



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Richard Carmody**

v

**Bureau Veritas Minerals Pty Ltd**

(U2024/11718)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 29 JANUARY 2025

*Application for an unfair dismissal remedy – summary dismissal – mining services industry – project co-ordinator – alleged data manipulation – whether valid reason – prior counselling – procedural fairness – proportionality – failure to dismiss on notice – dismissal otherwise fair – compensation ordered*

[1] Mr Richard Carmody (Mr Carmody or the applicant) has applied to the Commission under s 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy in relation to his dismissal by Bureau Veritas Minerals Pty Ltd (Bureau Veritas, the employer or the respondent) on 13 September 2024.

[2] Mr Carmody claims that his dismissal was harsh, unjust or unreasonable. He seeks compensation.

[3] Bureau Veritas oppose the application.

[4] The matter did not resolve by conciliation. I issued directions on 15 November 2024 and a production order on 22 November 2024.

[5] The production order required Bureau Veritas to produce certain documents, though was not as broad as the order sought by Mr Carmody. It was accompanied by an order for confidentiality, given that some of the documents produced were commercial in nature.

[6] I heard the matter in person on 23 December 2024. The parties were self-represented (Bureau Veritas by its People and Culture Manager, Ms Mancini, who was assisted by its Team Leader – Operations, Mr Lavender).

## Evidence

[7] I heard oral evidence from three persons:

- Richard Carmody (applicant);
- Keith Barsby (Laboratory Manager); and

- David Dungey (Production Co-Ordinator – Projects).

[8] All witnesses were conscientious and largely credible. Each sought, to the best of their recall, to provide relevant and accurate evidence to the Commission. There are some disputes of fact, though the most material disputes concern the conclusions to be drawn from facts rather than the relevant events or conduct being disputed.

[9] A substantial body of evidence, both oral and documentary, is before me. Aspects of this are technical and detailed. Much of it concerns processes applied by laboratory technicians and quality control officers to test and report on the physical and chemical properties of soil and rock samples received from clients, including those in the mining industry.

[10] As those reports and the testing systems used are commercial in confidence or concern protected intellectual property, I consider it necessary to maintain the confidentiality constraints that accompanied the production order. I extend that confidentiality order to the evidence led in this matter, oral and documentary. In this decision, I refer only to material that is not confidential.

[11] Some of the evidence (oral and written) strayed from factual matters into hearsay, assumption, and commentary. Indeed, as this matter involves heavily contested opinions, I place reduced levels of weight on such evidence unless it is corroborated by direct evidence, uncontested or inherently believable. I am not bound by the rules of evidence but consider them to be a good and useful general guide.

[12] I make findings on relevant facts, including the disputed matters, in the body of this decision.

## **Facts**

### *Bureau Veritas*

[13] Bureau Veritas is a globally operating foreign company providing testing, inspection and certification services to client businesses.

[14] It is not a small business within the meaning of the FW Act.

[15] Amongst its Australian operations is a laboratory at Whyalla in regional South Australia providing services to the mining and steel processing industries. One such client is BHP who engages Bureau Veritas to perform testing for the Carrapateena mine in northern South Australia.

[16] Bureau Veritas operates under the certification of the National Association of Testing Authorities. To maintain this certification, Bureau Veritas must conduct its operations in accordance with established industry standards. It is subject to audit in that regard, including by clients.

### *Testing and reporting systems*

[17] The services provided by Bureau Veritas include receiving raw material samples of rock or soil from a mining industry client and subjecting that material to technical assessment to ascertain its physical and chemical properties. The assessment process is two-fold; firstly, laboratory technicians conduct a processing function and input results (including weight, which is in part impacted by findings of moisture levels) into its data base (the Sorby LIM system). The raw data is then separately examined by an officer performing a quality control function. It is that quality control officer who is responsible for preparing and sending a report to the client on the findings on that sample.

[18] To assist the testing process or interpret test results, from time to time a client may, in addition to submitting a sample for testing, also submit a control sample of known properties (called a customer standard).

[19] The quality control officer is required to examine raw data imputed by the laboratory technicians for error or anomaly, and where a possible error or anomaly is identified, to resolve it so that the report sent to the client (which the quality control officer issues) is accurate and capable of being relied upon.

[20] Identifying error or anomaly requires attention to detail. Some errors are more apparent than others. Some may have nothing to do with the processing of a test sample. They may simply be typographical errors made by a technician when entering test results into the data base (for example, the wrong result may have been entered by keying a wrong numerical digit or too many digits, or by entering results in the wrong cell in the data base so as to put the immediately following data results out of sync). On the other hand, other error types may be associated with processing irregularities. These may require a review of wet sample weight, dry sample weight and crusher feed weight results (showing moisture levels) to ascertain if an anomaly exists or can be resolved.

[21] To resolve errors or anomalies (or ascertain if in fact an error exists) a quality control officer uses a variety of tools, including looking more deeply at the raw data (online or handwritten), assessing whether the test sample had been accompanied by a customer standard (whose properties are also recorded) or, if necessary (but rarely because often the relevant technician may be off shift at the time of quality control) speak to the technician about the testing process or test results.

[22] Where a quality control officer is not able to report a result or resolve an error or anomaly, it is open to result the sample as 'NR' (not reportable) and advise the client accordingly. Whilst permissible, this is not encouraged because a client contracts with Bureau Veritas to obtain results, not a non-result. Clients do not pay Bureau Veritas for non-results.

[23] A quality control officer can be responsible for issuing hundreds of client reports on samples in each day.

[24] Interactions a technician or quality control officer has with test results are automatically recorded in the Sorby LIM system. This creates an audit trail which enables company officers to determine what has been done, by whom and when with the test results of each sample and the resultant raw data entries, prior to results being reported.

*Mr Carmody*

[25] Mr Carmody is a long term resident of Whyalla. He has a degree in metallurgy with over twenty years of experience working as a metallurgist and laboratory technician in the mining, steel and zinc processing industries.<sup>1</sup> His Linked-in profile states:<sup>2</sup>

“Things that set me apart include my skills in data analysis...working on a wide range of commodities...In addition...I have a wide range of soft skills...such as a very calm, thoughtful and patient disposition, a great memory, being a self-disciplinarian, a contrarian, being very focussed, being able to admit error and deficiency and having high personal standards.”

[26] In addition to working in paid employment with Bureau Veritas, Mr Carmody was and remains a director of and operates his own business, EP Rock and Sand Pty Ltd.

#### *Employment at Bureau Veritas*

[27] In March 2023, Mr Carmody sought part-time employment with Bureau Veritas at its Whyalla operations. He did not seek a full-time position because he required at least one day a week to devote to his own business.

[28] Mr Carmody was interviewed by Mr Barsby, the Laboratory Manager and senior officer at Whyalla responsible for certification of testing. He is a long term manager, with substantial industry experience, who knew Mr Carmody from when Mr Carmody had previously worked for a Bureau Veritas client.

[29] Mr Carmody was offered and accepted a part-time role commencing 21 March 2023 as a Project Co-ordinator, working 24 hours per week (3 days).<sup>3</sup> From January 2024 this increased to 32 hours (4 days).<sup>4</sup>

[30] As Project Co-ordinator Mr Carmody undertook a variety of roles over his eighteen months of employment.

[31] During 2023, Mr Carmody worked in laboratory processing (testing samples from a variety of Bureau Veritas clients), and to a lesser degree, quality control. From January 2024 until his employment ended Mr Carmody worked exclusively on quality control for the BHP Carrapateena client.

[32] Across an eight hour shift performing quality control work, Mr Carmody was typically responsible for assessing and issuing about 130 reports on client samples.

[33] Mr Carmody formally reported to the Team Leader – Operations (Mr Lavender), though his immediate supervisor in 2024 was Mr Dungey (who also performed quality control work). However, Mr Dungey had periods of absence in both January 2024 and August 2024 (the time of relevant events). Mr Carmody reported to a temporary replacement supervisor in August 2024, who was another quality control officer, Mr Corbett.

#### *Training*

[34] Upon being employed, and periodically throughout his employment, Mr Carmody completed several mandatory training programmes on company policies and matters relevant to testing and quality control, including:<sup>5</sup>

- QHSE Induction: Commodities, Industry and Facilities (CIF) Pacific;
- Bureau Veritas Code of Ethics (including Principles, Policies and Rules); and
- Bureau Veritas Values.

[35] The Code of Ethics training provided examples of potential unethical behaviours concerning laboratory testing including fabrication of data, misrepresenting quality control samples, not following standard operating procedures, manipulating analytical results and falsifying records of analytical equipment.<sup>6</sup> It also provided that:<sup>7</sup>

“Falsifying results is a breach of the BV Code of Ethics and will incur disciplinary action – up to and including dismissal. As per the BV Code of Ethics, data security is a very serious matter and there will be consequences if anyone breaches this Code.”

[36] The remainder of Mr Carmody’s initial and refresher training was informal, and occurred on the job as and when issues arose.

#### *January 2024 incident and counselling*

[37] On 13 January 2024, BHP raised a concern with Mr Carmody’s supervisor (Mr Dungey) over test results received for a sample which had been reported by Mr Carmody. Mr Dungey examined the situation and provided a response and apology to BHP on 15 January. He concluded that the laboratory technician had failed to use a barcode scanner, but also that the quality control officer (Mr Carmody) had “cut and pasted” data as part of the report meaning that “a corner had again been cut”.<sup>8</sup>

[38] Pleased with the quick follow-up but not satisfied with the response, BHP asked further questions on 15 January as to why and how these errors (which BHP described as “data manipulation”) occurred. Mr Carmody was unsure of how to reply and, on 16 January, sought guidance from Mr Lavender (copying Mr Barsby). Mr Barsby, concerned at the client reaction, immediately conducted his own review of the audit trail for the sample from the data base, and identified errors by both the technician and Mr Carmody. More specifically, he believed that Mr Carmody ought to have identified incorrect moisture data entries entered by the technician which, had this occurred, ought to have resulted in an accurate rather than inaccurate report being issued to the client.<sup>9</sup> To assist Mr Carmody to respond, Mr Barsby provided email text inserts responding to some of the client’s questions.<sup>10</sup>

[39] Mr Carmody directly responded to BHP on 16 January. In his response,<sup>11</sup> Mr Carmody stated that “cut and paste” and removing customer standards were standard practices, acknowledged that he had made “assumptions” about moisture content and that he had assumed that the technician must have been “rushed” partly because Mr Carmody had been unable to locate the technician before sending the report to BHP.” By way of further explanation, Mr Carmody informed BHP that:<sup>12</sup>

“I assumed that the moisture would’ve been similar to other samples in the set and since at a quick look a round figure of 100g for a sample this size was a reasonable mass loss, I added 100g and put that as the feed weight, since that was the one that was missing, to get a result with similar moisture to that in its group.” (*emphasis added*)

[40] Mr Carmody concluded his explanation to BHP by stating:<sup>13</sup>

“Perhaps we should just leave unknowns as unknown rather than put estimations in”.

[41] BHP remained dissatisfied with Mr Carmody’s explanations. In an email to Mr Carmody on 19 January 2024 (copied this time to Mr Barsby) BHP stated that it was “not comfortable with the integrity of data associated with this dispatch”, adding that:<sup>14</sup>

“We do not consider estimation to be an adequate response to errors. If errors are noted, thorough investigation and correction of the data and behaviour is expected...Did the QC scientist check whether it was a standard before implementing a fix?...These systems...will be a focal point during the Q1 2024 lab audit.”

[42] Concerned at the errors Mr Barsby believed Mr Carmody had made, at the content of aspects of Mr Carmody’s email response to BHP on 16 January, and at BHP’s dissatisfaction with that response, Bureau Veritas decided to speak directly to Mr Carmody. There is some evidentiary dispute over what action was undertaken by Mr Barsby. Mr Carmody considered it to be an informal discussion, not counselling. Mr Barsby’s oral and written evidence was that he counselled Mr Carmody. I find that the discussion was counselling albeit undocumented. Given the nature of BHP’s response over the 13 to 19 January 2024 period, resulting in the escalation of its concerns to Mr Barsby, it is more likely than not that Mr Barsby, as the Laboratory Manager with the most experience on required processes and with overall responsibility for certification, undertook counselling and not simply engaged in a low-key informal discussion.

[43] I find that Mr Carmody was counselled by Mr Barsby about the errors which he had made in January 2024, and on the processes which Bureau Veritas believed should be put in place to properly review data anomalies in lieu of making the assumptions and estimates which Mr Carmody had made; assumptions which Mr Barsby considered had resulted in a self-determined estimate and hence “manipulation” of data. I find that Mr Barsby counselled Mr Carmody not to make self-assessed estimates but, when anomalies arose, to reference raw data or use other available tools to report a correct scientifically determined test result.

[44] Mr Carmody in evidence did not accept Mr Barsby’s characterisation that he had “falsified” or “manipulated” data to produce the January 2024 report. However, his evidence to the Commission was that:<sup>15</sup>

“I adjusted the weights of the samples assuming that there had been mis-typed numbers”.

[45] The counselling of Mr Carmody was direct and detailed.<sup>16</sup> However, it was informal in the sense that no written record was made or taken.

#### *Suggested revised procedures*

[46] In the weeks following the counselling, Mr Carmody was not indifferent to what had occurred in January 2024 or what had been said to him by Mr Barsby. Whilst he accepted some error on his part, Mr Carmody also considered that some expectations of quality control officers, and some laboratory and quality control practices, were unclear or inconsistently applied. He drafted some suggested revised practices for technicians and quality control officers. These

were submitted to his managers in the hope that they would be considered and incorporated into revised training material.

[47] As at the date of dismissal, the suggestions by Mr Carmody remained under consideration by Mr Barsby and had not been formally incorporated into training material or practice manuals. However, in his evidence Mr Barsby stated that the suggestions “align with the principles I had outlined” in the counselling session.<sup>17</sup>

#### *August 2024 incident and initial investigation*

[48] Between 23 and 27 August 2024, BHP Carrapateena sent several soil and rock samples (including a customer standard) to Bureau Veritas for testing.

[49] On or about 28 August 2024, a sample was tested by a laboratory technician and then assessed for quality control by Mr Carmody, who issued a report to BHP on the test results, certifying them to be true and correct.

[50] On 30 August 2024, BHP raised a concern with Bureau Veritas concerning the test results for the sample which had been reported by Mr Carmody.<sup>18</sup>

[51] In Mr Dungey’s absence, a temporary supervisor Mr Corbett initially handled the feedback by BHP.

[52] Mr Corbett conducted an initial assessment from the Sorby LIM audit trail and sent a holding response to BHP (copied to Mr Barsby). He considered that a data entry error concerning moisture levels (including with respect to the customer standard) had been made by a technician, and that this had not been noticed by the quality control officer (Mr Carmody) who had issued a report with incorrect results showing an extreme (and unrealistic) moisture level for the standard.

[53] Mr Barsby was alarmed and immediately examined the matter. The sample had included a customer standard. He identified that the technician had entered data into the data base for three BHP samples with moisture levels that were unrealistically stated (including the customer standard). Simply by looking at the Sorby LIM data base, Mr Barsby identified that the error had not been in the testing of the BHP samples but in the data entry; data had been entered by the technician into a wrong cell, resulting in results for the three BHP samples being plainly incorrect.

[54] Mr Barsby then considered how the incorrect report came to be sent to BHP and how the data entry errors had not been noticed by Mr Carmody during the quality control process. He believed that Mr Carmody had failed to identify that a customer standard was involved, and that the customer standard was incapable of having the extreme moisture reading identified in his report. Mr Carmody then appeared to have estimated and transposed data that ought to have reasonably been identified upon quality control review as incorrect or anomalous into a report for the client, without otherwise trying to resolve the anomaly. He believed that Mr Carmody had not checked the raw data but had simply entered and estimated incorrect values not from the raw data, and then signed them off as correct.

[55] Mr Barsby considered that these failures, in light of what he believed was a similar January 2024 incident and subsequent counselling, required formal disciplinary action. After

speaking to Mr Lavender (and another manager Ms Knowles), Mr Barsby commenced a show cause process by letter to Mr Carmody dated 2 September 2024 (with text notification of suspension sent the previous evening). Mr Carmody was suspended with pay. The letter read:<sup>19</sup>

“Dear Richard,

We wish to inform you, that you are required to attend a meeting on Tuesday 3 September 2024 at 1.00pm, in the Jacobs Street Lab Manager's Office, with the undersigned, regarding your current capacity for work as a Project Coordinator. Also in attendance will be David Lavender, Team Leader - Operations.

It has been alleged that you have seriously breached the policies and procedures as set out by the organisation. Specifically, it has been alleged:

- That you knowingly and intentionally manipulated and falsified client data in Sorby, which may adversely have the potential to impose significant commercial risks to the Company and its reputation.

This behaviour and misconduct was in serious breach of the Company's policies and procedures and the organisation's Code of Ethics and your obligations as per your contract of employment.

At this meeting you will be given the opportunity to respond to the allegations made above. You may elect to have a support person with you for the purposes of any meetings or discussions with the management during this process.

Independent, confidential, company-funded counselling for you and your immediate family is available via our Employee Assistance Program provider, TELUS Health. Their contact number is [REDACTED].

It is important you understand that if the allegations are substantiated, this may result in disciplinary action up to and including your dismissal.

Please note that you are directed to keep this matter confidential. If you have any questions, please do not hesitate to contact me, David Lavender or Dora Mancini, People and Culture Manager: Commodities.

Yours sincerely

Keith Barsby  
Laboratory Manager”

[56] Mr Carmody sought, and was granted, a deferral of the show cause meeting to 5 September 2024 to allow him to prepare a response.

*Show cause meeting and further investigation*

[57] The show cause meeting took place on 5 September 2024. Mr Carmody attended (with his lawyer by telephone). Mr Carmody was invited to explain his version of what had occurred, and why a report in the terms he had sent to BHP had been issued.



[58] There is no material factual dispute about the meeting. Meeting notes (not a verbatim record) are in evidence.<sup>20</sup> Mr Carmody sought that the alleged “misconduct” be explained. Mr Barsby did so. Mr Carmody sought that he be shown the relevant data from the Sorby LIM data base. This was shown. Mr Carmody paused the meeting to speak to his lawyer. Upon resumption, Mr Carmody produced a text exchange between he and Mr Corbett concerning a different sample and an October 2023 text exchange between he and Mr Dungey. He then stated that he believed those texts showed that other quality control officers did what he had done without sanction, and that what he did was consistent with his training.

[59] According to Mr Carmody’s evidence to the Commission:<sup>21</sup>

“I changed the results from nonsensical ones to far more sensible ones based on a bit of reasonable reasoning and this was the standard practice that I’d done and how I’d been instructed and trained. It was obvious to me it was a human error that I missed that the customer standard wasn’t meant to have weights against it. I went back in [*to the meeting*] and asked them to show me through the levels again. They did...”

[60] Upon resumption of the meeting Mr Barsby disputed the assertion that what had been done was consistent with Mr Carmody’s training. Mr Barsby referred to the January 2024 incident and the counselling subsequently provided. Mr Barsby closed the meeting by indicating that Bureau Veritas would investigate the matter further (including Mr Carmody’s suggestion based on the text messages that what he had done was accepted or common practice) and advise of its decision.

[61] Following the show cause meeting, Mr Barsby separately spoke to Mr Dungey and Mr Corbett about the texts and whether what Mr Carmody did was common or accepted practice amongst quality control officers. Following inquiry, Mr Barsby did not consider Mr Corbett’s practices, demonstrated by the sample which was the subject of the text exchange with Mr Carmody, to have been in breach of policy. For his part, Mr Dungey informed Mr Barsby that he had specifically advised Mr Carmody, after the January 2024 incident, to not resolve anomalies by making assumptions or reporting self-determined estimates.<sup>22</sup>

[62] Mr Barsby concluded that serious misconduct had occurred. He considered the report which Mr Carmody had sent BHP on or about 28 August 2024 to have been incorrect and the product of “falsification and manipulation” of data by Mr Carmody.

[63] Mr Barsby concluded, given the parallels with the January 2024 incident and the counselling he had provided at that time, that Mr Carmody should be dismissed for serious misconduct.

#### *Termination*

[64] Mr Carmody was called to a meeting on 13 September 2024.

[65] The meeting was brief. Mr Barsby informed Mr Carmody that the allegation of serious misconduct had been sustained and that his employment was summarily terminated from that date.

[66] Mr Carmody requested that the termination be communicated in writing. Mr Barsby agreed to do so. A termination letter dated 13 September 2024 was sent to Mr Carmody. It read:<sup>23</sup>

“Dear Richard,

Further to our meeting today, I write to confirm that your employment is terminated effective immediately.

The termination is due to serious and wilful misconduct as a result of the following:

- That you knowingly and intentionally manipulated and falsified client data in lab LIMS which is a serious breach of your obligations as per your Contract of Employment. Additionally, it is a serious breach of the company's Code of Ethics and the policies and procedures set out by the organisation and may adversely have the potential to impose significant commercial risks to the Company and its reputation.

The above issues have given rise to a significant loss of confidence in your ability to carry out reasonable and lawful instructions and adhere to the obligations as per your Contract of Employment and the Company's Code of Ethics. Your misconduct is in breach of the Company's Absolutes and Values. Due to the serious nature of such behaviour and actions, we are satisfied that your contract of employment obligations are incapable of being met or that it can continue. This has in turn resulted in an irretrievable breakdown in the employment relationship.

As a result of the above considerations, we are satisfied that, this serious breach of your Contract of Employment whereby you knowingly and intentionally manipulated and falsified client data in lab LIMS, which is deemed to be serious and wilful misconduct and therefore sufficient to justify summary dismissal which does not warrant any payment for notice.

Notwithstanding the above conclusions, we wish you well in your future endeavours.

Yours sincerely

Keith Barsby  
Laboratory Manager”

[67] Being a summary dismissal, no notice in lieu was paid.

*Events post dismissal*

[68] At the time of dismissal and in its immediate wake, Mr Carmody considered that he had been unfairly dismissed.

[69] He made this application via his solicitors nineteen days later, on 2 October 2024.

[70] For its part, Bureau Veritas did not fill Mr Carmody’s position. Given uncertainty surrounding one of its Whyalla clients (GFC steel operations) it decided not to do so.

[71] Following his dismissal Mr Carmody took some steps to seek alternate employment applying for four jobs in three months, but also focussed on his private business dealings and overcoming the professional shock at being accused of misconduct.

## **Submissions**

### *Mr Carmody*

[72] Mr Carmody submits that there was no valid reason for dismissal because, with respect to the report he sent BHP on 28 August 2024, his conduct was not misconduct in that:

- it represented reasonable professional assumption and estimation;
- was consistent with his training and the practices of quality control officers; and
- any inaccuracy was caused by a data entry error by a laboratory technician.

[73] In the alternative, Mr Carmody submits that there was no valid reason for dismissal because, even if there was some error on his part, he did not falsify or manipulate data and accordingly his conduct was not “serious and wilful misconduct” as alleged.

[74] In the further alternative, Mr Carmody submits that the dismissal was harsh on the ground that, in an overall sense, he was a competent employee. Dismissal was a disproportionate response to error with respect to one report in circumstances where he competently certified thousands of other reports.

[75] Mr Carmody acknowledges that the employment relationship has been damaged such that reinstatement is likely to be inappropriate but submits, in lieu, he should be compensated. Being a professional scientist living in regional South Australia, compensation should be at the upper end of the scale as work in his area of professional expertise in or around the Eyre Peninsula is scarce.

### *Bureau Veritas*

[76] Bureau Veritas submit that a valid reason for dismissal existed in that it had reasonably lost trust and confidence in Mr Carmody’s capacity to provide accurate reports to BHP with respect to samples its client had submitted for testing. That loss of trust and confidence was the product of:

- Mr Carmody having failed to competently perform his quality control responsibilities with respect to the report he certified to BHP on or about 28 August 2024;
- Mr Carmody having falsified and manipulated data in the report he sent to BHP, which constituted serious and wilful misconduct;
- Mr Carmody seeking to blame others for his failures;
- Mr Carmody failing to learn the lessons from the counselling provided eight months earlier concerning comparable conduct; and

- the consequences to the relationships Bureau Veritas had with its clients should they lose confidence in the test results its quality control officers certify, and the potential consequences to its accreditation and industry standing.

[77] Bureau Veritas submit that Mr Carmody was afforded procedural fairness through a transparent show cause process.

[78] Bureau Veritas submit that dismissal was not harsh or disproportionate because a quality control officer is reasonably expected to exercise care and diligence with respect to each report they certify under its name. The failures were not minor nor singular.

[79] In the alternative, Bureau Veritas submit that if the dismissal was unfair, no compensation should be paid (or should be nominal) given Mr Carmody's material contribution to the dismissal.

### **Consideration**

[80] No jurisdictional issues arise. Mr Carmody was a person protected from unfair dismissal (s 382). He served the statutorily required minimum employment period (s 382(2)(a)). His annual rate of earnings did not exceed the high income threshold (s 382(2)(b)(iii)). Bureau Veritas was a "national system employer" within the meaning of s 14. The application was made within time (s 394(2)).

[81] Nor is it in dispute that Mr Carmody was dismissed (s 386).

[82] This is not a matter where the Small Business Fair Dismissal Code applies.

[83] The issue for determination is whether the dismissal was "harsh, unjust or unreasonable" and, if so (but only if so) whether it is appropriate to order a remedy by way of reinstatement or compensation.

[84] Given the extensive written material before me (including on technical and confidential matters) I have not referenced in these reasons all the evidence or submissions. I have referenced those parts most material to the issues and contentions raised by the parties and the conclusions needing to be drawn. I have however had regard to all the material before me.

[85] Section 387 of the FW Act provides:

#### **"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:

- (1) 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
- (2) whether the person was notified of that reason; and

- (3) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (4) 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
- (5) if the dismissal related to unsatisfactory performance by the person - whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (6) 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
- (7) 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
- (8) any other matters that the FWC considers relevant."

*Valid Reason (s 387(a))*

**[86]** An employer must have a valid reason for dismissal. It is the Commission's task to determine if a valid reason exists. The reason(s) should be "sound, defensible and well founded" and not "capricious, fanciful, spiteful or prejudiced."<sup>24</sup>

**[87]** In a conduct-based dismissal such as this, except where the Small Business Fair Dismissal Code applies, the test is not whether the employer believed on reasonable grounds, after sufficient inquiry, that the employee was guilty of the conduct. The Commission must itself make findings as to whether the conduct occurred based on the evidence before it.<sup>25</sup>

**[88]** Where an employee is dismissed for misconduct, an evidentiary onus rests on an employer to establish that, on the balance of probabilities, the misconduct occurred.<sup>26</sup>

**[89]** The standard of proof is proof on the balance of probabilities. The standard requires "a proper level of satisfaction"<sup>27</sup> that the conduct did in fact occur. This is commonly referred to as the *Briginshaw* standard.<sup>28</sup> In the case of serious allegations, the civil standard requires more than mere satisfaction that it is more likely than not that the conduct occurred. Rather, it requires a proper level of satisfaction that the conduct did in fact occur.

**[90]** This approach has been adopted by the Federal Court of Australia<sup>29</sup> and by full benches of the Commission<sup>30</sup> in dealing with unfair dismissal matters.

**[91]** As Bureau Veritas allege that Mr Carmody engaged in serious and wilful misconduct (data falsification and manipulation) the *Briginshaw* standard applies, at least with respect to that allegation.

**[92]** In this matter there is little factual dispute as to what Mr Carmody did in undertaking the quality control function with respect to the three samples from BHP that were the subject of his report on 28 August 2024. The relevant issue is whether what Mr Carmody did objectively constituted a valid reason for dismissal.

**[93]** Based upon the evidence before me and the findings made, it is clearly established that with respect to this report Mr Carmody:

- failed to notice that the samples submitted by BHP included a customer standard;<sup>31</sup>
- failed to identify that the customer standard was incapable of having the extreme moisture reading he reported to the client;
- transposed data from the data base into the report despite aspects of that data being plainly anomalous and inaccurate; and
- failed to take reasonable steps to resolve the anomaly by examining raw data but rather made his own estimate of properties and reported those to the client as having been the result of laboratory testing when they were not.

**[94]** Was this conduct serious and wilful misconduct (falsification and manipulation of data) as alleged?

**[95]** Falsification requires an element of deliberate intention to deceive. There is no evidence that Mr Carmody had any such intent.

**[96]** Manipulation requires data to be deliberately distorted or altered such that it shows something which is incorrect or misleads.

**[97]** Mr Carmody dealt with the results coming out from the laboratory testing in two ways; by transposition and by estimation. He failed not just to notice that a customer standard was involved but also that raw data had been entered into a wrong cell, thereby causing the anomaly which he then sought to rectify by estimation rather than looking more closely into the raw data entries.

**[98]** I am not satisfied that the transposition of data by Mr Carmody from the Sorby LIM data base into the certified report (even if done without due care) is properly characterised as data manipulation. Whilst the effect of the data transposition was serious in that it contributed to the client being provided with inaccurate and unreliable test results (with potentially serious consequences if the client had acted on the results and not identified them as anomalous), that conduct does not of itself rise to the level of manipulation.

**[99]** In respect of the estimates made, Mr Carmody, according to his evidence “changed the results from nonsensical ones to far more sensible ones based on a bit of reasonable reasoning”<sup>32</sup> and after a “quick look”.<sup>33</sup> In this respect Mr Carmody made his own estimate of the properties of the samples and reported figures he himself devised and considered to be “sensible”. Put another way, Mr Carmody estimated what the properties of the samples were likely to be. I do not find that those estimates were the product of reasonable conduct. I take into account the evidence of Mr Dungey<sup>34</sup> that in his opinion there are occasions where estimates may have been made, although this contrasted somewhat with the evidence of Mr Barsby that “making up numbers is not an acceptable process”<sup>35</sup> and “as an analyst you don’t make assumptions”.<sup>36</sup> Whilst accepting the evidence that a raw sample is likely to be irretrievable after laboratory testing (and unable to be re-tested), what was reported to the client was not the outcome of scientifically based laboratory testing of the rock or soil samples that BHP had submitted. As Mr Barsby indicated in his evidence, even though the testing had rendered the raw sample

irretrievably damaged, there was nonetheless a correct answer available to resolve the anomaly if Mr Carmody had carefully looked at the raw data and identified that test results had been entered into a wrong cell<sup>37</sup>. Rather than doing this, a self-estimate was made by Mr Carmody which he thought was, according to his evidence, “plausible” or “historically typical”.<sup>38</sup> To this extent, the test results Mr Carmody reported to BHP could be reasonably characterised as the product of data “manipulation” in the sense that the properties reported had in part been devised by him and were not the result of laboratory testing.

**[100]** However, whilst this failure of duty was serious, given the absence of ill intent and my finding that Mr Carmody, having seen an anomaly, attempted to report a result that made some sense to him and the client, I do not make a finding of serious and wilful misconduct. The characterisation which more objectively reflects Mr Carmody’s conduct is that it was a serious lapse of professional judgement occasioned by a failure to take due care and resolve anomalies by reference to the available raw data.

**[101]** The issue before the Commission is whether a valid reason for dismissal existed, not whether the employer was correct in describing it as “falsification and manipulation” or “serious and wilful” misconduct.

**[102]** It is well established that the standard of conduct or performance reasonably required of an employee, including a qualified, experienced and professional employee such as Mr Carmody, is one of competence not perfection.<sup>39</sup>

**[103]** Did Mr Carmody fail to meet this standard with respect to the report issued on 28 August 2024 such that it constituted a valid reason for dismissal?

**[104]** For the following reasons, I find that he did.

**[105]** Firstly, the inaccurate report of 28 August 2024 was not the result of a singular error. Mr Carmody failed to identify that a customer standard was involved and that the moisture levels he reported could not have possibly come from the customer standard. Mr Carmody also failed to resolve the anomaly identified by reference to the tools he had been counselled to use by Mr Barsby in January 2024 (such as examining the raw data), electing rather to transpose plainly incorrect data and make estimates, albeit subjectively reasoned ones, before certifying the reported properties of the samples as true and accurate.

**[106]** Secondly, each of these errors were avoidable had due care and attention been exercised. That a customer standard was included was apparent on the face of the data.<sup>40</sup> That the moisture readings of the standard were plainly wrong was apparent given known moisture readings that accompany customer standards.

**[107]** Thirdly, Mr Carmody had the opportunity to take reasonable steps to accurately resolve the anomaly but failed to do so. I do not find that Mr Carmody’s conduct represented reasonable professional assumption and estimation. He reported sample properties based on an estimate he made and thought sensible, not on outcomes from laboratory testing of the samples. He could have, but did not, carefully examine the raw data against the anomalous results; or have spoken to the laboratory technician who had wrongly entered the data; or produced a report with a ‘no result’ (as he had indicated to BHP in January 2024 that he “perhaps” could do in the future if this circumstance repeated); or have sought guidance from his superiors (such as Mr Lavender or Mr Barsby) before certifying the results.

**[108]** These were material failures by Mr Carmody in the performance of the primary responsibilities of his quality control function. The quality control function has as a primary purpose the responsibility of looking for and identifying anomalies in test results and resolving them by reference to laboratory testing before certifying to a client that the results are true and accurate. Given that Mr Carmody had made similar errors with the January 2024 incident and been counselled by the Laboratory Manager on how to manage a future repeat circumstance (which did not include making estimates), and knew since at least January 2024 that the client whose samples these were also did not accept the practice of making and reporting estimates, I find that the loss of trust and confidence in his capacity to deliver reports to clients, that did not involve self-made assumptions or estimates, was reasonably based.

**[109]** I do not accept Mr Carmody's submission that because the incorrect report he certified was precipitated by a data entry error by a laboratory technician (or for that matter, failures on other occasions by technicians to use barcode scanners or for scanners to always be in good operating condition) mitigates error on his part. Mr Carmody's responsibility was quality control with respect to the test results coming out of the laboratory. His very job existed as a check and balance to identify errors or anomalies in the testing process or in data entered by the technicians, and to resolve these before certifying results to clients.

**[110]** I take into account that Mr Carmody genuinely believed that what he did had been done previously by himself or others. On this, the evidence is less than clear. However, I do not find that Mr Carmody was trained to resolve anomalies by taking short cuts such as transposing data or cutting and pasting results without inquiry back to raw data, or to make and report estimates of his own. I agree that the text exchanges in evidence between Mr Corbett and Mr Carmody<sup>41</sup> suggest that Mr Corbett may have at least once suggested that such a short cut was open and, as noted, that Mr Dungey in the October 2023 text exchange<sup>42</sup> had contemplated transposition of data (but not averaging estimates<sup>43</sup>). However, even if this were so it does not materially mitigate the failures by Mr Carmody because:

- in January 2024, Mr Carmody had been provided direction by the Laboratory Manager (Mr Barsby) on how to appropriately deal with such circumstances;
- Mr Carmody had been spoken to by Mr Dungey following the January 2024 incident about the need to resolve anomalies by deeper investigation of raw data;
- Mr Corbett was a temporarily assigned supervisor in August 2024; and
- Mr Carmody knew from the exchanges with BHP in January 2024 that the client would not accept a short cut approach based on transposition or estimation.

**[111]** Accordingly, there was a valid reason for dismissal based on a material failure by Mr Carmody to exercise due care with respect to the quality control function and the consequent loss of trust and confidence.

**[112]** I deal below with whether dismissal was proportionate to the failure to exercise due care in considering harshness.

**[113]** That a valid reason exists weighs against a finding of unfair dismissal.



*Whether notified s 387(b)*

[114] Mr Carmody was notified of the reason for dismissal on the day he was dismissed. He was informed that it was because of “a significant loss of confidence in your ability to carry out reasonable and lawful instructions and adhere to the obligations as per your Contract of Employment and the Company's Code of Ethics”. The particulars were that Bureau Veritas had concluded that he had “knowingly and intentionally manipulated and falsified client data in lab LIMS”.

[115] This is a neutral consideration.

*Opportunity to respond s 387(c)*

[116] I have found that:

- a show cause process occurred, with a show cause meeting deferred at Mr Carmody’s request; and
- Mr Carmody’s explanations were the subject of further investigation following the show cause meeting and prior to Bureau Veritas deciding to dismiss.

[117] Whilst dismissal had been determined prior to the termination meeting on 13 September 2024, when considered overall I do not find that Mr Carmody was denied procedural fairness.

[118] These considerations weigh against a finding that the dismissal was unfair.

*Support person s 387(d)*

[119] Mr Carmody was not denied access to a support person. Although he was initially concerned whether a company human resources officer could properly be his support person, he made independent arrangements and attended the show cause meeting with his solicitor. He was provided opportunities during the meeting to speak privately to his legal adviser, and did so.

[120] Given this, s 387(d) is a neutral factor.

*Performance s 387(e)*

[121] The dismissal was based on alleged misconduct. Serious as those allegations were, no broader or wider issues of unsatisfactory performance (beyond the January 2024 and August 2024 incidents) were alleged or emerge from the evidence.

[122] Section 387(e) is a neutral consideration.

*Size of business and human resource capacity (s 387(f) and (g))*

[123] Bureau Veritas is not a small business employer. It has human resources capacity.

[124] Its size and human resources capacity do not materially explain the decisions and conduct of the employer relating to Mr Carmody’s dismissal.

[125] Sections 387(f) and (g) are neutral considerations.

*Other matters s 387(h)*

[126] There are no other matters for consideration (other than considerations of harshness, considered below).

*Conclusion on unfairness*

[127] I have found a valid reason for dismissal existed based on a serious and material failure by Mr Carmody to exercise due care with respect to the quality control function he performed on or about 28 August 2024.

[128] I have not found the dismissal procedurally unfair.

[129] Other considerations are neutral.

[130] Section 387 requires a global assessment of all relevant factors. I agree with Mr Carmody, and it is well established, that even where a valid reason exists, dismissal may nevertheless be harsh, unjust or unreasonable.<sup>44</sup>

[131] Mr Carmody submits that even if a valid reason existed, the dismissal, when considered overall, was harsh. In this respect two matters are relevant:

- 1) whether dismissal was a proportionate response to the failure to exercise due care; and
- 2) whether the dismissal was harsh given that no notice was given or paid in lieu.

Proportionality

[132] This submission is based in part on the proposition that as there was no intention to deceive or mislead the client, dismissal was a disproportionate response. This submission is supported by my finding that, in the wake of the January 2024 incident, Mr Carmody sought to take on board what had occurred and had himself proposed some differently documented procedures. Nor do I have any doubt from the evidence before me that Mr Carmody was a conscientious professional who took his job seriously and sought to do no wrong to the client.

[133] However, I do not consider that the absence of an intention to deceive or mislead materially mitigates the failures of duty. A material breach by Mr Carmody of a fundamental element of his employment obligations does not require hostile intent. Its seriousness is to be assessed against the nature of the conduct in the context of Mr Carmody's employment responsibilities as a professional project co-ordinator performing quality control work.

[134] I have found those failures of duty to have struck at the primary responsibilities Mr Carmody owed with respect to his role. I have found a serious lapse of professional judgement, occasioned by a failure to take due care and to resolve anomalies by reference to raw data from laboratory testing, to have occurred.

[135] Mr Carmody also submits that dismissal was a disproportionate response because the failure of duty in August 2024 was an isolated incident amongst thousands of reports he issued in the course of his employment.

[136] There is some force in this submission. Mr Carmody was in fact required to issue hundreds of reports on sample testing each shift, amounting to many thousands over the course of his employment. Aside from the report of 28 August 2024 (and the report that was the subject of the January 2024 incident) there is no evidence that Mr Carmody otherwise failed in his duties.

[137] Given that the objectively required standard of performance is competence and not perfection, there is some attraction to the submission that allowance must be made for infrequent error, and that making such allowance in the context of his employment as a whole would render Mr Carmody's dismissal harsh.

[138] However, harshness itself is not to be narrowly considered by reference to a singular consideration alone. All relevant factors require consideration in determining whether a dismissal, objectively considered, is harsh. This is because the objects of Part 3-2 Division 2 (Unfair Dismissal) of the FW Act are to ensure a 'fair go all round' to "both the employer and the employee".

[139] In this matter, there are material countervailing factors. These include:

- the seriousness of the failures in the context of the importance of the role of a quality control officer and the reports they certify. With respect to the report of 28 August 2024, competent professional judgement was not exercised by Mr Carmody. Even allowing for human error, the test results reported were not the product of effective quality control;
- whilst the failures concerned an individual report to a client, the failures were not singular; they were multiple (not noticing a customer standard and extreme moisture reading; transposing plainly incorrect data; and making an estimate of scientific properties without having carefully examined the raw data for a solution). These failures compounded each other;
- the failures in August 2024 occurred in the context of a broadly similar failure in January 2024 following which counselling was provided;
- the failures were avoidable had Mr Carmody taken steps consistent with the counselling provided; and
- Mr Carmody was an experienced professional who had worked in both laboratory and quality control roles, completed appropriate training in company expectations and procedures and, at the time of recruitment, held himself out as having specialist skills with respect to data analysis.

[140] I take into account that no formal warning was on Mr Carmody's record and that the counselling in January 2024, whilst direct and relevant, was informal and undocumented.

[141] I agree that the dismissal of Mr Carmody for isolated albeit serious errors, even taking into account that he was an experienced professional scientist, was a heavy sanction. However, whilst it was open for Bureau Veritas to have taken a different view and retained his services by applying a lesser sanction (such as a final warning), and some employers may well have done so, the loss of trust and confidence was not unreasonably based. It is well established that the Commission does not stand in the shoes of an employer and decide what they could or should have done.<sup>45</sup> This is a decisive consideration in this matter. The issue is whether what Bureau Veritas did (dismissal) was, considered overall and objectively, harsh, unjust or unreasonable; not whether a lesser sanction would have been a more reasonable course. I conclude that dismissal, in the overall circumstances, was reasonably open to the employer and accordingly the dismissal was not harsh, unjust or unreasonable.

[142] Having regard to both the considerations in favour and against a finding of harshness, I do not find that Mr Carmody's dismissal was harsh on the ground that it was a disproportionate response.

### Notice

[143] I have found that the conduct was a valid reason for dismissal but lacked the necessary level of intent or disregard for the client's interests to be serious and wilful misconduct.

[144] I have found the conduct to have been a serious lapse of professional judgement, occasioned by a failure to take due care and to resolve anomalies in test results by reference back to raw data from laboratory testing.

[145] This being so, I consider that summary dismissal was objectively unfair. The failure to dismiss with notice renders the dismissal harsh, but for that reason only. I note that clause 4.2(b) of Mr Carmody's employment contract permitted Bureau Veritas to dismiss summarily on grounds which include circumstances where an employee's conduct compromises the "reputation or commercial viability" of the business.<sup>46</sup> Whilst it is reasonably arguable that Mr Carmody's conduct had the potential to jeopardise the relationship between Bureau Veritas and its client BHP (and thereby its reputation), clause 4.2(b) deals only with legal rights, not fairness. Whilst it may have been lawful for Bureau Veritas to dismiss summarily under the terms of the employment contract, I have concluded that it acted harshly in doing so.

[146] Accordingly, I find the dismissal to be harsh on the basis (and only on the basis) that Mr Carmody was summarily dismissed rather than dismissed with notice or payment in lieu.

### **Remedy**

[147] I now turn to the question of remedy.

[148] Remedies available to the Commission under s 390 of the FW Act are reinstatement (in the same or other position) or (but only if reinstatement is inappropriate) compensation (within statutory limits). Whether to order a remedy is discretionary.

[149] I consider it appropriate to order a remedy but only on the terms outlined below.

[150] I conclude that reinstatement is inappropriate. The loss of trust and confidence was reasonably based. Dismissal was not unfair; simply one characteristic of the dismissal (its summary nature) made it harsh.

[151] I turn to the issue of compensation. Section 392 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.”

[152] I now consider each of these criteria.

*Viability: s 392(2)(a)*

[153] There is no evidence before me to suggest that the compensation order will adversely affect the viability of Bureau Veritas.

*Length of service: s 392(2)(b)*

[154] Clause 4.1 of Mr Carmody's employment contract<sup>47</sup> states that notice on termination is provided “in accordance with the FW Act”. Having been employed for approximately eighteen months, the amount of notice (or payment in lieu) Mr Carmody would have been entitled to under the terms of the FW Act was two weeks.<sup>48</sup>

[155] However, somewhat incongruously, Schedule 1 of Mr Carmody's employment contract provides that the notice period will be “one month”.<sup>49</sup>

[156] There is a potential discrepancy between clause 4.1 and Schedule 1.

[157] I resolve that discrepancy in the following way. I conclude that the period of notice that is to be paid in lieu is the equivalent of one month (gross). I do so for the following reasons:

- Section 117(2) of the FW Act, to the extent it is referenced by clause 4.1, provides a minimum period of notice only. It is lawful for an employer and employee to agree to a greater period; and
- Schedule 1 specifies a specific sum whereas clause 4.1 does not. The sum specified in Schedule 1 is for a greater period.

[158] I conclude that Mr Carmody's service would have been extended by one month had he been provided notice or payment in lieu.

*Remuneration that would have been received: s 392(2)(c)*

[159] According to the employer's materials,<sup>50</sup> at the time of dismissal Mr Carmody was paid \$1,343.68 (gross) per week (for 32 hours). This equates to part-time remuneration of \$69,888 per annum (gross). One twelfth of this sum (one month) is \$5,824 (gross).

[160] Based upon Mr Carmody's remuneration at the time of dismissal, one month's notice or payment in lieu would have amounted to \$5,824 (gross).

*Mitigating efforts: s 392(2)(d)*

[161] Although no material efforts in mitigation were taken by Mr Carmody, it was not reasonable to expect that he would do so inside the notional notice period. I make no deduction on this account.

*Remuneration earned: s 392(2)(e)*

[162] There were no earnings during the notional notice period. I make no deduction on this account.

*Income likely to be earned: s 392(2)(f)*

[163] The period for which I will order compensation (the notice period) does not extend to a period of projected future work. I make no deduction on this account.

*Other matters: s 392(2)(g)*

[164] There are no other matters or contingencies that need to be provided for.

*Misconduct: s 392(3)*

[165] I have found a serious failure to exercise due care by Mr Carmody but that dismissal for those reasons nonetheless warranted the provision of notice. I make no deduction on this account. To do so would deny Mr Carmody the payment in lieu of notice he was entitled to.

*Shock, Distress: s 392(4)*

[166] As a professional, Mr Carmody was distressed at being accused of serious and wilful misconduct. The dismissal impacted his sense of professional standing. However,

compensation allowable by the FW Act does not include a component for hurt feelings. The compensation order will make no provision for such matters.

*Compensation cap: s 392(5)*

[167] The compensation ordered does not exceed the six-month compensation cap.

*Conclusion on compensation*

[168] The compensation order will be for an amount equivalent to one month in lieu of notice. I consider this to be the appropriate sum.

### **Conclusion**

[169] I find that Mr Richard Carmody, a person protected from unfair dismissal, was dismissed by Bureau Veritas Minerals Pty Ltd on 13 September 2024, and that his dismissal was harsh on the ground that he was dismissed summarily (without notice), but on that ground only.

[170] The amount of compensation payable by Bureau Veritas under s 392 of the FW Act will be \$5,824 gross (plus superannuation calculated at the superannuation guarantee rate applicable at the time of dismissal). I will order these sums to be payable within fourteen (14) days.

[171] An order to this effect is issued in conjunction with publication of this decision.<sup>51</sup>



DEPUTY PRESIDENT

*Appearances:*

R. Carmody, on his own behalf.

D. Mancini, with D. Lavendar assisting, *of and on behalf of* Bureau Veritas Minerals Pty Ltd

*Hearing details:*

2024.

Adelaide;

23 December.

Printed by authority of the Commonwealth Government Printer

<PR783767>



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<sup>1</sup> R3 10.1

<sup>2</sup> R3 10.2

<sup>3</sup> R3 10.3

<sup>4</sup> R3 10.5

<sup>5</sup> R2 paragraph 37 and R2 106 to 10.12

<sup>6</sup> R2 10.8

<sup>7</sup> R2 10.6

<sup>8</sup> R2 10.13

<sup>9</sup> R2 paragraph 61

<sup>10</sup> R2 10.28

<sup>11</sup> R2 10.13

<sup>12</sup> R2 10.13 email 26 January 2024 4.10pm

<sup>13</sup> *ibid*

<sup>14</sup> R2 10.14

<sup>15</sup> A1 paragraph 16

<sup>16</sup> R2 paragraphs 66 to 68

<sup>17</sup> R2 paragraph 74

<sup>18</sup> R2 10.17

<sup>19</sup> R2 10.22

<sup>20</sup> R2 10.20

<sup>21</sup> A1 paragraph 24

<sup>22</sup> R1 paragraph 14

<sup>23</sup> R2 10.22

<sup>24</sup> *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373

<sup>25</sup> *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213, [24]

<sup>26</sup> *Edwards v Guidice* (1999) 94 FCR 561, [6] - [7]

<sup>27</sup> *Budd v Dampier Salt Ltd* (2007) 166 IR 407, [14] – [16]

<sup>28</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>29</sup> *Edwards v Guidice* (1999) 169 ALR 89, 92 per Moore J

<sup>30</sup> *Parker v Garry Crick's (Nambour) Pty Ltd t/as Crick's Volkswagen* [2018] FWCFCB 279, [124] – [125]; *Hill v Peabody Energy Australia PCI Pty Ltd* [2017] FWCFCB 4944, [15]; *Heinz Company Australia Ltd v Green* [2014] FWCFCB 6031, [14] – [15]; *Budd v Dampier Salt Ltd* (2007) 166 IR 407, 14 - 16

<sup>31</sup> Evidence of Mr Carmody audio recording 23.12.2024 11.57am

<sup>32</sup> A1 paragraph 24

<sup>33</sup> Evidence of Mr Carmody audio recording 23.12.2024 12.00 noon

<sup>34</sup> Evidence of Mr Dungey audio recording 23.12.2024 2.35pm

<sup>35</sup> Evidence of Mr Barsby audio recording 23.12.2024 4.15pm

<sup>36</sup> Evidence of Mr Barsby audio recording 23.12.2024 4.17pm and 3.39pm

<sup>37</sup> Evidence of Mr Barsby audio recording 23.12.2024 3.23pm and 3.37pm

<sup>38</sup> Evidence of Mr Carmody audio recording 23.12.2024 11.54am

<sup>39</sup> *Crozier v Palazzo Corporation Pty Ltd t/as Noble Park Storage and Transport* (2000) 98 IR 137, [62] “not whether the employee was working to their personal best, but whether the work was performed satisfactorily...”

<sup>40</sup> Evidence of Mr Barsby audio recording 23.12.2024 4.37pm

<sup>41</sup> A1 3.8

<sup>42</sup> A1 5.7

<sup>43</sup> Evidence of Mr Dungey audio recording 23.12.2024 2.48pm

<sup>44</sup> *J Boag & Son Brewing Pty Ltd v Button* [\[2010\] FWAFB 4022](#), [31] citing *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1

<sup>45</sup> *Miller v University of New South Wales* [2003] FCAFC 180, 64; *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685

<sup>46</sup> R2 10.2 clause 4.2(b)

<sup>47</sup> R2 10.3

<sup>48</sup> Section 117. Though over the age of 45, Mr Carmody had not worked for two years to be eligible for the one week age supplement

<sup>49</sup> R2 10.3 Schedule 1

<sup>50</sup> F3 Employer response item 1.5

<sup>51</sup> [PR783768](#)