



# DECISION

*Fair Work Act 2009*  
s.394 - Application for unfair dismissal remedy

**Mr Joshua Lambert**

v

**Ducala Pty Ltd trading as Northpoint Toyota**  
(U2024/10865)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 6 JANUARY 2025

*Application for an unfair dismissal remedy – trade assistant at motor vehicle dealership – unexplained motor vehicle accident – drivers licence suspended pending medical assessment – whether capacity to perform inherent requirements of job – whether dismissal harsh, unjust or unreasonable – dismissal not unfair – application dismissed*

[1] On 12 September 2024, Joshua Lambert (Mr Lambert or the applicant) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy.

[2] The respondent is Ducala Pty Ltd trading as Northpoint Toyota (Northpoint, the employer or the respondent). Mr Lambert was working as a trades assistant when dismissed on 22 August 2024.

[3] The respondent contends that the dismissal was not unfair because there was a valid reason. Mr Lambert disagrees.

[4] The matter was not resolved by conciliation. I issued directions on 31 October 2024.

[5] Materials were filed by Mr Lambert and Northpoint. I heard the application in-person on 12 December 2024.

[6] Mr Lambert was legally represented, with permission. Northpoint was self-represented by its Head of People, Safety and Culture, Mr Rudd.

[7] I heard evidence from two persons:

- Joshua Lambert (applicant); and
- Lynn Walker, Human Resources Manager.

[8] There are no factual disputes of significance.

[9] No health or medical professional was called. The only medical information before me are two letters from Mr Lambert’s cardiologist of 3 May 2024 and 16 July 2024, submitted by Mr Lambert, and a hospital discharge summary of 31 July 2024.

[10] Northpoint did not call other persons associated with the relevant events. In particular, it did not call Mr Lambert’s direct manager, Mr Shephard (Service Manager). Mr Lambert submitted that I should draw a *Jones v Dunkel*<sup>1</sup> inference against Northpoint for not doing so. I agree that Mr Shephard’s evidence may have been relevant as he was (as I have found) a co-decision maker and present at the 20 August 2024 show cause meeting. However, it is not necessary to do so because the factual narrative associated with Mr Shephard’s involvement is not materially in dispute. Ms Walker, who gave evidence, was also a co-decision maker.

## **Facts**

[11] I make the following findings.

### *Northpoint*

[12] Northpoint operates a motor vehicle dealership from three locations in suburban Adelaide.

[13] It is not a small business for the purposes of the FW Act.

### *Mr Lambert*

[14] Mr Lambert commenced employment as a full time trades assistant at the Gepps Cross location on 6 June 2022. More informally, his position was described as a ‘Car Washer and Yard Hand’. His duties primarily involved washing, detailing and moving motor vehicles (80%) and general yard duties such as cleaning and tidiness (20%).<sup>2</sup>

[15] As a regular part of his duties, Mr Lambert was required to drive motor vehicles in and around the dealership and occasionally (as a valet service to customers) on public roads.

[16] A position description is in evidence.<sup>3</sup> It indicates that a required “licence/qualification” for the role was a “Driver’s Licence (Manual)”.

### *Motor vehicle accident*

[17] On 20 April 2024, Mr Lambert was involved in a motor vehicle accident on a public road in the course of his employment. Without prior notice or warning he experienced a medical episode whereby he blacked-out at the wheel, writing-off the dealership’s motor vehicle and a private vehicle he struck.

[18] Fortunately, no serious physical injuries occurred as a result of the accident.

### *Licence suspension*

[19] The South Australian government requires motor vehicle licence holders or health professionals to report medical conditions or episodes which may preclude a person from continuing to hold a driver’s licence.

[20] Immediately following the accident, Mr Lambert's driver's licence was suspended by the licensing authority as a consequence of the unexplained medical episode.

[21] Mr Lambert's licence was automatically suspended for six months (20 October 2024).

[22] Once a person's licence is suspended for medical reasons, it can be re-instated by decision of the licencing authority on the receipt of medical certification from a health professional that the person has been assessed as medically fit to drive.

#### *Medical consultations*

[23] Due to the sudden and unexpected nature of the accident, Mr Lambert (with the support of the employer) sought immediate medical assessment. He was referred by his general practitioner to a cardiologist.

[24] Mr Lambert consulted a cardiologist on 3 May 2024.

[25] On 30 June 2024, Mr Lambert was referred to a sleep apnoea clinic.

[26] On 16 and 31 July 2024, Mr Lambert received medical treatment at a local hospital to install a monitor to assess heart rhythms.

[27] After further consultations at the sleep clinic on 13 and 19 August 2024, Mr Lambert was provided a CPAP machine to test sleep patterns.

[28] Despite these tests, no diagnosis of a medical condition or of the cause of the medical episode was made in the pre-dismissal period.

#### *Employment following accident*

[29] Mr Lambert was off work from the time of the accident until his employment was terminated four months later. As he had no driver's licence, neither he nor Northpoint considered that Mr Lambert was able to perform his regular job until the cause of the medical episode was diagnosed or his licence reinstated.

[30] At the time of the accident, Mr Lambert had no, or no significant, remaining accrued personal leave or annual leave credits.

[31] In the wake of the accident, Mr Lambert was concerned whether he would lose his job because he had lost his driver's licence.

[32] Mr Lambert had meetings with his employer to discuss the situation on 26 April and 7 June.

[33] At the 26 April meeting (attended by his manager Mr Shephard and Ms Walker) Mr Lambert was advised that, although he was unable to drive, Northpoint would grant him leave without pay, on the basis that the employer would keep his job open but review the situation once Mr Lambert had the opportunity to recover from the immediate impact of the accident and undertake the necessary medical testing.

[34] At a meeting on 7 June, Mr Lambert advised his employer that he continued to be unable to drive as he was medically certified not to do so until 20 October 2024. Mr Lambert suggested that he be offered alternate duties until he could resume his regular work (including driving).

[35] Following the meeting, Mr Shephard and Ms Walker discussed whether alternate duties could be provided. They considered whether work not involving driving and within Mr Lambert's skill set was available at any of the three sites operated by Northpoint. They assessed that no position existed that could be offered to Mr Lambert.

[36] In the days that followed, the employer advised Mr Lambert that no alternate duties were available that could be offered to him.

[37] Neither prior to, at or following the 7 June 2024 meeting did Mr Lambert provide the employer with a medical report, certification or evidence disclosing his prognosis or diagnosis, nor his related work capacity or ability to have his driver's licence restored. Instead, Mr Lambert orally communicated his understanding which was that his licence was suspended until 20 October, that he was undertaking medical tests, and that no medical diagnosis or explanation for the medical episode had yet been made.

[38] The 7 June 2024 meeting concluded on the basis that Northpoint would continue to keep the job open, Mr Lambert would remain on leave without pay and the situation would be further reviewed in July.

[39] Having received no earnings from Northpoint, in the weeks that followed the accident (and at least by 7 June) Mr Lambert applied for social security benefits. He was approved by Centrelink and began to receive a jobseeker (unemployment) benefit (even though he remained employed but without earnings). Mr Lambert was thereafter in receipt of jobseeker benefits up to and following dismissal. His evidence was that it was only following dismissal (in about October or November 2024) that he was placed by Centrelink on a disability benefit rather than jobseeker. Mr Lambert did not disclose to Northpoint on 7 June, or at any time prior to dismissal, that he had applied for or was in receipt of unemployment benefits whilst remaining employed but on leave without pay.

#### *Performance of Mr Lambert's duties in his absence*

[40] Notwithstanding Mr Lambert's absence following the accident, Northpoint continued to require his job to be done. It particularly required the washing, detailing, moving of cars and provision of the customer valet service to occur.

[41] Aside from Mr Lambert, no other employee had been employed at the Gepps Cross site to perform this role. Northpoint put in place two temporary arrangements until clarity existed about Mr Lambert's return to work or a decision was otherwise made about his employment. These were:

- Northpoint engaged a labour hire firm to provide temporary labour hire workers to perform the job; and
- on the days when a labour hire worker could not be sourced, or on days when a labour hire worker failed to turn up for a scheduled shift, an existing Northpoint employee from

the parts department or other areas of the business was re-allocated to car washing and detailing duties.

[42] Northpoint sourced labour hire services from Workpac to perform Mr Lambert's duties on a regular basis during the period 20 April 2024 to dismissal (22 August 2024).<sup>4</sup> However, Northpoint experienced some difficulties with this arrangement. According to the evidence of Ms Walker, which I accept, a number of problems emerged:

- a required labour hire worker could not always be sourced;
- no single person performed the role. Different persons were provided across different days and weeks;
- from time to time, even when a labour hire worker had been sourced, that person did not always turn up to work as required;
- the operation of other parts of the business came to be negatively impacted when an employee had to be taken from their regular duties to perform Mr Lambert's job; and
- progressively, the employees who were directed away from their regular duties to perform car washing and yard duties expressed dissatisfaction with being required to do so when they had not been employed to do that work.

[43] In the days leading up to 12 August 2024, these problems came to a head when Northpoint was again unable to obtain a labour hire employee to perform the work.

*Show cause and dismissal*

[44] In the weeks prior to 12 August, Northpoint tried to contact Mr Lambert (by phone and text) for the intended July 2024 review of his situation. Mr Lambert was non-responsive.

[45] By mid-August 2024, Northpoint decided to escalate the matter. Rather than simply seek a further status update, it decided to commence a show cause process as to why Mr Lambert's employment should not be terminated.

[46] On 12 August 2024, Ms Walker emailed Mr Lambert requiring him to attend a show cause meeting for 14 August. It read:<sup>5</sup>

**“Notice to Show Cause**

I refer to our previous meetings the last of which was held on 7 June 2024 and our ongoing discussions about your ability to perform your role as Trades Assistant. You are employed in the role of Trades Assistant at the Gepps Cross Branch. This is a role which requires you have a driver's licence, and my understanding is that you have not yet been cleared to drive.

Being able to drive company and customer cars is an essential competency of your role and you currently cannot fulfill this.

I understand your ability to drive was taken from you around 3 months ago due to a medical concern. North point has been very supportive of your situation and has held your role open for all this time.

We have been trying to contact with you over the last couple of weeks and we have had no response from you. We were trying to contact you to organise a time for you to come into the dealership to discuss your situation.

Before we make any decisions in relation to your employment, we would like to give you the opportunity to update us on your situation. For your employment to continue, I will need you to be able to confirm to me that you are able to drive and meet the expectations of your role.

A meeting has been arranged to take place with me and Chris Shepherd at 12:30pm on Wednesday 15 August at 152 Grand Junction Road, Gepps Cross where you will be able to respond. You are welcome to bring a support person to this meeting. If you choose to bring a support person, please can you let me know who this person is prior to the meeting.

No decision has been made in relation to your employment, and no decision will be made until you have had an opportunity to respond at this meeting.

If you do not attend the meeting without reasonable excuse, I will proceed to make a decision in relation to your employment based on the information currently available.

If you have any questions at all please contact me on [REDACTED].”

[47] Mr Lambert contacted Northpoint following receipt of the email. He requested that the meeting be deferred to the following week. Northpoint agreed and the meeting was re-scheduled for 20 August. Ms Walker had intended to attend this meeting. However, due to an unexpected personal emergency, she could not do so. The meeting was attended by Mr Shephard and, in Ms Walker’s absence, another officer of the human resources department, Ms Danckops.

[48] At the 20 August meeting Mr Lambert orally updated the employer on his medical treatment. He did not provide Northpoint with the medical letters from his cardiologist of 3 May and 16 July, or the hospital discharge form of 31 July.<sup>6</sup>

[49] Mr Lambert advised that he was being treated for sleep apnoea and that his licence remained suspended until 20 October. He advised that despite a heart rhythm device being fitted, no heart problems had been found. He advised that the cause of the black-out had not yet been clinically determined. He again requested alternate duties. Northpoint repeated that no alternate duties were available. It advised Mr Lambert that the employer would consider the situation further but that he should consider resigning as his employment could not continue in his absence indefinitely. Mr Lambert asked for a few days to consider his position. His request was granted. It was agreed the parties would again meet on 22 August.

[50] Following the 20 August 2024 meeting, Mr Shephard telephoned Ms Walker. Ms Walker’s evidence, which I accept, was that Mr Shephard informed her of the updated information provided by Mr Lambert. After discussing the matter, Ms Walker and Mr Shephard jointly agreed that if Mr Lambert didn’t resign then Northpoint would dismiss him because he

still did not have a driver's licence and, in its view given the impacts on the business, the job could not be reasonably held open until 20 October to see whether the driver's licence was restored and Mr Lambert was fit and able to resume work.

[51] On 22 August 2024 Mr Lambert attended a meeting with Northpoint (Mr Shephard and Ms Walker in attendance). Mr Shephard asked Mr Lambert whether he had decided to resign. Mr Lambert said that he had decided not to resign because he wanted to keep his job and the accident was not his fault.

[52] Mr Walker then informed Mr Lambert that his employment was terminated. He gave Mr Lambert a letter of dismissal which read:<sup>7</sup>

“Dear Joshua

I refer to the email sent to 12 August 2024 and then the meeting held on Tuesday 20 August 2024 in relation to your employment status. After considering your situation the business has decided that it will end your employment today 22 August 2024.

This decision has not been made lightly but based on the fact that you have been unable to work for more than three months and that you still do not have your driver's license, we are unable to keep your role open. Having your drivers licence is a core competency of fulfilling your role.

As a business we have been reasonable in waiting to see when your licence would be reinstated. We now need to fill the role as the business is struggling due to not having a full-time person in the role.

We will pay you two weeks notice in lieu and this will be processed on Tuesday 3 September 2024. A separation certificate will provide upon your request.

I thank you for your service to Northpoint and wish you all the very best for the future.

Regards

Chris Shepherd  
Service Manager”

[53] At the time of dismissal, Mr Lambert's medical condition had not been diagnosed. Neither he nor Northpoint had received an opinion from a health or medical practitioner as to the cause of the black-out that led to the accident or concerning Mr Lambert's future fitness for work.

*Circumstances following dismissal*

[54] Mr Lambert was diagnosed with sleep apnoea in September 2024, one month after dismissal.

[55] Testing of Mr Lambert's heart did not disclose arrhythmia.

[56] At the time of giving evidence (11 December 2024), Mr Lambert had not been advised by his health professionals of the cause of the black-out, despite the diagnosis of sleep apnoea.

[57] On 21 October 2024, Mr Lambert attended an appointment with his general practitioner seeking a medical clearance to apply for his driver's licence to be re-instated. The doctor provided that medical clearance. Mr Lambert submitted the medical clearance to the government licensing authority. The licensing authority then assessed Mr Lambert as fit to drive and restored his licence. From late October 2024 Mr Lambert resumed driving.

[58] Since dismissal, Mr Lambert has not actively sought or secured other employment. His evidence was that he is now in receipt of a disability support payment (and has been since October or November 2024). He says that he is incapacitated and unable to work. His evidence was that his incapacity concerns a knee injury and mental health problems which he says existed prior to, but were exacerbated by the dismissal. No medical evidence was led, in either written or oral form, to explain or support these propositions.

## **Submissions**

### *Mr Lambert*

[59] Mr Lambert submits that the dismissal was harsh, unjust or unreasonable for reasons that include the following:

- there was no valid reason for dismissal. The employer did not allege any medical incapacity for the job. There is no evidence that Mr Lambert was medically unfit to wash or detail cars or clean the yard. The employer acted without being fully informed about his medical condition;
- as a reason for dismissal, the employer simply relied on the fact that Mr Lambert's driver's licence was suspended. This did not frustrate the contract because it was only a short term circumstance. Nor was it a valid reason because both Mr Lambert and the employer had reasonable grounds to believe that his licence would be restored six months after the accident, that is, on or about 20 October 2024. Mr Lambert had informed the employer of this expectation, and this is what happened. The employer acted prematurely;
- the employer failed to consider alternatives to dismissal, such as splitting his role into a casual or part-time yard duties job (which would not require driving) and offering that job to him, or otherwise allowing him to do all tasks other than driving whilst his licence was suspended; and
- Mr Lambert was denied procedural fairness because the decision to dismiss was predetermined, having been made prior to the meeting on 22 August 2024.

[60] Mr Lambert submits that he should be re-instated to the job from which he was dismissed. He submits that but for the dismissal he would have been ready, willing and able to resume work once his licence was restored. His current incapacity is a product of the dismissal. Once his unfair dismissal claim is resolved, he is likely to be able to resume work if a reinstatement order is made.



**[61]** In the alternative, a compensation order should be made. Mr Lambert's failure to seek out alternate work since dismissal is a product of the mental health impacts of the dismissal; that is, the conduct of the employer for which he should be compensated.

*Northpoint*

**[62]** Northpoint submit that the termination was not unfair because a valid reason existed. At the time of dismissal, and during the four months preceding, Mr Lambert was incapable of fulfilling the inherent requirements of the job. This included the driving of motor vehicles for which a licence was required. The continuing failure to hold a licence meant the inherent requirements of the job could not be performed.

**[63]** Northpoint did not act prematurely because:

- after holding the job open for four months, there was no evidence before the employer that Mr Lambert was fit and able to return to work;
- at the time of termination, Mr Lambert could not perform an essential requirement of the job (holding a valid driver's licence and driving motor vehicles);
- although, at the time of termination Mr Lambert informed the employer that he expected to have his licence restored on or about 20 October 2024, there was no certainty of this because it was dependent on medical certification of his fitness to drive after this date and a decision by the licencing authority to restore the licence.
- waiting a further period to ascertain whether the driver's licence would be restored was not reasonable because it was not known to the employer whether Mr Lambert was or would be otherwise fit to resume work;
- waiting a further period of two months to ascertain whether Mr Lambert's driver's licence would be restored was not reasonable because the temporary arrangements Northpoint put in place during the preceding four months prior to termination had become unreliable, caused disruption to business operations and created some discontent within the workforce; and
- no alternate roles were available or reasonably available for Mr Lambert to undertake. Northpoint submit that Mr Lambert's capacity to perform the inherent requirements of the job should be assessed by reference to the job he was employed to perform. This was a full time position with an 80% component of dealing with motor vehicles including driving cars on site and on public roads. It is not the Commission's role to assess fairness by a standard that would require an employer to re-create or experiment with different positions from the one held by the employee.

**[64]** Northpoint submit that Mr Lambert was not denied procedural fairness. It submits that it gave Mr Lambert advance notice that it could not keep his job open indefinitely and met with him on 26 April, 6 June and 20 August 2024 prior to any decision to dismiss. It asked him to show cause why his employment should not be terminated. He was on notice of this from 12 August. Northpoint considered his views and the update he gave on 20 August 2024 prior to deciding on dismissal.

[65] Whilst the circumstances were unfortunate, the dismissal was not unfair, and the application should be dismissed.

### **Consideration**

[66] Mr Lambert is eligible to make the claim. He was a person protected from unfair dismissal (s 382) and was dismissed (s 386). The application was made within time (s 394(2)).

[67] Northpoint is not a small business for the purposes of the FW Act. The Small Business Fair Dismissal Code does not apply to this matter.

[68] I now turn to whether the dismissal was harsh, unjust or unreasonable.

[69] Section 387 provides:

#### **“387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA 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 FWA considers relevant.”

[70] I now consider these matters.

#### Valid reason s 387(a)

[71] A valid reason for dismissal is one that is sound, rational or defensible.<sup>8</sup>

[72] The reason advanced by Northpoint is that Mr Lambert was unable to perform the inherent requirements of the job, had not been able to do so in the four months prior to dismissal, and that his job could not be indefinitely kept open.

[73] An inability to perform the inherent requirements of a position will generally provide a valid reason for dismissal, though not invariably so.<sup>9</sup>

[74] A reason will be “related to capacity” where the reason is associated or connected with the ability of the employee to perform his or her job.<sup>10</sup> It is the substantive position or role of the employee that must be considered and not some modified role, restricted duties or temporary alternative position.<sup>11</sup> The reference to “inherent” requirements invites attention to the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral.<sup>12</sup>

[75] In *Jetstar Airways Pty Ltd v Neeteson-Lemkes*<sup>13</sup> a Full Bench held that “[c]onsideration of the validity of that reason [related to capacity] requires three interconnected elements to be considered: firstly, whether [the employee] was capable of performing the inherent requirements of [the] role as at the date of dismissal; secondly, whether [the employee] would be able to perform the inherent requirements of [the] role at some time in the future; and thirdly, whether there was some reasonable adjustment which could be made to [the] role to accommodate any current or future incapacity.”

[76] In *Shortland v Smiths Snackfood Co*<sup>14</sup> a Full Bench observed that “[w]hen an employee is absent because of an incapacity to perform duties, a question of timing arises. The FW Act precludes a termination for a temporary absence of up to 3 months. If an absence extends beyond that period, it becomes a question of whether there is likely to be a return to duties in the short or medium term. Usually updated medical advice will be important to that consideration. Indeed, that medical information could have a bearing on the adequacy of the reason for termination.”

[77] I apply these principles in determining this matter. I deal specifically with the question of timing (whether the dismissal was unfair on the ground that it was premature) in considering the applicant’s submission (below) concerning harshness.

[78] It is readily apparent from the evidence, and not disputed, that a requirement of Mr Lambert’s position was that he held a current and valid driver’s licence. I accept Ms Walker’s evidence that, for insurance purposes, Northpoint required Mr Lambert to hold a valid driver’s licence even when driving solely on-site.

[79] It is also not disputed that a material and essential part of the role required Mr Lambert to drive motor vehicles both on-site and, from time to time, on public roads.

[80] These were not incidental or peripheral requirements of the job.

[81] Further, it is not in dispute that, at the time of dismissal, Mr Lambert did not hold a valid driver’s licence permitting him to drive. He had not held one for the four months prior. It had been suspended and remained so.

**[82]** For these reasons I find that holding a valid driver's licence was an inherent requirement of the job and that Mr Lambert was unable to fulfil that inherent requirement at the time of dismissal.

**[83]** This was a valid reason for dismissal.

**[84]** I make this finding without needing to consider whether Mr Lambert was incapable, for medical reasons, to perform the inherent requirements of the job. I agree with Mr Lambert that the employer did not rely on medical incapacity as the basis for its dismissal, though I observe that the Commission is not, when considering valid reason, bound solely to consider the ground relied on by an employer. Conduct or circumstance can constitute a valid reason, even if not relied upon by the employer, provided it existed at the time of dismissal.

**[85]** I simply observe that given the medical episode, and the reporting of it to the licensing authority, was the reason for the licence suspension, it is more than arguable that at the time of dismissal Mr Lambert was also unable to perform an inherent requirement of the job (that is, safely drive a motor vehicle) for that to also have been a valid reason.

**[86]** I do not consider that the employer failed to fully inform itself of Mr Lambert's medical condition. Whilst it did not seek out medical reports, it accepted the oral updates that Mr Lambert provided on 7 June and 20 August. Those updates informed the employer that medical testing was occurring and that no diagnosis or explanation for the medical episode had yet been made. To the extent that there was a failure to rely upon medical reports, it was Mr Lambert who did not provide the employer with the letters from his cardiologist of 3 May and 16 July, or the hospital discharge form of 31 July. I do not however consider this failure material because those reports largely added no more relevant information than what Mr Lambert orally conveyed.

**[87]** I do not accept Mr Lambert's submission that there was no valid reason because alternate arrangements could have been put in place to enable him to perform the inherent requirements of the job. Each of the alternate arrangements postulated by Mr Lambert would have required the job to be restructured into something different (such as a part time or casual job) so that only those elements which he could perform needed to be done. Testing valid reason against such an approach is impermissible. Firstly, as noted, valid reason is tested against the regular job as it existed, not some incidental or light duties portion of it or hypothecated subset. Mr Lambert's regular job was a full time role encompassing all the duties set out in the position description. Secondly, the evidence clearly establishes that the need to drive cars was indivisible from Mr Lambert's duties of car washing and detailing. Mr Lambert was required to drive cars to and from the washing and detailing bays and not simply be present at those locations waiting for cars to be driven to him by others.

**[88]** Absent a driver's licence, I find that no reasonable adjustment could be made to Mr Lambert's job to accommodate any current or future incapacity.

**[89]** That a valid reason existed weighs against a finding of unfair dismissal.

Whether notified s 387(b)

[90] Mr Lambert was notified of the reason for dismissal on the day he was dismissed. He was informed that it was because holding a driver's licence "was a core competency of the role" and that "we are unable to keep your role open".

[91] This is a neutral consideration.

Opportunity to respond s 387(c)

[92] I have found that:

- a show cause process was put in place, with a show cause meeting deferred by a week at Mr Lambert's request;
- as part of the show cause meeting, Mr Lambert was told to consider resigning;
- Mr Lambert sought and was granted a short period of time to consider his options;
- the decision to dismiss was a joint decision of Ms Walker and Mr Shephard, made after the show cause meeting and informed by it, including the fact that Mr Lambert had declined to resign; and
- absent a resignation, termination was pre-determined prior to the dismissal meeting on 22 August.

[93] Considered overall, and although the decision to escalate the matter to a show cause process and then dismiss was sudden, I do not find that Mr Lambert was denied procedural fairness. The minimum requirements of procedural fairness were met. Mr Lambert was on notice for the ten days prior that he may be dismissed. Mr Lambert was given an opportunity to state his case on 20 August and his views were then considered. Mr Lambert was given the reason for dismissal in an open and transparent manner two days later.

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

Support person s 387(d)

[95] Mr Lambert was not denied access to a support person because he did not request one. Ms Walker's email of 12 August 2024 specifically invited Mr Lambert to attend the show cause meeting with a support person.

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

Performance s 387(e)

[97] The dismissal was not connected to Mr Lambert's performance other than the employer's assessment that he was unable to perform the inherent requirements of the job and had not been able to do so in the four months prior. I have dealt with these issues in considering valid reason.

[98] That aside, no other performance issues arise or are relevant. It is not in contest that, until the April 2024 motor vehicle accident., Mr Lambert was a good and keen employee whose performance had not been brought into question.

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

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

[100] Northpoint is not a small business employer. It has some human resources capacity.

[101] Its size and human resources capacity do not materially explain the decisions and conduct of the employer relating to Mr Lambert's dismissal.

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

Other matters s 387(h)

[103] There are no other matters for consideration.

Conclusion on unfairness

[104] Clearly the dismissal arose from a dreadful circumstance which was neither the fault of Mr Lambert nor Northpoint.

[105] However, that circumstance (a medical episode whereby Mr Lambert blacked-out at the wheel whilst driving in the course of his employment) presented a personal, medical, industrial and business reality that both parties needed to deal with.

[106] I have found there to be a valid reason for dismissal based on Mr Lambert being unable to perform an inherent requirement of the job.

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

[108] Other considerations are neutral.

[109] However, Mr Lambert submits that even if a valid reason existed, the dismissal, when considered overall, was harsh.

[110] This submission is based on the proposition that, as the reason for dismissal relied on by the employer was the driver's licence being suspended, the decision was premature because the employer ought reasonably to have waited a further two months until the licence was restored.

[111] Section 387 requires a global assessment of all relevant factors. I agree with Mr Lambert, and it is well established, that there may be a valid reason for dismissal but dismissal may nevertheless be harsh, unjust or unreasonable.<sup>15</sup>

[112] There is some force in Mr Lambert's submission of harshness.

[113] Firstly, Mr Lambert genuinely believed that his licence would be restored six months after the accident, on or about 20 October 2024, because it had only been suspended for six months. Mr Lambert had informed the employer of this expectation. This is what happened.

[114] Secondly, having kept the job open for four months and having put in place workarounds to have his duties performed by others, the employer could have elected to wait another two months.

[115] Thirdly, in the context of the statutory scheme where a three month absence from work on account of illness or injury is deemed “temporary”, keeping a job open for four or six months is not as long a period as might otherwise be the case.

[116] In this respect Mr Lambert submits that regard should be had, as the Full Bench did in *Smith* (above), to the provisions of s 352 of the FW Act:

**“352 Temporary absence--illness or injury**

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.”

[117] Regulation 3.01(5)(i) of the *Fair Work Regulations 2009* provides that an illness or injury is not of a prescribed kind if “the employee’s absence extends for more than 3 months”.

[118] I agree that s 352 and regulation 3.01 are contextually relevant to an assessment of fairness, and particularly whether an employer has allowed a reasonable time to elapse before dismissing an employee who is unable to perform the inherent requirements of the job on account of illness or injury. The legislature has provided this relatively extensive period of protection for an employee’s absence before dismissal on account of illness or injury is considered lawful. This being so, it follows that what is a reasonable period when considering fairness should be similarly assessed somewhat liberally, though ultimately fairness remains based on all relevant circumstances. Just as the courts have observed that a dismissal contrary to an employer’s workers compensation obligation would not be considered fair<sup>16</sup>, it would be difficult to contemplate circumstances whereby a dismissal inside the three month period provided for by s 352 would be fair.

[119] Consequently, if Northpoint had dismissed Mr Lambert inside three months from the commencement of his absence it may well have been acting both unlawfully and unfairly. I need not make a finding on this hypothetical. Whilst it may be arguable that Mr Lambert was not on personal leave and thus may not, strictly speaking, have taken an absence of a “prescribed kind” within the meaning of regulation 3.01(2), I prefer the view that the regulation applied to these circumstances.

[120] That aside, I assess whether Mr Lambert’s dismissal was unfair in that it was premature (or, conversely, whether the time allowed by Northpoint was reasonable in the circumstances) in the statutory context that up to three months is considered by the legislature as a “temporary” absence.

[121] Northpoint acted after four months.

[122] Whilst the applicant submits that dismissal after the period of four months in the context of a prospective restoration of Mr Lambert's driver's licence at the six month mark was unreasonable, there are material countervailing considerations. These are:

- at the time of termination Mr Lambert had been unable to perform an essential requirement of the job (hold a valid driver's licence and drive motor vehicles) for four months;
- at the time of termination it was not known whether Mr Lambert's driver's licence would be restored in two months' time. Although prior to termination Mr Lambert had informed the employer that he expected to have his licence restored on or about 20 October 2024, there was no certainty of this because it was dependent on firstly, medical certification of his fitness to drive from this date and, secondly a decision by the licencing authority to restore the licence. A genuine belief was held by Mr Lambert, but the employer had no insight into what the future medical assessment of his doctors would be or the views of the licensing authority on any such medical assessment (though it is reasonable to expect that a licensing authority would act on any such certification). An assessment of harshness is not made in hindsight but by reference to known and reasonably known facts which existed at the time of dismissal;
- whilst this aspect should not be over-stated (given the nature of the job in the context of overall business operations), the temporary arrangements Northpoint had put in place during the preceding four months had become somewhat unreliable, caused some disruption to business operations and created a level of discontent within part of the workforce; and
- no alternate roles were available or reasonably available to be performed which Mr Lambert could undertake.

[123] Having regard to both the considerations in favour and against a finding of harshness, and whilst taking a relatively liberal view to the time that an employer ought to reasonably allow, I do not find that Mr Lambert's dismissal was harsh on the ground that the employer dismissed him prematurely.

[124] Whilst it was open for Northpoint to have taken a different view and waited longer before dismissal (and some employers may well have done so), it was not unfair that Northpoint did not do so. 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>17</sup> The issue is whether what the employer actually did was, considered overall and objectively, harsh, unjust or unreasonable. I conclude that it was not.

[125] For the sake of completeness, I have not weighed against Mr Lambert his evidence that that he was unable to perform his job in the two months that followed dismissal when he was placed on a disability support payment or that, in his opinion, he was unable to work after being dismissed (including being unable to seek work) because he was dismissed. As neither the dismissal nor my conclusion are based on an alleged medical incapacity beyond the medical episode that suspended the driver's licence, I do not do so.

[126] Further, although it is somewhat unorthodox to say the least that Mr Lambert may have been in receipt of unemployment benefits prior to being dismissed, this has formed no part of



my decision. Those are issues between he and Centrelink. That he was for four months without income and sought income support is understandable. I repeat the observations I made in *Alexandrou v Randstad Pty Ltd*<sup>18</sup> that the fairness of government agencies requiring, to be eligible for unemployment benefits, that employment has ceased (rather than, for example simply that paid work has ceased) is a matter for policy makers, not the Commission.

### **Conclusion**

[127] As Mr Lambert was dismissed through no fault of his own and consequent on an unexplained medical episode which deprived him of his driver's licence, one can readily have empathy for his circumstances.

[128] However, as his dismissal was not unfair, no issue of remedy arises. The application must be dismissed.

[129] An order giving effect to this decision is issued in conjunction with its publication.<sup>19</sup>



DEPUTY PRESIDENT

*Appearances:*

A. Wright, of *WK Lawyers*, on behalf of Mr Lambert.

M. Rudd, of and on behalf of, *Ducala Pty Ltd* trading as Northpoint Toyota

*Hearing details:*

2024.

Adelaide;

12 December

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<sup>1</sup> (1959) 101 CLR 298

<sup>2</sup> Oral evidence of Ms Walker

<sup>3</sup> R1 Position description dated 16.01.2023

<sup>4</sup> R1 Workpac invoices (various dates)

<sup>5</sup> R1 Email 12.08.2024 1.59pm

<sup>6</sup> A1 JL01, 02 and 03

<sup>7</sup> A1 JL04

<sup>8</sup> *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 37

<sup>9</sup> *Qantas Airways v Christie* (1998) 193 CLR 280

<sup>10</sup> *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031, [14]

<sup>11</sup> *J Boag & Son Brewing Pty Ltd v Button* [2010] FWAFB 4022, [22]

<sup>12</sup> *X v Commonwealth* (1999) 200 CLR 177, [102]

<sup>13</sup> [2013] FWAFB 9075, [53]

<sup>14</sup> [2011] FWAFB 2303, [19]

<sup>15</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

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<sup>16</sup> *Qantas Airways v Christie* (1998) 103 CLR 280

<sup>17</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>18</sup> [\[2024\] FWC 2502](#), [94] – [98]

<sup>19</sup> [PR782992](#)