that the bulk of any relevant information would be saved on OneDrive. I consider Mr Camenzuli had a suitable reason for having set the laptop to factory settings on 8 June 2023 in anticipation of the meeting on 9 June 2023, and in fact he was told by Mr Alkan to clean it. When he returned home he discovered he could not do so as he was locked out.

**[296]** I do not consider there is any post-dismissal conduct of Mr Camenzuli's that weighs against a finding that the dismissal was harsh, unjust and unreasonable. This includes his communication at 10:41pm on 9 June 2023 which had been labelled by Mr Killick as bitter and unpleasant, but which he accepted in cross-examination was not. I find the communication which was written post-dismissal was courteous and more gracious than the Respondent's reciprocal conduct.

**[297]** I have had regard to Mr Camenzuli's length of service of 14 years and note it was a long period of time.

**Conclusion**

**[298]** I have determined that there was no valid reason for the dismissal.

**[299]** I consider that the Respondent did not inform Mr Camenzuli of all of the reasons for the dismissal.

**[300]** I have determined that Mr Camenzuli was not given an opportunity to respond to all of the reasons for the dismissal, however he was given an opportunity to respond in respect of the instruction to return the mobile phone.

**[301]** There was no unreasonable refusal by the Respondent to allow Mr Camenzuli a support person.

**[302]** Mr Camenzuli was provided a warning in respect of not returning the mobile phone in the event that he was going to be made redundant on 9 June 2023, which he did not know until the meeting of 9 June 2023.

**[303]** The Respondent's enterprise is not small. I note that there was an absence of a dedicated human resource specialist which did impact on the procedures followed, however this is

somewhat mitigated by the specialist advice the Respondent sought to obtain from Mr Alkan. I have not been impressed at all by the advice given by Mr Alkan to the Respondent or his conduct in effecting the dismissal.

**[304]** I determine that Mr Camenzuli's dismissal was harsh, unjust and unreasonable. Having satisfied myself that the dismissal was harsh, unjust and unreasonable, pursuant to s.385(b) of the Act, I find that Mr Camenzuli was unfairly dismissed.

**Remedy**

**[305]** Section 390 of the Act reads as follows:

> "**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.
>
> Note: Division 5 deals with procedural matters such as applications for remedies."

**[306]** Mr Camenzuli is a person protected from unfair dismissal for the Act's purposes and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether he can be reinstated.

**[307]** I am satisfied that it is inappropriate to order reinstatement due to the irrevocable break down of the employment relationship between the parties.

**[308]** I now turn to consideration of compensation.

**Compensation**

**[309]** Section 392 of the Act provides:

"**392 Remedy—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."

*Authorities*

**[310]** The approach to the calculation of compensation is set out in a decision of a Full Bench of Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.[25] That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;[26] *Jetstar Airways Pty Ltd v Neetson-Lemkes*;[27] and *McCulloch v Calvary Health Care* (*McCulloch*).[28]

**[311]** I have had regard to the above authorities, and I have considered the submission of each party.

*The effect of the order on the viability of the respondent*

**[312]** Mr Camenzuli submitted that the Respondent is a large employer with significant resources who used those responses to terminate an employee without grounds and wilful disregard to the law.

**[313]** There is no evidence to suggest that an award of compensation would affect the viability of the Respondent's enterprise.

*The length of Mr Camenzuli's service*

**[314]** Mr Camenzuli had approximately 14 years of service with the Respondent. It is a long period of time.

*The remuneration that Mr Camenzuli would have received, or would have been likely to receive, if he had not been dismissed*

**[315]** Mr Matthew Camenzuli elected against giving evidence in these proceedings and I find it appropriate to draw a *Jones v Dunkel*[29] inference. On Mr Killick's evidence, Mr Matthew Camenzuli did not like his employees working from home, and whilst he had permitted Mr Camenzuli to relocate to the Gold Coast, I consider that if he had been called to give evidence, he would have likely given evidence of his dissatisfaction in having Mr Camenzuli working from home. If I am wrong about that, on account of the Brisbane-based sales employee being permitted to work from home, I consider that there would have been evidence Mr Matthew Camenzuli would have given in respect of the family falling-out that he would have preferred not to have given, and which constituted a reason for the dismissal.

**[316]** I am fortified in this view because of Mr Matthew Camenzuli's failure to show to Mr Camenzuli the courtesy of meeting with him on 8 June 2023 to discuss a proposed redundancy.

**[317]** In the absence of any evidence of a restructuring of the business, there being not a single email put by Mr Killick before the Commission to assist in the Respondent's submissions that Mr Camenzuli alone, as the single employee across the entire business needed to be made redundant, I consider that the proposition of Mr Camenzuli needing to be made redundant in June 2023 was a sham. On the balance of probabilities, I conclude that Mr Matthew Camenzuli wished to remove Mr Camenzuli due to family disputations, and he was to be offered a redundancy with a $5,000 sweetener in exchange for a release not to pursue any claims against the Respondent. Mr Alkan was brought in to execute the dismissal while Mr Killick and Mr Matthew Camenzuli's hands remained clean.

**[318]** I consider that but for the orchestration of the dismissal, which I have found to be unfair, Mr Camenzuli would have remained employed by the Respondent until 31 December 2023, that being a period of 29 weeks. At this point, it is likely the relationship would have deteriorated between Mr Camenzuli and Mr Matthew Camenzuli such that Mr Matthew Camenzuli would have strategically and lawfully removed Mr Camenzuli from the business by way of a settlement, noting that Mr Matthew Camenzuli does not spend a great deal of his time working within the business.

**[319]** At a rate of $2,448.52 per week, I find that Mr Camenzuli would have earned $71,007.08 in those 29 weeks. He would have been entitled to superannuation at the rate of 10.5% up until 30 June 2023, and 11.0% for the period 1 July 2023 to 31 December 2023. That is an amount of:

| | |
|---|---|
| 3 weeks x $2,448.52 @ 10.5% | = $771.28 |
| 26 weeks x $2,448.52 @ 11.0% | = $7,002.77 |
| Total: | = $7,774.05 |

*The efforts of Mr Camenzuli (if any) to mitigate the loss suffered because of the dismissal*

**[320]** Mr Camenzuli properly mitigated his loss by securing new employment which commenced on 28 August 2023. However, the remuneration for the new employment is less than what Mr Camenzuli was receiving during his employment with the Respondent.

**[321]** Mr Camenzuli's salary at this new employment is $105,000.00 gross, plus superannuation, per annum.

*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*

**[322]** In the period between 28 August 2023 and 31 December 2023, when I determine the employment with the Respondent would have ceased, Mr Camenzuli earned 18 weeks' salary at the rate of $105,000 per annum. That is an amount of $36,346.15 gross. He would have been entitled to an amount of $3,998.08 in superannuation.

*The amount of any income reasonably likely to be so earned by Mr Camenzuli during the period between the making of the order for compensation or the actual compensation*

**[323]** This factor is not relevant in the circumstances of this matter.

*Other relevant matters*

**[324]** Mr Camenzuli submitted that the conduct of the Respondent should be met with the harshest response, as it was intentionally contrived and undertaken to deprive Mr Camenzuli financially. I agree that the Respondent's conduct was reprehensible.

**[325]** If Mr Camenzuli had been made redundant by the Respondent, and despite my findings that it would not have been a bona fide redundancy on account of what I consider to be the true reasons for the dismissal, the Respondent was preparing to make the redundancy payment and an amount close to $5,000 tax-free to Mr Camenzuli. That alone would have been an amount near to $35,000 paid tax-free, it would seem.

**[326]** The Commission is unable to award a tax-free payment to Mr Camenzuli and it is not appropriate to try and put Mr Camenzuli in a similar position if he had been provided with a tax-free payment by the Respondent, whether it was lawful or not.

**[327]** On account of Mr Camenzuli doing a very good job at mitigating his loss, finding a job within around 10 weeks, albeit at a lesser rate of pay, the award of compensation payable to Mr Camenzuli is reduced on account of his earnings with his new employer. This rewards the Respondent's improper conduct, however I must ensure that there is not double-dipping.

**[328]** Regrettably, the award of compensation I will make to Mr Camenzuli is less than he would receive if he had been made redundant by the Respondent and if it had taxed his payment as a bona fide redundancy (which I am not satisfied that it is).

*Misconduct reduces amount*

**[329]** I do not consider that Mr Camenzuli engaged in any misconduct either prior to the dismissal or post-dismissal which came to the Respondent's attention. I have already provided my views in respect of the condition of the laptop and the mobile phone.

*Shock, distress etc. disregarded*

**[330]** I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Mr Camenzuli by the manner of the dismissal.

*Compensation Cap*

**[331]** I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the applicant, or to which the applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

**[332]** The high income threshold immediately prior to the dismissal was $162,000.00, and the amount for 26 weeks was $81,000.00. The amount of compensation the Commission will order does not exceed the compensation cap.

*Payment by instalments*

**[333]** No submissions were made by the Respondent that any award of compensation should be made by instalments and I am not satisfied it is appropriate to make an order for payment by instalments.

*Order of compensation*

**[334]** I have determined that Mr Camenzuli would have earned remuneration in the amount of $71,007.08 in wages and amount of $7,774.05 in superannuation.

**[335]** In that same period, Mr Camenzuli has earned an amount of $36,346.15 in wages and an amount of $3,998.08 in superannuation.

**[336]** The award of compensation is therefore $71,007.08 less $36,346.15 = $34,660.93 in wages, and $7,774.05 less $3,998.08 = $3,775.97 in superannuation.

**[337]** The Respondent is to pay to Mr Camenzuli the following amounts within 14 days:

(a) $34,660.93 taxed as required by law; and

(b) $3,775.97 into Mr Camenzuli's superannuation account.

**[338]** An order [PR775128] giving effect to this decision will be published.

**Post Script**

**[339]** My concerns in respect of Mr Alkan and Ms Macallister's conduct in September 2023 in representing to Mr Camenzuli's new employer that Mr Camenzuli had provided his permission for a reference check when he had not clearly had no bearing on my decision in this matter. I do, however, condemn the conduct in the strongest possible terms.


COMMISSIONER

*Appearances*:

*C Watters*, Counsel, with permission, instructed by *R Davenport* of Affinity Lawyers for the Applicant.
*G Adams* of GLR Law, with permission, along with *R Killick*, General Manager for the Respondent.

*Hearing details:*

2023.
Brisbane.
19 October.
2 November.

*Final written submissions:*

28 November 2023.

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[1] Transcript, at PN624.

[2] Transcript, at PN569.

[3] Transcript, at PN549.

[4] *Corporations Act 2001*, s.127(4).

[5] Transcript, at PN2030.

[6] Transcript, at PN570 – 575.

[7] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333; (1995) IR 371, 373.

[8] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[9] *James McCarron v Commercial Facilities Management Pty Ltd T/A CFM Air Conditioning Pty Ltd* [2013] FWC 3034 at [32].

[10] [1959] HCA 8; 101 CLR 298.

[11] Transcript, at PN1763.

[12] Transcript, at PN2025.

[13] Transcript, at PN1961.

[14] Transcript, at PN2288.

[15] Transcript, at PN2074 – 2100.

[16] Transcript at PN1119.

[17] Transcript, at PN923.

[18] Transcript, at PN1281 to 1299.

[19] Transcript, at PN2129-2130 & PN2427-2428.

[20] [2023] FWC 121 at [88]; citing *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21.

[21] [2018] FWCFB 3989 at [69]-[71]; citing earlier cases such as *Lane v Arrowcrest Group P/L* (1990) 43 IR 210 at 237-238.

[22] (1995) 185 CLR 410, [465].

[23] *Sayer v Melsteel* [2011] FWAFB 7498 at [20].

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

[25] (1998) 88 IR 21.

[26] [2013] FWCFB 431.

[27] [2013] FWCFB 9075.

[28] [2015] FWCFB 2267.

[29] [1959] HCA 8; 101 CLR 298.