



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Mr Tangyao Gao**

**v**

**Royal Crest Blinds Pty. Ltd.**

(U2024/12660)

COMMISSIONER REDFORD

MELBOURNE, 17 JANUARY 2025

*Application for an unfair dismissal remedy – jurisdictional objection raised — whether dismissal consistent with Small Business Fair Dismissal Code -jurisdictional objection dismissed – dismissal found to be unfair – reinstatement not appropriate - compensation ordered.*

[1] Mr Tangyao Gao was employed by Royal Crest Blinds Pty Ltd (**Royal Crest**) in November 2022 as a blind installer. Mr Gao’s employment was terminated on 16 October 2024. On 23 October 2024 Mr Gao made an application pursuant to s 394 of the *Fair Work Act 2009* (**the Act**) seeking a remedy from the Commission in relation to unfair dismissal. Royal Crest objects to the application on the basis that it says the termination of Mr Gao’s employment occurred in a manner that was consistent with the Small Business Fair Dismissal Code (**SBFDC**).

[2] The matter was listed for a hearing or determinative conference on 19 December 2024. At the commencement of the proceeding, I indicated to the parties my preference that a determinative conference be conducted. Neither party objected to this approach. Mr Gao appeared for himself at the determinative conference with the assistance of an interpreter. Royal Crest was granted permission to be represented by a lawyer or a paid agent, and Mr David Bell appeared for Royal Crest, together with Mr Ram Nadarajah, its Director.

[3] Prior to the determinative conference, both parties filed and served material in support of their position. Both parties filed a document described as an Outline of Argument together with various other documentary material. During the determinative conference, Mr Gao gave evidence as did Mr Nadarajah for Royal Crest. Shortly after commencement it became evident that Mr Bell was directly involved in matters relevant to the termination of Mr Gao’s employment and he was sworn in and also gave evidence for Royal Crest.

[4] The manner in which both parties to this matter gave evidence was not of particular assistance to the Commission. Mr Gao dealt with allegations put to him about his work performance in a defensive and somewhat belligerent matter. A significant anomaly in the narrative presented by Royal Crest arose during the determinative conference due to the production of further documentary evidence, which caused me to doubt the veracity of its original explanation as to the reason for the termination of Mr Gao’s employment (which I deal

with further below). It has been necessary to determine this matter despite the questionable quality of the evidence given by both parties.

### **Small business**

[5] It was not contested that Royal is a small business within the meaning of the Act. It had 7 employees at the time Mr Gao was dismissed. Accordingly, the SBFDC applies.

### **Serious misconduct**

[6] It is necessary at the outset to resolve an apparent contradiction in some of the materials filed by Royal Crest. In its Outline of Argument, in section 6 “Remedy”, Royal Crest included submissions apparently framed against the Small Business Fair Dismissal Code Checklist issued by the Fair Work Ombudsman. Items 4 and 5 of the checklist relate to whether it is said the dismissal occurred due to allegations of misconduct or serious misconduct, a term which is defined by regulation 1.07 of the *Fair Work Regulations 2009 (the Regulations)*<sup>1</sup>. At section 6 of its Outline of Argument, Royal Crest appears to answer those questions as follows:

*“The answer is Yes – Mr Gao was rude and offensive towards Clients and aggressive item 4 (d). No direct threats were made, but Mr Gao was aggressive towards Clients from feedback given.*

...

*Mr Gao was dismissed for other forms of misconduct ...”.*

[7] However, earlier in its Outline of Argument, apparently in answer to whether it is said Mr Gao was dismissed for misconduct or serious misconduct, Royal Crest answers “no”. Substantive submissions are made under a different section entitled “Dismissed for poor work performance”.

[8] The proposition that Mr Gao was dismissed by Royal Crest over allegations of poor work performance, and not serious misconduct, is more consistent with Royal Crest’s original response to the application, filed on 6 November 2024. In the response, Royal Crest says:

*“The reasons for the dismissal were:*

- 1. Poor workmanship*
- 2. Being regularly late to work*
- 3. Not documenting jobs as requested*
- 4. Poor customer interaction”*

[9] Regulation 1.07 of the Regulations provides that “serious misconduct” has its ordinary meaning, exemplified in the case of employees as conduct such as:

- (a) wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment;*

(b) *conduct that causes serious and imminent risk to:*

(i) *the health or safety of a person; or*

(ii) *the reputation, viability or profitability of the employer's business;*

(c) *engaging in theft, fraud, assault or sexual harassment in the course of the employee's employment;*

(d) *being intoxicated at work;*

(e) *refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.*

[10] At the determinative conference, it was said for Royal Crest that it does not allege Mr Gao engaged in "serious misconduct".

[11] I consider that it is not seriously contended by Royal Crest that it dismissed Mr Gao over allegations of serious misconduct within the meaning of r 1.07 of the Regulations. While the circumstances include allegations Mr Gao engaged in conduct of a kind that Royal Crest did not consider appropriate, he was not summarily dismissed for engaging in serious misconduct.

[12] Even if it had been submitted that Mr Gao had engaged in serious misconduct, I consider there is no evidence to support such a contention.

### **The Small Business Fair Dismissal Code**

[13] Section 388 provides as follows:

#### ***388 The Small Business Fair Dismissal Code***

*(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.*

*(2) A person's dismissal was consistent with the Small Business Fair Dismissal Code if:*

*(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and*

*(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.*

[14] The SBFDC, provides as follows:

#### ***Summary Dismissal***

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

### ***Other Dismissal***

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

*The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.*

*The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.*

### ***Procedural Matters***

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

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

## **Issues relating to Mr Gao's conduct, capacity and work performance.**

[15] Mr Gao commenced employment with Royal Crest on 23 November 2022, as confirmed in a letter of appointment dated 9 October 2022.

[16] Royal Crest submitted that during 2024 it was required to deal with a number of complaints from its clients about the quality of Mr Gao's work. These resulted in Royal Crest providing Mr Gao with several warnings about his work performance, as outlined below.

[17] During the determinative conference, each of the matters raised by Royal Crest were put to Mr Gao for his response. I consider that Mr Gao did himself no favours in the manner he responded to these matters in his evidence. The matters were first made known to Mr Gao on 6

November 2024 when he saw Royal Crest's response to his application, in which each of these matters were set out. Further detail was provided in its Outline of Argument, filed and served on 27 November 2024. Despite this, Mr Gao claimed he did not remember most of the matters raised or simply denied them. The only occasion on which Mr Gao accepted that "sometimes he made mistakes" was when confronted with the incontrovertible evidence that performance issues had been raised with him, in the form of an email warning he was given on 15 July 2024. Mr Nadarajah on the other hand seemed to have a clear recollection about each of the incidents and in some cases was able to supplement them with further detail in oral evidence. Mr Gao submitted some of the incidents are simply "made up". I do not consider Royal Crest fabricated or made up these allegations. I accept Royal Crest's evidence of Mr Gao's work performance issues, as follows:

- a. That on 10 April 2024, during an installers meeting Mr Gao was given a "verbal warning" in relation to poor workmanship, messy sites and Mr Gao undertook to improve. It was also agreed Mr Gao would work accompanied, until he confirmed he was "happy to meet the standards of installation", which he then did on 15 April 2024.
- b. That on 3 June 2024, in relation to a job for a client called Mr Pizzney, issues arose including poor installation, that Mr Gao left his tools on the client's furniture, that mess was left requiring the client to cleanup, and it was necessary to give the client a discount.
- c. That on 8 July 2024, a complaint was received by a client called Antler Environments that Mr Gao left screws and aluminium cuttings on carpet where children were playing and left without cleaning up. After Mr Nadarajah attended the work-site to inspect the complaint, it was necessary to provide the client with a discount. Mr Nadarajah discussed this matter with Mr Gao.
- d. That on 9 July 2024 Mr Gao was given another verbal warning about poor performance at an installers meeting, in relation to the complaint received the previous day.
- e. That on 14 July 2024 clients named Ms Muir and Mr Buckley complained about metal shavings left in an alfresco area and a damaged blind. It was necessary to send another installer to address these matters.
- f. That on 15 July 2024 Mr Gao was given a formal written warning in an email sent to him by Mr Nadarajah. A copy of this email was tendered in evidence. The warning mentioned complaints as to workmanship, safety and tidiness. It also instructed Mr Gao to follow a particular procedure in relation to his work schedule. It said that if these matters continue the matter "may escalate" and lead to Mr Gao's dismissal.
- g. That on 2 September 2024 Mr Gao used the toilet at the house of a client named Mr Elcheikh without permission, and did not flush it. It was also alleged that damage was caused to the walls when the blinds were carried in. It was necessary for another installer to complete the works and repair the damage. A complaint was later made about this incident, resulting in a negative Google review, and a discount provided to the client.

- h. That on 2 October 2024 Mr Gao did not use a drop sheet and leaned shutters against a timber staircase, causing damage to a client property. It was necessary to provide the client – Mr Al-Dabbagh – with a discount.
- i. That on 8 October 2024 Mr Gao asked to start at 9:30AM but did not start work until 10:45AM, making it necessary to postpone appointments.
- j. That on 9 October 2024 Mr Gao was given another verbal warning, during an installers meeting, to come to work on time.

[18] There was also evidence given that in “March” there was a client complaint about Mr Gao’s work, involving extra holes being made in the ceiling, which had to be repaired, and in relation to which the client was given a discount. In oral evidence, Mr Nadarajah said this incident occurred in March “2023”. Mr Gao said he could not remember this incident. All of the other matters referred to in Royal Crest’s evidence relate to matters said to have occurred in 2024 and this allegation is anomalous in this regard. However, during the course of the determinative conference a document was tendered dated 3 March 2023 which showed a text message exchange between Mr Nadarajah and an unidentified person including a photograph of what appeared to be an extra hole drilled into a ceiling. The document did not include any identifying information in respect to Mr Gao. I consider that the manner in which this evidence was given, which originally omitted the proper date of the allegation, its anomaly in timing with the other allegations, the length of time that has now elapsed since the alleged incident together with Mr Gao’s evidence that he cannot remember it, make it unreliable and I give it no weight in relation to this matter.

[19] The incident alleged to have occurred on 2 September 2024 at the house of Mr Elcheikh is somewhat critical to this matter. In relation to this incident, it appears Mr Gao believes the allegations made by this client are contrived. He said that during the job, the client had become unhappy because Mr Gao he had insisted that he contact Mr Nadarajah to confirm that he had been required to remove curtains – a task that was not on Mr Gao’s job sheet.

[20] Having said that, Mr Gao *does* concede that he used the toilet, albeit that he says he *did* flush it.

[21] Documentary evidence was tendered during the determinative conference showing that Mr Nadarajah engaged in a text message exchange with Mr Elcheikh on 9 October 2024 in which bank details are provided apparently for the purposes of obtaining a discount or refund. The exchange also shows part of an apology provided by Mr Nadarajah. The circumstances in which this evidence was produced during the determinative conference is dealt with in more detail below.

[22] While Mr Elcheikh did not give evidence in this matter, I find that Mr Nadarajah received a complaint in relation to Mr Gao’s conduct from this client, an assertion made by Mr Nadarajah which is corroborated by the text message exchange tendered in evidence. While the evidence as to precisely when this complaint was made was unclear, I consider it likely to have been made on or close to 2 September 2024 when the works were carried out.

[23] Mr Nadarajah said he gave instructions to Mr Gao to apologise to this client, and did so in person, at the Royal Crest office. Mr Gao denies this. I prefer Mr Nadarajah's evidence in this regard and find that Mr Gao was instructed to apologise to the client and did not do so.

[24] Mr Nadarajah said that after Mr Gao failed to apologise to Mr Elcheikh, a negative Google review was posted on the Royal Crest web-site by him. Mr Nadarajah said that after he discovered the negative review, he contacted Mr Elcheikh and apologised, and it was agreed that he would remove the negative review on the basis that he would be provided with a "significant discount". Mr Nadarajah said that as a result, the negative review has now been taken down and can no longer be accessed. Presumably for this reason, a copy of the review was not provided to the Commission in evidence. I nevertheless accept that in the circumstances described by Mr Nadarajah a negative review was posted on the Royal Crest web-site by this client.

[25] The timing of the posting of that review is another matter and is dealt with below.

[26] Despite the apparent disparities in the evidence, particularly because documentary evidence was tendered in relation to this client complaint (which I deal with in more detail below) I consider that Mr Gao did use Mr Elcheikh's toilet, that a complaint was made, that Mr Gao was instructed to apologise to client, that he did not do so and that consequentially, a negative review was posted on the Royal Crest web-site, which caused Mr Nadarajah to have to apologise to Mr Elcheikh and provide him with a discount. In the circumstances, I consider it is not necessary that I determine whether the toilet was or was not flushed.

### **Carers Leave**

[27] On 15 October 2024, at 10:36PM Mr Gao sent a text message to Mr Nadarajah stating that his wife sprained her ankle that evening and that the following day he wished to take carer's leave so he could take her to the Doctor. Mr Gao described this as the "usual practice" in relation to requests to take personal leave. Mr Nadarajah sent a response at 10:37PM saying "no worries Patrick".

[28] Later at 10:44PM on 15 October 2024 Mr Nadarajah sent Mr Gao another text message stating that he had "just checked with Rachel" who had already booked two important jobs for the following day which could not be postponed and requested that Mr Gao "go [to the Doctor] after installation", or "come to work bit late [sic]". Mr Gao replied that he would try.

[29] On 16 October 2024, at 7:41AM, Mr Nadarajah sent another text message to Mr Gao which said "Please let me know what is the go for today ... I need to make an arrangement ... Thanks". Mr Nadarajah clarified in evidence that his reference to "arrangement" was in respect to the two jobs that had been booked for that day. Mr Gao replied at 7:48AM that he had booked 9:45AM for the GP and after that they would go for a "foot image", but he didn't know "how long for it".

[30] Later in the morning 16 October 2024, at 9:23AM, Mr Nadarajah sent Mr Gao an email attaching a letter which said Mr Gao's employment was terminated "effective immediately", after "providing numerous warnings written and verbal of conduct, behaviour and poor workmanship".

[31] Mr Gao alleges that his employment was terminated because he sought to take carer's leave to attend to his wife.

[32] Mr Nadarajah said in evidence that after he exchanged text messages with Mr Gao at 7:41AM and 7:48AM he discovered Mr Elcheikh's negative google review about Royal Crest. As is discussed below, it later emerged in evidence that Mr Nadarajah *did not* discover this review on this day but had discovered it some days earlier.

### **The termination of Mr Gao's employment**

[33] As mentioned above, Mr Gao was notified of the termination of his employment by email in the morning of 16 October 2024. He had no immediate notice that his employment was to be or might be terminated prior to receiving this email.

[34] Mr Gao did receive warnings in relation to poor work performance and conduct, the most recent of which occurred on 9 October 2024, verbally, during an installers meeting. There was little detail provided in evidence as to the specific nature of this or the other verbal warnings save that they were described by Royal Crest as "warnings". The significant warning Mr Gao received was in writing and referred to the possibility of dismissal if his work performance did not improve. However, this warning was provided some months before, on 15 July 2024.

[35] Mr Gao was paid 2 weeks in lieu of notice in respect to the termination of his employment.

[36] Under the heading "Summary Dismissal", the SBFDC provides that an employee may be dismissed fairly "without notice or warning" in cases of conduct serious enough to justify "immediate dismissal". This part of the Code is concerned with dismissals which have immediate effect – that occur without any actual notice - not dismissals on notice<sup>2</sup>. A payment in lieu of notice does not alter the effect of a failure to provide any actual notice of termination with immediate effect<sup>3</sup>.

[37] On this basis, I find that Mr Gao was summarily dismissed on 16 October 2024 in that he was terminated with immediate effect without actual notice.

### **Why was Mr Gao dismissed?**

[38] It was raised with Mr Nadarajah as to why at about 7:41AM on 16 October 2024 he apparently wanted Mr Gao to attend work that day, by sending a text which said, "what is the go", but then decided to terminate Mr Gao's employment at 9:23AM that morning. The question was put to Mr Nadarajah as to "what changed" between 7:41AM, at which point he appeared to want Mr Gao at work, and 9:23AM, by which time he had apparently decided to terminate Mr Gao's employment.

[39] Mr Nadarajah's evidence in answer to this question was unclear. He initially said that Mr Gao was terminated for poor work performance. When pressed as to the timing of his decision, he said he decided to terminate Mr Gao's employment because Mr Gao was not going to attend for work and had "let him down". When pressed for clarity, Mr Nadarajah appeared



to repeat this explanation. Later in his evidence, he said that his discovery of the negative review and Mr Gao's failure to apologise to the client "was the last straw".

[40] In its Response to the application, Royal Crest said, in relation to the reason for Mr Gao's dismissal, that:

*"In addition to this, the employee appears to have misunderstood why he was let go. It has nothing to do with being away for the day. The final item was that he was to have communicated and apologised to a client who was upset with the employee using the clients toilet facilities and did not flush the toilet. He was asked to apologise to the client which he didn't do and on the day after communications relating to being away had elapsed, that client posted a review on the Royal Crest Website."*<sup>4</sup>

[41] The suggestion that the reason Mr Gao was dismissed was the negative client review was underscored in the Outline of Argument filed by Royal Crest, in which it was said:

*"16 October 2024 – The Company received a review from Mr David Elcheikh online complaining about the installation. Mr Nadarajah rang the client to discuss the review left online. Mr Elcheikh informed Mr Nadarajah that Mr Gao had not apologised or made contact with him. Mr Nadarajah discussed the review and Mr Nadarajah apologised. Mr Gao was terminated that day, as his performance had been below standards expected and was emailed his termination, which outlined his entitlements."*<sup>5</sup>

[42] While Mr Nadarajah's oral evidence in relation to this matter was discrepant, it is clear that Royal Crest has invited the Commission to accept a narrative that the decision to terminate Mr Gao's employment was made on 16 October 2024 following the discovery *that day* of the negative review posted by Mr Elcheikh, and this was "the last straw" in relation to Mr Gao's employment. And that as a result, Mr Gao's notice that he intended to take carer's leave, which has an obvious temporal relationship with the decision to terminate his employment, is not the reason or a reason for termination of his employment. This is plainly the narrative asserted in the Response to Mr Gao's application, Royal Crest's Outline of Argument (where the reference to the receipt of the review on 16 October 2024 was explicit), and was reiterated, less clearly, in Mr Nadarajah's evidence.

[43] During the determinative conference, the question arose as to whether a copy of the client complaint or the negative review was available. A short adjournment occurred to enable Royal Crest to attempt to obtain a copy of the review. After the adjournment, two documents were tendered. Mr Gao initially objected to the attempt to tender the documents, but then withdrew the objection and they were accepted into evidence.

[44] The first document tendered was the text message exchange referred to above, from 3 March 2023. The second document was the text message exchange between Mr Nadarajah and Mr Elcheikh, referred to above time and date stamped 9:11AM, 9 October 2024.

[45] In this way it emerged that Mr Nadarajah did not discover the negative client review on 16 October 2024, nor did he have an exchange with the client that day, nor did he discover that Mr Gao had not apologised to the client that day. He discovered these things at least a week earlier, on or before 9 October 2024.

[46] I therefore find it difficult to accept that the matters involving Mr Elcheikh were the “last straw” for Mr Nadarajah in respect to Mr Gao’s employment. Mr Gao continued working after the complaint was made – for nearly two months - and even after the negative review was discovered. As late as on the morning of 16 October 2024, Mr Nadarajah continued to want Mr Gao to attend for work for him.

[47] Undoubtedly, the work performance issues Mr Nadarajah had been counselling Mr Gao about during 2024, Mr Gao’s failure to apologise to Mr Elcheikh and the subsequent negative review were sources of frustration for Mr Nadarajah and his business. But they did not cause Mr Nadarajah to terminate Mr Gao’s employment.

[48] I consider it much more likely that what prompted Mr Nadarajah to send an email to Mr Gao at 9:23AM on the morning of 16 October 2024 terminating his employment was Mr Gao’s failure to attend work. There is no doubt the reason for Mr Gao’s absence – to take carer’s leave to care for his wife – was known to Mr Nadarajah. In respect to the carer’s leave, it appears Mr Gao notified Mr Nadarajah of his absence from work according to the usual practice, and Mr Nadarajah acknowledged this notice by saying “no worries”. Mr Nadarajah did request Mr Gao to assist with the fact that two jobs had already been booked, by altering the date of the medical appointment or coming in to work afterwards. However, there was no suggestion made to me that Mr Gao’s carer’s leave was anything other than legitimate.

[49] I am fortified in this view by Mr Nadarajah’s oral evidence in which he initially said he decided to terminate Mr Gao’s employment because Mr Gao was not going to attend for work and had “let him down” – a comment that was repeated when he was pressed for clarity.

[50] I find the reason for Mr Nadarajah’s decision to terminate Mr Gao’s employment was his absence from work, and this absence was a legitimate exercise of Mr Gao’s workplace right to take carer’s leave.

[51] This being said, Mr Nadarajah’s decision occurred against the backdrop of performance issues which had been repeatedly raised with Mr Gao. One of those issues was the matters Mr Nadarajah discovered on or about 9 October 2024 – that Mr Gao had not apologised to the client and the client posted a negative review of the business. I consider that, had Mr Gao attended for work on 16 October 2024, his employment would not have been terminated. However, taking into account the issues with Mr Gao’s work performance, including the issue discovered on or about 9 October 2024, it may well have been that Mr Gao’s employment would have been terminated if there had been any further client complaint about his work performance over the ensuing weeks.

**Consideration: was the dismissal consistent with the SBFDC?**

[52] Having found that Mr Gao was summarily dismissed, it is necessary, pursuant to s 385(c) of the Act, to consider whether the dismissal was consistent with the first part of the SBFDC that deals with circumstances of summary dismissal. A Full Bench of this Commission set out the following approach<sup>6</sup>:

*(1) If a small business employer has dismissed an employee without notice - that is, with immediate effect - on the ground that the employee has committed serious misconduct that falls within the definition in reg.1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the “Summary dismissal” section of the Code. All other types of dismissals by small business employers are to be considered under the “Other dismissal” section of the Code.*

*(2) In assessing whether the “Summary dismissal” section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee’s conduct was sufficiently serious to justify immediate dismissal, and second whether the employer’s belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element.*

**[53]** Above, I have found that Royal Crest did not seriously contend that Mr Gao engaged in serious misconduct and confirmed this during the determinative conference. I have also found that even if it was submitted Mr Gao engaged in serious misconduct (or conduct “serious enough to justify immediate dismissal”) there is no evidence to support such a contention.

**[54]** Accordingly, I cannot find Royal Crest had a genuine belief that Mr Gao’s conduct was sufficiently serious to justify immediate dismissal based on reasonable grounds. It nevertheless terminated Mr Gao’s employment without notice and with immediate effect. The dismissal was not consistent with the SBFDC and Royal Crest’s objection to the application is dismissed.

### **Unfair dismissal**

**[55]** Having determined that Mr Gao’s dismissal was not in accordance with the SBFDC, I now turn to the merits of his application for an unfair dismissal remedy.

**[56]** I note for completeness that it is the case, and it was not contended otherwise, that:

- a. Mr Gao’s application was made within the period required in s 394(2) of the Act; and
- b. Mr Gao was a person protected from unfair dismissal within the meaning of s 382 of the Act; and
- c. This was not a case of genuine redundancy.

**[57]** Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- a. whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- b. whether the person was notified of that reason; and
- c. whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

- d. any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- e. if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- f. the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- g. the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- h. any other matters that the FWC considers relevant.

**[58]** I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me<sup>7</sup>.

**Was there a valid reason for dismissal related to Mr Gao’s capacity or conduct?**

**[59]** It is well established that in order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded” and should not be “capricious, fanciful, spiteful or prejudiced”<sup>8</sup>.

**[60]** The letter provided to Mr Gao on 16 October 2024 said the reason for the termination his employment was “conduct, behaviour and poor workmanship”. The evidence shows examples of problems with Mr Gao’s workmanship during 2024, the last of which occurred on 2 October 2024. A question therefore arose as to what triggered the decision to terminate the employment on 16 October 2024, but as explained above, it was contended before the Commission that on the morning of 16 October 2024, Royal Crest discovered a negative Google review from a client arising from a complaint directed towards Mr Gao, and that this was “the last straw” after a series of previous issues. However, for whatever reason, it has emerged this narrative is mistaken, or is a contrivance, because Royal Crest became aware of the negative review at least a week beforehand, perhaps on 9 October 2024, not on the morning of 16 October 2024, and did not move to terminate Mr Gao’s employment at the time – rather – it continued his employment and he continued to work. Above, I explain that I cannot accept the that the client’s complaint and review was the reason for the decision to terminate Mr Gao’s employment, and that the reason for the decision was Mr Gao’s absence from work - an absence that was a legitimate exercise of his workplace right to take carer’s leave.

**[61]** In these circumstances, I do not consider had Royal Crest had a sound defensible or well founded reason to terminate Mr Gao’s employment on 16 October 2024, and its reason was at least prejudiced, arising from frustration that Mr Gao had taken legitimate leave.

**Was Mr Gao notified of the reason for dismissal?**

[62] Notification of the valid reason for dismissal must be given to the employee explicitly and in plain and clear terms. But crucially, this must occur before the decision to terminate the employment is made<sup>9</sup>.

[63] Mr Gao was notified of Royal Crest's purported reason for his dismissal in the letter he received on 16 October 2024 in which his employment was terminated. This notification did not occur before the decision was made and, in any event, was not the real reason for the decision. Mr Gao was not notified of the reason for dismissal. This factor weighs further in favour of a finding that the termination of Mr Gao's employment was unfair.

**Was Mr Gao given an opportunity to respond to the valid reason?**

[64] While the opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly<sup>10</sup>, the employee must be aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern<sup>11</sup>.

[65] Mr Gao was not afforded an opportunity to respond to the reason for the termination of his employment because he was not provided with the reason before the termination occurred. This factor weighs in favour of a finding that the termination of Mr Gao's employment was unfair.

**Did Royal Crest unreasonably refuse to allow Mr Gao to have a support person present to assist at discussions relating to the dismissal?**

[66] There were no discussions relating to the dismissal. This factor consequently weighs neutrally in my consideration.

**Was Mr Gao warned about unsatisfactory performance before the dismissal?**

[67] It is well established that a "warning" for the purposes of s 387(e) of the Act should make it clear that the employee's employment is at risk unless the performance is improved<sup>12</sup>.

[68] Mr Gao received a written warning on 15 July 2024 in relation to matters including poor work performance. He also received other verbal warnings in relation to work performance and conduct. However, I have found that the reason for the termination of Mr Gao's employment was not unsatisfactory performance and, as a result, this factor weighs neutrally in my consideration.

**To what degree would the size of Royal Crest's enterprise or the absence of human resources management specialists be likely to impact on the procedures followed in effecting the dismissal?**

[69] Royal Crest is a small business and does not appear to have dedicated human resources specialists. Some kind of ongoing relationship exists between Royal Crest, and it's advocate in

this matter, Mr Bell, however in the absence of more information about the nature of his services or expertise I do not consider this relationship relevant to the matters raised by s 387(g) of the Act. Accordingly, I consider it likely Royal Crest's size and absence of human resource specialists likely to have impacted on the procedures followed in effecting Mr Gao's dismissal.

[70] It is however well established that these matters do not justify a dismissal to be conducted without procedural fairness or the employee being provided with a fair go<sup>13</sup>. They also do not justify the making of factual assertions in documents filed in the Commission that, as it has transpired, are plainly incorrect.

[71] In circumstances where Mr Gao's employment was terminated effective immediately, and where the Commission has been invited to accept a justification for this conduct based on an apparent contrivance, I consider Royal Crest's size and lack of human resources expertise to weigh neutrally in my consideration as to whether Mr Gao's termination of employment was unfair.

#### **What other matters are relevant?**

[72] Section 387(h) requires the Commission to take into account any other matters considered relevant. I consider that several further factors weigh in favour of a finding that the termination of Mr Gao's termination of employment was unfair as follows:

- d. Mr Gao was terminated without notice in circumstances where, on his employer's own concession, it was not serious contended he had engaged in serious misconduct<sup>14</sup>.
- e. It appears Mr Gao was terminated in circumstances where he was attempting to exercise a workplace right – namely – to take carer's leave.

[73] I do however note that while I consider the termination of Mr Gao's employment to have been unjustified, he contributed to his own demise. In particular, his failure to follow an instruction provide to him by his employer that he apologise to Mr Elcheikh caused his employer to suffer reputational loss, in the form of a negative google review, and financial loss, in the form of having to provide a significant discount. While I cannot find this overwhelms the unfairness associated with having been summarily terminated as a result of or in associated with taking carer's leave, I have nevertheless taken this in account, both in my consideration of whether the dismissal was harsh, unjust or unreasonable, and on the question of remedy, discussed below.

#### **Is the Commission satisfied that the dismissal of Mr Gao was harsh, unjust or unreasonable?**

[74] I have made findings in relation to each matter specified in s.387 of the Act. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable<sup>15</sup>. I have found that the reason for the termination of Mr Gao's employment was not valid. He was not notified of the reason for his dismissal, nor given a chance to respond. Several other factors weigh in favour of a finding of unfairness, including the summary nature of the dismissal, and its association with Mr Gao having

exercised a workplace right to take carer's leave. Weighing against the finding is Mr Gao's work performance and conduct, particularly that which appears to have exposed his employer to reputational and financial damage. On balance, having considered each of the matters specified in s.387 of the Act, I consider the weight of these factors bears in favour of a finding of unfairness, and I am satisfied that the dismissal of Mr Gao was harsh, unjust and unreasonable.

[75] I find Mr Gao was unfairly dismissed.

### **Remedy**

[76] Being satisfied that Mr Gao:

- a. made an application for an order granting a remedy under s.394;
- b. was a person protected from unfair dismissal;
- c. and was unfairly dismissed within the meaning of s.385 of the Act, I may, subject to the Act, order Mr Gao reinstatement, or the payment of compensation to Mr Gao.

[77] Under s.390(3) of the Act, I must not order the payment of compensation to Mr Gao unless: (a) I am satisfied that reinstatement of Mr Gao is inappropriate; and (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

### **Is reinstatement of Mr Gao inappropriate?**

[78] Mr Gao does not seek reinstatement and has obtained alternative employment. I find in these circumstances that reinstatement is inappropriate.

### **Is an order for payment of compensation appropriate in all the circumstances of the case?**

[79] Mr Gao has suffered financial loss in circumstances where I have found he was unfairly dismissed. Whilst it does not automatically follow that a payment of compensation is appropriate<sup>16</sup>, in all the circumstances, I consider that an order for payment of compensation is appropriate.

### **Compensation – what must be taken into account in determining an amount?**

[80] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to Mr Gao in lieu of reinstatement including:

- a. the effect of the order on the viability of Royal Crest's enterprise;

- b. the length of Mr Gao's service;
- c. the remuneration that Mr Gao would have received, or would have been likely to receive, if he had not been dismissed;
- d. the efforts of Mr Gao (if any) to mitigate the loss suffered because of the dismissal;
- e. the amount of any remuneration earned by Mr Gao from employment or other work during the period between the dismissal and the making of the order for compensation;
- f. the amount of any income reasonably likely to be so earned by Mr Gao during the period between the making of the order for compensation and the actual compensation; and
- g. any other matter that the Commission considers relevant.

[81] I consider each of these matters below.

**Effect of the order on the viability of Royal Crest's enterprise.**

[82] Despite there having been no evidence provided about this matter, I have given consideration to the effect of an order of compensation on the viability of Royal Crest's enterprise, knowing as I do that it is a small business. Taking into account the amount of compensation I intend to order to be paid to Mr Gao, I consider this is a neutral factor in respect of the s 392(2) considerations.

**Length of Mr Gao's service**

[83] Mr Gao was employed by Royal Crest nearly two years. While this is not a long period of service it is also not an insignificant one. Taking into account the matters described below (especially the fact that Mr Gao successfully obtained alternative employment not long after the termination) I do not consider the length of Mr Gao's services impacts on the consideration of whether an order of compensation should be made in this matter.

**Remuneration that Mr Gao would have received, or would have been likely to receive, if Mr Gao had not been dismissed**

[84] In determining the remuneration that Mr Gao would have received, or would have been likely to receive, I am required to address myself to the question of whether if Mr Gao's employment had not been terminated, the employment would have been likely to continue or would have been terminated at some time by another means, and in doing so, make an assessment as to the anticipated period of employment<sup>17</sup>.

[85] A number of incidents arose during 2024 in which Mr Gao's work performance and conduct appeared to be questionable, causing Royal Crest to counsel and warn him at least our times, arising in various client complaints and causing it to have to provide clients with



apologies and discounts on several occasions. On at least one of these occasions Mr Gao conducted himself in such a manner that a client made a negative review about Royal Crest which was publicly available and could have caused damage to its business. This occurred on or about 9 October 2024 – the same date on which Mr Gao received a warning about being late for work.

[86] Despite these incidents, Mr Gao’s employment was not terminated, and it was only when he sought to take carer’s leave that he was dismissed. A question therefore arises as to how long Royal Crest would have tolerated any further performance issues or client complaints – as it did throughout 2024 and even after the negative client review was posted on or about 9 October 2024. On balance, I consider it unlikely Royal Crest would have tolerated the position for much longer, particularly if there had been a further client complaint – such complaints being not infrequent in the lead up to the termination of employment. In these circumstances I consider it unlikely Mr Gao’s employment with Royal Crest would have continued for longer than another month, from 16 October 2024 until 16 November 2024. This is the “anticipated period of employment”<sup>18</sup>.

[87] A payroll activity summary in respect to Mr Gao was tendered by Royal Crest showing his gross earnings in the six months prior to the termination were \$46,283.98 (not including superannuation). For the purposes of calculating compensation in this matter, I intend to use this summary which was tendered in evidence and not challenged. On this basis, I consider that the remuneration Mr Gao would have been likely to receive if he had continued working for one month, from 17 October 2024 to 17 November 2024, to be \$7,713.99 gross plus superannuation.

#### **Efforts of Mr Gao to mitigate the loss suffered by Mr Gao because of the dismissal**

[88] Mr Gao gave evidence that following the termination of his employment he applied for six jobs through SEEK and INDEED, obtained three interviews and was successful in obtaining a new job. He commenced in his new job on 30 October 2024.

#### **Amount of remuneration earned by Mr Gao from employment or other work during the period between the dismissal and the making of the order for compensation**

[89] Mr Gao commenced employment in a new job on 30 October 2024. After the determinative conference, on 27 December 2024, Mr Gao provided the Commission with a pay slip showing that during the period 30 October 2024 until 5 November 2024 he had been paid \$1,330.00 gross apparently on the basis of being paid \$35.00 per hour gross in his new job, or \$1,330.00 (gross) per week.

[90] It appears likely therefore that since the termination of his employment, commencing 30 October 2024, Mr Gao began earning \$1,330.00 gross per week. Nearly three months has passed since that date. In response to a request made by my chambers on 17 January 2025, Mr Gao confirmed that since he began in his new job, he has earned \$1,330.00 gross per week over the course of about nine weeks, or \$11,970.00.

[91] However, a significant portion of those earnings have been earned outside the period of anticipated employment, which I consider ended on 16 November 2024<sup>19</sup>. I consider that during the anticipated period of employment, Mr Gao earned two weeks' pay in his new job, or \$2,660.00.

**Amount of income reasonably likely to be so earned by Mr Gao during the period between the making of the order for compensation and the actual compensation**

[92] It appears likely Mr Gao will continue to earn income between the period of any order made that he be paid compensation (if any was to be made), and when that compensation would be paid. However, I do not consider this to be relevant, because it occurs outside the period of anticipated employment.

**Other relevant matters**

[93] I have found that leading up to the termination of his employment, there were a number of incidents in which Mr Gao's work performance was questionable, he was warned several times and his inappropriate use of a client's toilet resulted in a complaint which caused a public negative review to be published about Royal Crest – this and other incidents also caused Royal Crest to have to provide clients with discounts or engage in other remedial action. While I have found this was not the reason for the termination of his employment, I consider this conduct to be relevant to the question of remedy in this matter.

**Calculation of compensation**

[94] Below, I adopt the *Sprigg* formula to calculate the amount of compensation which should be awarded to Mr Gao in respect to this matter<sup>20</sup>. The formula is as follows:

- a. Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
- b. Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered.
- c. Step 3: Discount the remaining amount for contingencies.
- d. Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

**Step 1**

[95] I have estimated that Mr Gao would have remained employed by Royal for at least a further month.

[96] The remuneration Mr Gao would have received or would have been likely to receive if he had continued working for one month, from 16 October 2024 to 16 November 2024, is \$7,713.99 gross plus superannuation.

## **Step 2**

[97] Mr Gao has confirmed that since the termination of his employment, he has earned \$14,630.00. However, much of that income was earned outside the period of anticipated employment. During the anticipated period of employment, Mr Gao earned \$2,660.00. When this is deducted from the remuneration Mr Gao would likely have received during the period, an amount of \$5,053.99 remains.

## **Step 3**

As is mentioned above, I consider it appropriate to take into account the fact that, leading up to the termination of his employment, there were a number of incidents in which Mr Gao's work performance was questionable, he was warned several times, he failed to follow an instruction that he apologise to Mr Elcheikh and this incident caused a public negative review to be published about Royal Crest – this and other incidents also caused Royal Crest to have to provide clients with discounts or engage in other remedial action. On this basis, I consider it appropriate to discount the award of compensation that might otherwise be applied by half. A figure of \$2,526.00 remains.

## **Step 4**

[98] I have considered the impact of taxation but have elected to settle a gross amount of \$2,526.00, plus superannuation, and leave taxation for determination.

### **Compensation – how does the compensation cap apply?**

[99] The application of compensation cap<sup>21</sup> does not alter the amount of compensation I have determined should be awarded to Mr Gao in this matter.

### **Is the level of compensation appropriate?**

[100] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that “the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case.”<sup>22</sup>

[101] I am satisfied this is appropriate, taking into account all the circumstances of the case as required by s.392(2) of the FW Act.

### **Compensation order**

[102] I will make an order<sup>23</sup> that Royal Crest must pay Mr Gao \$2,526.00 less taxation as required by law, plus a superannuation contribution into his nominated fund of \$290.49, within 14 days of the date of this decision.



COMMISSIONER

*Appearances:*

*Mr Tangyao Gao* the Applicant  
*Mr David Bell* for the Respondent, with *Mr Ram Nadarajah*

*Hearing details:*

2024  
Melbourne  
19 December 2024

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<sup>1</sup> *Jeremy Ryan v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 52 [38]

<sup>2</sup> *Ibid* [36(1)]

<sup>3</sup> *Ibid* [42]

<sup>4</sup> Form F3 Employer Response Form, 6 November 2024 p.6

<sup>5</sup> Respondent's Outline of Argument, 27 November 2024 p.12

<sup>6</sup> *Ibid* [41]

<sup>7</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 [14]

<sup>8</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 [373]

<sup>9</sup> *Newton v Toll Transport* [2021] FWCFB 3457 [182]; *Crozier v Palazzo Corporation* (1996) 98 IR 137 [73]

<sup>10</sup> *RMIT v Asher* (2010) 194 IR 1 [14] – [15]

<sup>11</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 [7]

<sup>12</sup> *Sirijovski v BlueScope Steel* [2014] FWCFB 2593 [37]

<sup>13</sup> *Pecker Maroo Verano Pty Ltd v Stevens* [2024] FWCFB 147 [110]

<sup>14</sup> See *Streeter v Telstra Corporation Limited* [2008] AIRCFB 15 [27]

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<sup>15</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) IR 117 357 [51]; *Edwards v Giudice* [1999] FCA 1836 [6] – [7]

<sup>16</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 [9]

<sup>17</sup> *He v Lewin* [2004] FCAFC 161 [58]

<sup>18</sup> *Ellawalla v Australian Postal Corporation* Print S5109 [34]

<sup>19</sup> See for example *Wayne Merry v Sweisstec Investment Holdings* [2025] FWC 58

<sup>20</sup> *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21

<sup>21</sup> *Fair Work Act 2009* s 392(5) and (6)

<sup>22</sup> *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206 [17]

<sup>23</sup> [PR783432](#)