[2019] FWC 181[Note: An appeal pursuant to s.604 (C2019/739) was lodged against this decision. - refer to Full Bench decision dated 26 March 2019 [[2019] FWCFB 1767] for result of appeal.]]

FAIR WORK COMMISSION

DECISION

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

Mr Jordan Lamacq
v
Smerff Electrical
(U2018/5137)

DEPUTY PRESIDENT ASBURY BRISBANE, 14 JANUARY 2019

Application for an unfair dismissal remedy – Jurisdictional objections – Small Business Employer – Minimum employment period met – dismissal not consistent with Small Business Fair Dismissal Code – Dismissal harsh unjust or unreasonable – compensation awarded.

BACKGROUND

[1] Mr Jordan Lamacq applies to the Fair Work Commission (the Commission) for a remedy for unfair dismissal under s.394 of the *Fair Work Act 2009* (the Act). In his Form F2 Unfair dismissal application, Mr Lamacq states he commenced employment with Smerff Electrical (Smerff) as a casual trade assistant on 23 January 2017. Mr Lamacq states that he remained employed by Smerff on a casual basis up until he commenced a full time apprenticeship with Smerff on 6 September 2017. Mr Lamacq claims he was then employed as a full time apprentice with Smerff from 6 September 2017 up until he was summarily dismissed by Mr Simon Hickey, owner and managing director of Smerff, on 16 May 2018.

[2] The hearing and determination of the issues in dispute was complicated by the conduct of Mr Hickey. On 21 May 2018 staff of the Commission corresponded with Mr Hickey by informing him that the application had been made and listed for a conciliation conference on 15 June 2018 and providing Mr Hickey with a copy of the application. Mr Hickey was also requested to complete a Form F3 Employer response which was sent to him. Mr Hickey responded on 25 May 2018 indicating that he was not available on 15 June 2018 due to an overseas holiday and making various allegations against Mr Lamacq and another employee in relation to theft.

[3] Material on the file indicates that various attempts were made to contact Mr Hickey to arrange an alternative date for a conciliation conference and that he was provided with links to resources on the Commission's website to assist him to prepare for a conciliation conference. Regrettably Mr Hickey did not utilise these resources. Mr Hickey's response to an email from the Commission regarding an adjournment of the conciliation conference was sent by email on 28 May 2018 and is in the following terms:

"Oi I am not seeking an adjournment this is not a court.

I will not be there.

The thief can have his day I don't care but it won't be the 15th.

Pick another day after the 18th and I may or may not show then depending on whether someone has investigated his theft or not."

[4] Further correspondence was sent to Mr Hickey on 13 June 2018 informing him that a conciliation conference would be held on 18 June 2018 and again requesting that Smerff file a Form F3 Employer response to the application. The Commission's file also indicates that an attempt was made to contact Mr Hickey by telephone also on 13 June in relation to these matters. Reminders were sent by SMS message to Mr Hickey and Mr Lamacq on 15 June 2018. A Conciliator's Report on the file dated 18 June 2018 indicates that a conciliation did not take place.

[5] A Form F3 Employer response completed by Mr Hickey was filed on 18 June 2018. The F3 was not of assistance in identifying the reason for Mr Lamacq's dismissal and simply stated (inter alia) that:

"No conciliation is possible. Jordan [Lamacq] will not be re-employed. He will not get any money. And neither will this organisation. I will not enter into any conciliation and I will not waste an hour filling out these forms UNTIL somebody investigates the theft by Jordan and … of which I have enough evidence to convict … 3 times over and I think enough to convict Jordan…Jordan is a thief. When somebody starts an investigation into the theft then I will participate in this charade. Until then you get nothing. I will answer your call but don't Expect any effort to participate. Jordan is a thief…"

[6] The Form F3 was filed under cover of an email dated 17 June 2018 which set out reasons for the dismissal of Mr Lamacq as serious misconduct based on his fraudulent misuse of company property and failure to carry out a lawful and reasonable instruction that was consistent with his employment contract. The Form F3 did not indicate that Smerff intended to raise any jurisdictional objections to the application.

[7] Directions for a hearing were issued on 25 June 2018 requiring that Mr Lamacq and Smerff file and serve an outline of submissions and witness statements and other documentary material respectively by 9 July 2018 (Mr Lamacq) and 30 July 2018 (Smerff. Mr Lamacq filed his material in accordance with the Directions. Material for Smerff was required to be filed by 30 July 2018. On 18 July 2018 Mr Hickey filed a document entitled "*outline of argument*" which set out a range of allegations against Mr Lamacq and attached some documents said to be relevant. The outline of argument also contained statements to the effect that Mr Hickey did not have time to spend on his material and that further evidence may be presented if the matter went to hearing. It was also stated that text messages appended to Mr Lamacq's witness statement were incomplete and the "*court/tribunal/ whatever you call this event*" should consider all of the text messages or none. Further, in the outline of argument it was asserted that Mr Lamacq ceased employment voluntarily. No further material was received from Smerff Electrical by 30 July 2018.

[8] On 6 August 2018 my Associate corresponded with Mr Hickey informing him that material on behalf of Smerff was required to be filed by 30 July 2018 and that if he wished to file further material including the text messages referred to in the material already filed, he would need to seek an extension of time in

which to do so and provide reasons for not filing the material within the required time. It was also pointed out to Mr Hickey that no witness statements had been filed on behalf of Smerff. Mr Hickey responded indicating that he sought an extension of time in which to file additional material on the basis that he was defending a number of charges associated with installing security equipment without a permit and using a carriage service to offend "*terrorist wives*". Mr Hickey also asserted that various pieces of computer equipment that he required to defend Mr Lamacq's application had been confiscated by Police.

[9] Mr Hickey included links to Smerff's website to evidence his need for an extension of time in which to file his material. The website gave every indication that Mr Hickey (who refers to himself as the "*Nazi Sparky*") had gone to great effort to create and post a wide range of offensive material despite the alleged confiscation of his computer equipment. Notwithstanding the incongruity of the reasons given by Mr Hickey I granted him an extension of time until 10 August 2017 to file his material, on the assumption that his website may have been developed before the confiscation of his computer equipment.

[10] The matter was listed for hearing on 27 August 2018 to determine the merits of the application. On 7 August 2018 Mr Hickey raised further jurisdictional objections to Mr Lamacq's application, alleging that the Company is a small business employer and that Mr Lamacq was not employed for the minimum employment period provided in s. 383 of the Act. Given the timing of the jurisdictional objections I determined that they would be dealt with as part of the substantive hearing on 27 August 2018.

[11] At the hearing Mr Lamacq appeared on his own behalf and Mr Hickey appeared for Smerff. Given that neither party was represented, I determined to conduct the hearing in the form of a determinative conference. Mr Lamacq and Mr Hickey were both under oath at all times during the hearing. Both Mr Lamacq and Mr Hickey gave evidence and each questioned the other during the course of the proceeding. I also questioned both witnesses. I have considered all of the material filed, evidence given and submissions made by the parties.

ISSUES IN DISPUTE

[12] It is not in dispute between the parties that Mr Lamacq's annual rate of earnings is less than the high income threshold and that Smerff, being a business with fewer than 15 employees at the time of Mr Lamacq's dismissal 1, is a small business employer within the meaning of s.23 of the Act. The dismissal is not a case of redundancy and no issue with respect to genuine redundancy arises.

[13] The issues in dispute are whether Mr Lamacq has served the minimum employment period for small business employees as defined in s.383(b) of the Act. It is also necessary for me to determine whether Mr Lamacq was in fact dismissed by Smerff. If I determine Mr Lamacq was employed for the minimum employment period and that he was dismissed, I must then consider the merits of his application. As Smerff is a small business employer it will first be necessary for me to determine whether Mr Lamacq's dismissal was consistent with the *Small Business Fair Dismissal Code* (the Code) and if I find that it was not, to then consider whether the dismissal was harsh, unjust or unreasonable having regard to matters set out in s.387 of the Act.

LEGISLATION AND THE SMALL BUSINESS FAIR DISMISSAL CODE

[14] The minimum employment period an employee must serve in order to qualify for a remedy for unfair dismissal is defined at s.383 of Act:

"**383 Meaning of "minimum employment period:**

(a) if the employer is not a small business employer—6 months ending at the earlier of the following times:

(i) the time when the person is given notice of the dismissal;

(ii) immediately before the dismissal; or

(b) if the employer is a small business employer—one year ending at that time."

[15] A period of employment for the purposes of s. 383 is defined in s. 384 as follows:

"**384 Period of employment**

(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer."

[16] By virtue of s.385 of the Act, a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed;

(b) the dismissal was harsh, unjust and unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

[17] The meaning of "*dismissed*" is set out in s. 386 of the Act as follows:

"**386 Meaning of *dismissed***

(1) A person has been ***dismissed*** if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been ***dismissed*** if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion."

[18] The Small Business Fair Dismissal Code is provided for in s. 388 of the Act, 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."

[19] The terms of the Small Business Fair Dismissal Code were declared by legislative instrument with effect from 1 July 2009. Those terms are 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, than 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 either 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 may be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia. Evidence may include a completed check list, copies of written warning(s), a statement of termination or signed witness statements."

[20] The Code provides for two kinds of dismissal –immediate (or summary) dismissal on the ground of reasonable belief on the part of the employer that the the employee's conduct is sufficiently serious to justify immediate dismissal and other dismissal on the basis of conduct or capacity to do the job. The approach to deciding whether a summary dismissal is consistent with the Code was established by a Full Bench of the Commission in *Pinawin v Domingo* 2 where it was held that:

"[29] …There are two steps in the process of determining whether this aspect of the Small Business Fair Dismissal Code is satisfied. First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.
[30] Acting reasonably does not require a single course of action. Different employers may approach the matter differently and form different conclusions, perhaps giving more benefit of any doubt, but still be

acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned." 3

[21] It is clear from the terms of the Code and the test to be applied in determining whether a dismissal is consistent with it (at least the provisions of the Code dealing with summary dismissal) that the reason must be one that is known at the time the dismissal is effected. This is because the employer must hold a belief at the time of the dismissal that the employee's conduct was sufficiently serious to justify summary dismissal and that belief must be based on reasonable grounds. There can be no belief at the time of dismissal – reasonable or otherwise – about conduct that was discovered after the dismissal had taken effect.

[22] If an employer cannot establish that a dismissal is consistent with the Code the Commission is then required to consider whether it was harsh, unjust and unreasonable on the basis of the criteria in s.387 of the Act. Those criteria are:

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

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees);and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

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

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

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

[23] The employer bears an onus of establishing that there was a valid reason for dismissal.46 A valid reason for dismissal is one that is "*sound, defensible or well founded*" and not "*capricious, fanciful, spiteful or prejudiced*."47 The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts,48 and the validity is judged by reference to the Tribunal's assessment of the factual circumstances as to what the employee is capable of doing or has done.49 While the

employer bears the onus of establishing the validity of the reason for dismissal, the dismissed employee bears the onus of establishing that the dismissal was unfair.

[24] To determine whether there was a valid reason for a dismissal relating to conduct, the Commission must determine whether, on the balance of probabilities, the conduct allegedly engaged in by the employee actually occurred, on the basis of the evidence before the Commission. The test is not whether the employer believed on reasonable grounds, after sufficient inquiry that the employee was guilty of the conduct. To constitute a valid reason for dismissal, the Commission must assess whether the conduct was of sufficient gravity or seriousness such as to justify dismissal as a sound, defensible or well-founded response to the conduct.50 In finding that there was a valid reason for dismissal, the Commission is not

limited to the reason relied on by the employer.

[25] The matters in s.387 go to both substantive and procedural fairness and it is necessary to weigh each of those matters in any given case, and decide whether on balance, a dismissal is harsh, unjust or unreasonable. A dismissal may be:

Harsh - because of its consequences for the personal and economic situation of the employee, or because it is disproportionate to the gravity of the misconduct;

Unjust - because the employee was not guilty of the misconduct on which the employer acted; and/or

Unreasonable - because it was decided on inferences that could not reasonably have been drawn from the material before the employer.51

EVIDENCE AND SUBMISSIONS

Employment Period

[26] It is not in dispute that Mr Lamacq commenced employment with Smerff as a casual trade assistant on 23 January 2017. Mr Lamacq asserted that his casual employment with Smerff continued on a regular basis until he commenced an apprenticeship on 6 September 2017 as a full time employee. 4 As Smerff is a small business the relevant employment period is twelve months. In order for Mr Lamacq to have served that minimum employment period, it is necessary that his period of casual employment is counted.

[27] Mr Hickey on behalf of Smerff asserted at the hearing that Mr Lamacq's casual employment should not be included in the Commission's assessment of whether he has served the minimum employment period under s.383(b) of the Act. 5 Mr Hickey submitted that Mr Lamacq's casual employment with Smerfff was neither regular nor systematic and was interrupted by Mr Lamacq leaving to work for a different employer at some point after 27 February 2017.6 Mr Hickey submitted a group certificate for the 2016/2017 financial year as evidence that Mr Lamacq was not employed on a regular basis. The group certificate evidences that Mr Lamacq was paid $8,544 between 23 January 2017 and 30 June 2017, an average of $328 per week. Mr Hickey also tendered a number of pay slips. These were considered in chronological order and evidence that for the week 20 to 27 February 2017 Mr Lamacq worked 48 hours. The next payslip produced by Mr Hickey is dated 17 July 2018.

[28] In response to a question from me about whether Mr Lamacq worked for Smerff during this period, Mr Hickey said that the Company winds down for winter during March and that most of the staff go and do other work during this time. Mr Hickey also said that there might have been a day or two between February and July 2017 when Mr Lamacq worked for Smerff but that he worked for another employer during this period doing NBN work. Mr Hickey later said that Mr Lamacq would have been lucky to work for Smerff for one day per fortnight between March and July 2017. 7

[29] Mr Lamacq conceded that he did work on a casual basis for another employer during his period of casual employment with Smerff, but claimed that he continued to regularly work for Smerff at the same time. 8 Mr Lamacq claimed that during the period between 23 January 2017 and July 2017, he worked for Smerff a minimum of one or two days every fortnight depending on how much work Smerff was contracted to undertake.9 Mr Hickey conceded that Mr Lamacq did work between one and two days per fortnight during the period from February 2017 to July 2017. Mr Lamacq was not able to produce pay records or a group certificate for his work with the other employer.

[30] Mr Hickey also tendered a written employment contract said to have been signed by Mr Lamacq on 17 September 2017. Mr Hickey said that he did not remember signing the contract and that the signature on it was not like his signature. The contract makes for interesting reading. In relation to wages it states at 5.1:

"You will be paid Weekly at the rate of $15 per hour. If you are unhappy with your wage, you can fuck off. Nobody is forcing you to work here."

[31] The contract also provides for notice on termination in accordance with s. 117 of the Act. Further, the contract also provides that:

"Any work done by staff after hours that is compensated in any way must be declared to The company or it can be reasonably assumed to be theft of company materials or customers or both. Therefore grounds for dismissal (3.4).

Tampering with vehicle wiring, mechanical operation or GOS operation is grounds for immediate dismissal unless prior authorisation is obtained (3.5).

Fuel cards are to be used for fuelling company vehicles only and must remain with the person to who they were issued. Swapping or borrowing fuel cards for any reason must be noted to office staff (3.6)."

Cessation of employment

[32] Mr Hickey alleged at the hearing that he did not dismiss Mr Lamacq but rather gave him an ultimatum. According to Mr Hickey, he gave Mr Lamacq until 4.00 pm on 16 May 2018 to tell him the address of a cash job that he had undertaken with a former employee using Mr Hickey's van, tools, stock, equipment and fuel. Mr Hickey asserts that Mr Lamacq chose not to give him that information and instead delivered the Company van back to the site and told other employees that he was leaving.

[33] In his oral evidence, Mr Hickey said that he dismissed the other employee in February because he was not happy with his performance in 2018 and did not discover "*his thefts*" until May 2018. It appeared from Mr Hickey's evidence that he discovered in May 2018 that the employee had been purchasing diesel fuel on the Company's fuel card and the Company does not have diesel vehicles. Mr Hickey made contact with the former employee to discuss the matter and to obtain information but he

did not get a response. Mr Hickey then determined that Mr Lamacq had been friendly with the employee in question when they worked together and demanded that Mr Lamacq provide details of a cash job he had undertaken with the former employee and the address at which the former employee was working at that time.

[34] Mr Hickey asserted that if the boss gives an employee a direction to provide information about a job done using Company assets, the employee should comply. Mr Hickey referred to GPS records for a Company vehicle for the date of 31 March 2018 and I assume that this is the relevant date. Mr Hickey said that when he spoke to a home owner at the location the home owner denied knowledge of any work being undertaken at the premises and Mr Hickey required assistance from Mr Lamacq to verify the address at which the work was undertaken. 10 Mr Hickey also said that he is legally required to check on the work as neither Mr Lamacq nor the other employee are licensed electricians. This means that they can install equipment but cannot connect it to the power source.

[35] The request for information was made by Mr Hickey in a text message exchange with Mr Lamacq in the period 14-15 May 2018. Screenshots of the text message exchange were submitted to the Commission by Mr Lamacq and were appended to his witness statement. There was no challenge to the admissibility of the screenshots as evidence in this matter and Mr Hickey did not deny that he sent the messages. Mr Hickey's objection to the text messages being admitted into evidence was that the chain of messages was incomplete. Mr Hickey was given an opportunity to tender any additional messages and said that he was unable to do so because he does not keep his text messages. The text messages are relevant to the issues in dispute in this case including whether Mr Lamacq resigned his employment. Accordingly, I set out the text message exchange below with dates and times where they are indicated in the copies tendered by Mr Lamacq:

Monday 14 May 2018

8.59 pm Lamacq: Oi can you give us a call please.

Tuesday 15 May 2018

7.33 am Hickey: Whaddya want

Lamacq: What's going on with you and [former employee]? Did he really report you.

Hickey: Give a fuck if he did I did nothing wrong where's he working.

Cunts been charging $350 a month fuel to the BP card using the app since January.

What's the address of that cashy you did with him recently. It wasn't his Aunty place

You can start working anytime when you tell me where [employee] is working and where that cashy is. That motherfucker was stealing for months. Darren my mate told me he suspected it first couple days so you people must have known some thing. I was curious as to why he was driving so far every day but you know I had a fuckload on this summer so some details slipped through. There were units missing when I went to jail I know that. You can have second year wages and super if you want that's 18 + 4 approx or the 25 you getting. Your Call. That's if you wanna tell me all you know about [former employee] and come work again. Sorry.

Hickey: Right so that cashy was one of my customers. Easy. It was that cunt with the fag son I reckon. You can keep your job if that's the case and you give up everything on [former employee] today. Otherwise we'll be round to collect the van close of business. Lol good thing you got that loan I told ya not to. [Former employee] is one of those spoilt rich kids. He lives … road. He thinks I have what I have because I somehow stole it off him. Took advantage of him. Think about it. Do I have any more or less since I met either of you? It wouldn't matter if neither of you existed I would still be where I am now. It's not you doing me a favour by working here it's me doing you a favour by employing your asses. I made everything I have today with my own hands. I stole nothing from you or [employee]. It is that fat fuck who stole from me. He fucked his hand at the gym and pretended it was at work 'just conveniently as work was dropping off for the year' and never even reported it to me so how will I claim it? Can't. Because he's lying. Your choice today bro. Info or job by 4 pm. I'll find out about that cunt one way or another even if not through you and I will fuck him. So you're not stopping it from happening by keeping quiet. I'll give ya till 4.

Tuesday 15 May 2018

2.13 pm Hickey: So you're a thief to. Figures. Expect a visit from the police. Doing cashies from an established business customers is considered theft too. You had your chance. I'll still fuck that fat cunt don't worry. His dad recently took the rap for … steroid stash and lost all his govt appointed jobs.

Cancelling your tafe blocks now."

[36] At 11:17pm on 15 May 2018 Mr Hickey sent an email to Mr Lamacq in the following terms:

"Good evening … I been doing some investigation. Right so the gps was disconnected up till you parked it up at salisbury today. What you been doing with my van in the mean time thief? You could have kept your job had you spilled the beans on fatty fatty boom boom but no. Now I have the cashy you did in … Saturday 31 March Anyway. I have … cold on theft of over a grands worth of fuel. He will have theft conviction soon. Maybe you too. Not sure whether to press charges on you yet.

You've lost your apprentice ship. Did you get a tax return and group certificate last year? You did. Why would you listen to that fat cunt about anything related to tax. What the fuck would he know? He was caught and going down and just wanted to take someone with him. Live and learn dumb cunt. I never would have picked you as a thief but now I know better. Here's the number for fair work Australia 13 13 94. Do you know how many calls they get per day? Boo Hoo this cunt fired me and he wasn't paying me leave loading 12% or some shit. Do you know what these cunts do about it? Nothing unless it's a company worth prosecuting. They know they'll get nothing from me and even if they could get me for something what would it be? Your wage which $7 over the award one year less difference in super they might tell me to owe you $30. More likely they will tell me to pay cunts the award of $18 and super which is $4 and I am better off either way…

Then they'd chuck it in the not worth persuing (sic) basket and the net result is you are hoping whatever job that fat cunt lined up is going to sign you into an electrical apprenticeship after I find out who and where and tell them about your shennanigans. Didn't think that one through did ya. One thing you and that Fat fucking germ should know is I fuck back. You will regret stealing from me. Like I am going out of business anytime soon. Look what they thrown at me and I am still here. Fair Work gonna put me out of business LMAO

[Former employee] never gonna be qualified no cunt will keep that thief for 4 years. You may do but I will do my best to hinder and interrupt any apprenticeship you do in Brisbance. I know a lot of sparkies remember. And you have no ideas which ones. Up yours …Bitch. Couldn't even face me so you must have been knocking off a fair bit of shit. To make a race horse pull as much as a plow horse you can only cripple the plow horse. To make a plow horse run as fast as a racehorse, the only way is to cripple the race horse. In either way the pursuit of equality is the destruction of excellence."

[37] Mr Hickey submitted that in response to the requests for information set out in these communications, Mr Lamacq effectively resigned from Smerff by refusing to comply with the direction to inform him of the location of a cash job he performed with a former employee and by handing the keys to his company vehicle back to Mr Glenn Keys, an employee of Smerff, afterwards. 11 In this regard, Mr Hickey said that Mr Lamacq returned the Company vehicle on 16 May taking it to a worksite close to his home. Mr Hickey also said that Mr Keys reported that Mr Lamacq fiddled with the vehicle before giving the keys back and Mr Hickey said that he must have been turning on the GPS. Mr Hickey tendered GPS records for the vehicle for 16 May 2018 and said that these showed that the GPS was not activated until the vehicle arrived at the worksite in question.12

[38] Mr Lamacq said that he did not drive the vehicle to the worksite but got on his motorbike and took the keys there as the worksite was close to his home. The vehicle was later collected from Mr Lamacq's home. Mr Lamacq also said that he refused the direction in Mr Hickey's text messages because he did not want to give private information about the dismissed employee to Mr Hickey including the address of his "*Auntie's house*" or his current work address. Mr Lamacq agreed that when he was told that if he did not give Mr Hickey the information he required, he knew that Mr Hickey would dismiss him and decided that he would not comply.

[39] At the hearing, Mr Lamacq rejected Mr Hickey's assertion that he had resigned from his employment prior to being dismissed. Mr Lamacq argued that Mr Hickey's ultimatum in relation to his employment was inappropriate as it contained an unreasonable instruction to give Mr Hickey the personal details of a former employee. Mr Lamacq further submitted that the tone of the text messages added to the unreasonableness of the direction. 13 Given this context, Mr Lamacq submitted that Mr Hickey effectively ended his employment relationship with Smerff by issuing an ultimatum with which Mr Lamacq could not have reasonably been expected to comply.14

Alleged Serious Misconduct

[40] Mr Hickey submitted at the hearing that Mr Lamacq had undertaken a "cash job" or "cashie" on 31 March 2018. Mr Hickey stated that performing cash jobs was an accepted, though not regular, practice for employees of Smerff. Mr Hickey claims all cash jobs had to be approved by him, especially if his tools and equipment were to be used, and that he would only permit cash jobs if it was an urgent job or one undertaken for an employee's close family member. 15 At the hearing Mr Hickey also tendered a copy of Smerff's standard employment contract, which states explicitly at paragraph 3.3 that employees must disclose any paid work they have performed or intend to perform outside working hours.16

[41] On 31 March 2018, Mr Hickey claims Mr Lamacq came to him and asked him if he could do a "cashie" for a relative of another employee of Smerff. Mr Hickey later said in his evidence that he was not certain that Mr Lamacq told him the job was for a relative of the other employee. Mr Hickey also said in his evidence that the employee in question was dismissed in February 2018. When questioned by

me at the hearing as to why he would have allowed Mr Lamacq to do a cash job for a relative of that employee in March 2018 when the employee had been dismissed in February 2018, Mr Hickey accepted that Mr Lamacq did not tell him that the job was to be undertaken for a relative of the employee he dismissed in February but maintained that Mr Lamacq told him that the job was for "*someone's close relative*". Mr Hickey also maintained that the dismissed employee was there on the day that Mr Lamacq did the job. Mr Hickey accepted that he permitted Mr Lamacq to do the job on 31 March 2018 and also said that he did not think about it again until 16 May 2018 when he was investigating the dismissed employee's use of the Company fuel card to purchase diesel fuel. 17

[42] In this regard, Mr Hickey said that following the dismissal of the other employee in February 2018, he began looking into his behaviour during the entire period of his employment. 18 In particular, Mr Hickey was concerned about the amount he had been paying for fuel for Smerff's company vehicles and formed a belief that the other employee was overcharging or fraudulently charging for fuel that was being primarily used for non-business related purposes.19 Mr Hickey did concede that he had allowed the employee concerned to fill his vehicle with fuel on a few occasions using Company fuel cards or an app on his mobile telephone. On 16 May 2018, during his investigations into the alleged misconduct of the other employee, Mr Hickey was examining the GPS records of Smerff's vehicles and noticed that the van usually operated by Mr Lamacq had been near the address of a regular client of Smerff on 31 March 2018 and had spent six hours parked at that location.20 Mr Hickey claims that he remembered Mr Lamacq had done a cash job on that day, 31 March 2018, and became concerned that Mr Lamacq had been doing cash jobs for Smerff's regular customers on the side, taking their business away from his employer.21 Mr Hickey was also concerned that the dismissed employee had been involved in the cash job.

[43] This caused Mr Hickey to send the text messages set out above to Mr Lamacq asking him to provide the address at which the cash job on 31 March 2018, and giving Mr Lamacq until 4.00 pm to respond or face immediate termination of his employment. 22 Mr Hickey submits that Mr Lamacq did not supply him with the address of the job, directly contravening paragraph 7.1(c) of his employment contract pertaining to the requirement that all Smerfff employees must "*follow all reasonable and lawful directions given to you by your employer*."

[44] Mr Lamacq did not dispute that the dismissed employee was involved in the cash job performed on 31 March 2018 and said that he met the dismissed employee on the morning of 31 March 2018 and followed him to the job. In response to Mr Hickey's submissions Mr Lamacq claimed that Mr Hickey did not only ask him for the address of the 31 March 2018 cash job, but also requested personal details in relation to the other employee including the address of his current employer. 23 Mr Lamacq argued that he did not think it necessary to tell Mr Hickey the address of the job as it was not his client nor was it arranged through Smerff.24 Mr Lamacq further claimed that, regardless of whether it was necessary for him to tell Mr Hickey or not, he did not know the address of the cash job on 31 March 2018 as it had been arranged by the other employee.25 Mr Lamacq did concede when questioned, however, that he could have provided some assistance to Mr Hickey in determining where the job was performed and he chose not to.26

[45] Mr Lamacq also maintained that originally Mr Hickey allowed cash jobs for family members and then allowed employees to do cash jobs (other than air-conditioning) for anyone. Mr Hickey disputed

this and said it was not logical that he would allow employees to undertake unlimited cash jobs and the business could not survive if this was the case.

[46] Mr Hickey also made a number of other allegations of misconduct against Mr Lamacq in relation to misuse of a Company fuel card assigned to Mr Lamacq. Mr Hickey claims that Mr Lamacq gave his fuel card to the employee Mr Hickey dismissed in February 2018 without Mr Hickey's consent and that Mr Lamacq improperly used a Company vehicle assigned to him on days he was not rostered to work for Smerff. 27 Later Mr Hickey said that he knew that Mr Lamacq was not involved in the theft of fuel but thought that he might know something about it.

[47] Mr Hickey submitted as evidence of his claims, transaction records that indicate the fuel card was used in Hervey Bay on 4 November 2017 when Mr Lamacq was not rostered to work for Smerff. The transaction records also indicate that the same fuel card was used for two separate transactions on 20 November 2017 at service stations in Salisbury where Mr Lamacq lives, and Merrimac, where the other employee lives. The Salisbury transaction was made at 7.18 am and the Merrimac transaction at 6.47 pm. Mr Hickey contends that Mr Lamacq gave his fuel card to the other employee and also points to the fact that the Merrimac transaction was made well outside Smerff's business hours. 28 As previously stated, Mr Hickey also gave evidence to the effect that the other employee had access to an app which allowed him to purchase fuel on the Company card by using his mobile telephone.

[48] Further, Mr Hickey submitted a copy of a parking fine from the Sunshine Coast Council for the vehicle assigned to Mr Lamacq. The fine was dated 4 April 2018, a date Mr Lamacq was not rostered to work for Smerff. Mr Hickey contended that this is evidence Mr Lamacq was improperly using his work vehicle for personal reasons. 29

[49] Mr Lamacq rejected Mr Hickey's submissions, claiming that Smerff had a number of fuel cards that were regularly passed between employees of Smerffff whenever they needed to re-fuel their work vehicles or purchase fuel after using their own vehicles for work-related purposes. 30 He further claims that he always sought the approval of Mr Hickey any time he used his work vehicle for personal trips on days he was not working for Smerff.31 Mr Lamacq agreed that he was at the Sunshine Coast on 4 April 2018 for personal reasons (it was his birthday) but said that he sought permission from Mr Hickey the week before. Mr Lamacq also said that if he had known about the parking ticket he would have paid it as he had no reason not to do so.

[50] Mr Hickey did not dispute the assertion made by Mr Lamacq that he sought permission to use his work vehicle to travel to the Sunshine Coast on 4 April 2018. Mr Hickey's issue seemed to be that Mr Lamacq got a parking fine and did not pay it. Mr Hickey also alleged that Mr Lamacq claimed an amount of $40 per month for use of his personal mobile telephone. According to Mr Hickey that amount was excessive. Mr Lamacq said that he used his mobile telephone in the course of his employment including to navigate to jobs as the vehicle he was assigned did not have a GPS navigation system installed in it.

Other relevant issues

[51] During the course of the hearing I asked both parties to comment on the likely period that Mr Lamacq would have remained in employment but for the events that led to his employment ceasing. Mr Lamacq said that he was a year in to a four year apprenticeship and saw himself continuing in employment with Smerff until he completed his apprenticeship. Mr Lamacq also said he was happy

working for Smerff and had his own van and was allowed to go to jobs in that van and did not know any other apprentices who had their own van. Mr Lamacq later said that when he was given a choice of not having a job or giving Mr Hickey the details he was seeking about the dismissed employee, he did not see himself being treated the same way even if he provided the information. Mr Lamacq based this view on the anger expressed by Mr Hickey in his text messages.

[52] Mr Hickey said that he had a good relationship with Mr Lamacq prior to the incident that led to the ending of Mr Lamacq's employment and that the incident changed everything. Mr Hickey also stated his belief that if he had spent more time on the investigation into Mr Lamacq's conduct he would have been able to uncover more and that he did not think that Mr Lamacq would have been able to complete his apprenticeship with Smerff.

[53] Mr Lamacq tendered an email dated 20 August 2018 (also tendered by Mr Hickey) in which Mr Hickey stated that Mr Lamacq should google the name of the other dismissed employee and that:

"If you cancel your Friday extortion attempt before close of business tomorrow I will refrain from publishing the Jordan Lamacq version. Do you really want my entry being number 1 of page 1 of google search results for Jordan Lamacq?...

I should include cash payment for my lost time as well, but I will settle for complete abandonment of your extortion attempt by tomorrow afternoon or you will have your own page 1 like [former employee]. And I am not finished with him yet."

[54] The "Friday extortion attempt" referred to Mr Lamacq's case in the Commission. The email also contended that it is a defence to the publication of defamatory matter if the defendant proves that one or more imputations are substantially true. Mr Lamacq referred to a website operated by Mr Hickey on behalf of Smerff Electrical and said that it contains defamatory material and threats against the other employee. Mr Lamacq said that he has made a number of unsuccessful attempts to obtain other employment and believes that his dismissal and the reasons for it are impacting him in this regard.

[55] Mr Hickey said in response that the information posted on his website represents fair and accurate reporting as he sees it. Mr Hickey also said that prospective employers of Mr Lamacq are free to call him for a reference. It is the case that Mr Hickey's website (to which he emailed me a link) contains various derogatory posts about persons who have offended Mr Hickey including a number of Queensland Judicial Officers and the former employee.

CONSIDERATION

Has Mr Lamacq served the minimum employment period?

[56] It is not in dispute that Mr Lamacq has been employed as a full time employee of Smerff for less than the 12 month minimum employment period for a small business employee. It is therefore necessary to determine whether Mr Lamacq's casual employment from 23 January 2017 till 6 September 2017 counts toward his period of service.

[57] The test for whether a period of casual employment counts toward a period of service is set out in s.384(2)(a) of the Act – the employment as a casual employee is on a regular and systematic basis and during the period of service as a casual employee the employee had a reasonable expectation of continuing employment with the employer on a regular and systematic basis. In *Ponce v DJT Staff*

Management Services Pty Ltd T/A Daly's Traffic, 32 Commissioner Roe held that to meet the definition outlined in s.384(2)(a)(i) of the Act an employee need only show that employment, and not necessarily hours of work, was regular and systematic.

[58] Further, as Commissioner Jones (as she then was) noted in *Grives v Aura Sports Pty Ltd* 33 (citing with approval the ACT Court of Appeals decision in *Yaraka Holdings Pty Ltd v Giljevic*34) the term 'regular' implies some pattern of repetition but does not necessitate that the work be frequent, often, uniform or constant. It does, however, require that work be offered and accepted regularly enough that the employment could not be regarded as occasional or irregular. In addition, as noted in *Yaraka* by Madgwick J, the requirement that employment was 'systematic' necessitates that the casual employee demonstrate their work with their employer was more than merely frequent. As his Honour noted "*The basis of engagement must exhibit something that can fairly be called a system, method or plan.*"35

[59] In *Shortland v Smiths Snackfood Co Ltd*, 36 a Full Bench of the Commission determined that, once continuous service is found to have been established, the employer or employee may only break that period of continuous service by making it evident to the other party that there were to be no further engagements.

[60] On balance I am satisfied and find that Mr Lamacq's casual employment should count toward his period of service in that it was regular and systematic and Mr Lamacq had a reasonable expectation that it would continue on a regular and systematic basis. While there is evidence to demonstrate that Mr Lamacq's employment prior to 6 September 2017 was 'seasonal,' Mr Hickey admitted at the hearing that Mr Lamacq was still engaged in work for Smerff at least one or two times a fortnight during the entire period between 23 January 2017 and 6 September 2017. Further, there is no evidence to suggest that Mr Lamacq was not offered suitable work when it was available, nor was any evidence presented establishing that Mr Lamacq ever rejected suitable work when it was offered to him. Finally, it is clear on the evidence that there was a reasonable expectation Mr Lamacq would continue to be employed by Smerff, particularly as work became more frequent during the summer months.

Was Mr Lamacq dismissed?

[61] Section 386(1) of the Act defines being "*dismissed*" to include the termination of the person's employment on the initiative of the employer or where the person has resigned from his or her employment but was forced to do so because of conduct or a course of conduct engaged in by the employer. A series of cases discussing the meaning of termination on the initiative of the employer (s. 386(1)(a)) have established that the central issue is whether the employer's conduct intended or had the probable effect or result of bringing the employment of the relevant employee to an end. 37

[62] The second limb of the definition in s. 386(1)(b) of the Act deals with constructive dismissal and the central question is whether the conduct of the employer was such as to repudiate the contract of employment giving rise to a right in the employee to accept the repudiation as bringing the contract to an end. 38 The point of whether a constructive dismissal has occurred is not the form that the termination took or the events that occurred, but rather, the substantial cause of the termination.39 The essence of Mr Hickey's assertion that Mr Lamacq was not dismissed is that in failing to comply with the ultimatum that was given to him by text mesaages on 14 and 15 May 2018 and returning his company vehicle, Mr Lamacq ended his own employment and Mr Hickey accepted that this was a resignation.

[63] I am satisfied that Mr Lamacq's employment was terminated on the initiative of the Mr Hickey, the owner of Smerff. No employee should ever be subjected to the threats and abuse meted out by Mr Hickey in his text messages and the email sent to Mr Lamacq between 14 and 16 May 2018. That an employer would subject an employee, much less an apprentice, to such language beggars belief. The fact that the text messages contain an arguably reasonable request for Mr Lamacq to reveal the address at which a cash job was undertaken using his employer's tools and equipment, does not excuse or mitigate the content of the text messages. The other content in the text messages and the email is inexcusable. In my view the sending of the text messages and the email were acts of Mr Hickey as the employer which resulted directly or consequentially in the termination of the employment relationship between Smerff and Mr Lamacq. It is inconceivable that an employee who received such messages from an employer could have any view other than that the employment relationship had ended at the initiative of the employer. Mr Lamacq did not cease employment voluntarily but rather his employment was terminated by the conduct of Mr Hickey.

[64] If I am wrong on that point, then for the same reasons, I am satisfied that Mr Hickey's conduct in sending the text messages and emails was such that he repudiated the contract of employment and gave rise to a right in Mr Lamacq to accept the repudiation. Mr Lamacq did this by returning the keys to the Company vehicle. It may have been reasonable for Mr Hickey to request that Mr Lamacq provide the address of the cash job and for Mr Hickey to indicate that failure to do so could result in adverse consequences for Mr Lamacq's future employment. However, the request was couched in language so threatening and offensive that Mr Lamacq did not have an option to comply. In order to comply, Mr Lamacq would have been required to return to work for Mr Hickey in circumstances where Mr Hickey had treated him in a manner that no employee should be required to endure. To find that Mr Lamacq was not dismissed and that he ceased employment voluntarily in the face of Mr Hickey's threatening, offensive and abusive tirade would be contrary to the objects of Part 3-2 of the Act and to the circumstances that s. 386(1) of the Act is intended to address.

Was Mr Lamacq's Dismissal Consistent with the Code?

[65] As outlined above, the Code provides that 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. The reason for the dismissal must be known to the employer at the time the belief is formed. Mr Hickey did not assist in identifying his reasons for dismissing Mr Lamacq or the basis of his purported belief that at the point he was dismissed, Mr Lamacq had engaged in misconduct that was sufficiently serious to justify immediate dismissal. In the present case, as far as I can distil from the threats and abusive commentary in the text messages sent by Mr Hickey to Mr Lamacq from 14 to 16 May 2018 and from Mr Hickey's evidence and submissions to the Commission, Mr Hickey decided to summarily dismiss Mr Hickey on the basis of his belief that:

• Mr Lamacq must have known something about the theft engaged in by the other employee;

• Mr Lamacq had engaged in theft against Smerff by inappropriately using the Company vehicle for personal reasons, inappropriately using the Company fuel card and claiming an amount for work use of his mobile telephone that was excessive;

• The cash job performed by Mr Hickey and the former employee on 31 March 2018 was for a customer of Smerff; and

• Mr Lamacq did not provide the address of the cash job or the current workplace of the former employee by the 4.00 pm deadline on 15 May 2018 as stipulated in Mr Hickey's text messages.

[66] I do not accept that at the time he dismissed Mr Lamacq, Mr Hickey believed that Mr Lamacq knew about any theft on the part of the dismissed employee or that Mr Hickey believed that Mr Lamacq had engaged in theft against Smerff. Mr Hickey provided no basis for this belief in the text messages and the email which preceded the dismissal of Mr Lamacq. Even at the point this matter was heard, Mr Hickey was unable to articulate any basis for his belief that Mr Lamacq knew anything about the theft of fuel by the other employee much less that Mr Lamacq had engaged in such theft.

[67] All of the evidence against Mr Lamacq in relation to use of the Company fuel card and his personal vehicle appeared to have been obtained by Mr Hickey after the dismissal. Mr Hickey assured me that given more time he could find additional evidence. It was apparent from the evidence that Mr Hickey allowed employees to use the Company fuel card to fuel their own vehicles. Mr Hickey conceded that on a number of occasions – 3 or 4 occasions during summer – he allowed the dismissed employee to fill his own car using the company fuel card. Further, there was evidence that the dismissed employee also had a fuel app on his mobile telephone which allowed him to charge fuel to the Company and that this was approved by Mr Hickey. Mr Lamacq's uncontested evidence was that it was common practice for employees to exchange fuel cards.

[68] It is clear that Mr Hickey allowed Mr Lamacq to use the Company vehicle for private purposes and that Mr Lamacq did this. Further it was not in dispute that Mr Hickey allowed Mr Lamacq to charge $40 per month to the Company for his mobile telephone. It is also clear from the evidence that at the time he dismissed Mr Lamacq, Mr Hickey felt aggrieved that Mr Lamacq had behaved in a manner that Mr Hickey believed was abuse of the privileges he had been provided with. It may be that this belief was reasonable. It may also have been reasonable for Mr Hickey to place some limitations on the provision of such benefits to employees. However Mr Lamacq's conduct in this regard does not provide a basis for Mr Hickey believing that Mr Lamacq had engaged in theft and is not sufficiently serious to justify immediate dismissal.

[69] I accept that Mr Hickey believed that the cash job undertaken by Mr Lamacq and the former employee on 31 March 2018 was for a customer of Smerff. Given the manner in which Mr Hickey described the customer in his text messages to Mr Lamacq it is doubtful that the customer would have remained a customer for long. In any event I accept Mr Hickey's evidence that permission for employees to undertake cash jobs was limited to relatives and would certainly not have been extended to customers of the Company. I also accept that while Mr Hickey gave permission for Mr Lamacq to undertake the cash job on 31 March 2018 he did soon the basis that the job was to be undertaken for "*someone's Auntie*" and not a customer of Smerff.

[70] It is not clear whether Mr Hickey knew at the relevant time that the dismissed employee carried out the cash job with Mr Lamacq but Mr Hickey certainly knew that this was the case when he sent the text messages and email to Mr Lamacq between 14 and 16 May 2018. In any event, for Mr Lamacq to have carried out a cash job for a customer of Smerff thereby undercutting his employer, would be conduct that is sufficiently serious to justify summary dismissal, particularly if Mr Lamacq deliberately concealed information about the job because of this.

[71] However, I do not accept that at the time Mr Hickey dismissed Mr Lamacq he believed that Mr Lamacq was engaging in conduct that was sufficiently serious to warrant summary dismissal by performing cash jobs for regular customers of Smerff and pocketing the difference between the price that the Company would have charged and the cash price for the job. Neither do I accept that Mr Hickey was concerned to ascertain whether the job had been carried out to appropriate standards. The series of text messages and the email from Mr Hickey sent to Mr Lamacq between 14 and 16 May 2018 indicate that the motive Mr Hickey had for requesting the details of the cash job and the current workplace of the dismissed employee was more to do with Mr Hickey's desire to seek revenge against the former employee than it was about concern on Mr Hickey's part about Mr Lamacq's involvement in undertaking the cash job.

[72] The text message exchange also made clear that Mr Hickey was perfectly capable of pursuing the matter regardless of whether Mr Lamacq assisted by giving Mr Hickey the information he was requesting. There was no belief on the part of Mr Hickey that Mr Lamacq's refusal to provide the relevant information was serious misconduct. Rather, Mr Hickey dismissed Mr Lamacq because he would not assist Mr Hickey in his pursuit of revenge against the former employee. While Mr Hickey believed that the former employee had been stealing from him, there was no basis for believing that Mr Lamacq was guilty by association of the same conduct.

[73] Even if Mr Hickey did believe that at the time of the dismissal Mr Lamacq had engaged in conduct that was sufficiently serious to justify immediate dismissal, I do not accept that the belief was based on reasonable grounds. As a Full Bench of the Commission said in *Pinawin v Domingo* 40 the legislative provisions setting out the Small Business Fair Dismissal Code require a consideration of whether the employer, in determining its course of action in relation to the employee at the time of the dismissal, carried out a reasonable investigation and reached a reasonable conclusion in all of the circumstances.

[74] It is apparent that most if not all of Mr Hickey's investigation of the allegations against Mr Lamacq was carried out after the dismissal and in preparation for the hearing of Mr Lamacq's unfair dismissal application. If Mr Hickey had any evidence of misconduct at the time he dismissed Mr Lamacq it related to the conduct of another employee who had been dismissed some three months earlier. Mr Hickey jumped to a conclusion that Mr Lamacq knew about, or was involved in the alleged misconduct of another employee and reacted accordingly.

[75] Further, to the extent that Mr Hickey believed the refusal on the part of Mr Lamacq to give him the information that he wanted indicated that Mr Lamacq had knowledge of theft on the part of another employee, that belief was not based on reasonable grounds. Mr Lamacq's silence in the face of a tirade of expletive laden and threatening abuse set out in the text messages and the email sent to him by Mr Hickey in the period between 14 and 16 May 2018 is entirely understandable and is not an indication that Mr Lamacq was guilty of anything.

[76] Accordingly, I have concluded that Mr Lamacq's dismissal was not consistent with the Small Business Fair Dismissal Code and that Mr Lamacq is not excluded from making an unfair dismissal application on that basis. I turn now to consider whether the dismissal was unfair on the grounds that it was harsh, unjust and unreasonable in accordance with the criteria in s. 387 of the Act.

Was Mr Lamacq's Dismissal Unfair?

Was there a valid reason for dismissal – s. 387(a)

[77] The reasons given by Mr Hickey for dismissing Mr Lamacq are within the spectrum of reasons that would be considered valid reasons for dismissal. However in the circumstances of this case I am of the view that the reasons for Mr Lamacq's dismissals were not valid in that they were not sound, defensible or well founded. Mr Lamacq had private use of a Company vehicle and a fuel card. Mr Hickey appears to have had no issue with Mr Lamacq's conduct in respect of these matters until the issues with a former employee arose. Mr Lamacq contended and it was not denied, that he was given permission to drive the vehicle to the Sunshine Coast on 4 April – his birthday. Even if Mr Lamacq was taking advantage of these privileges or abusing them, this was not a valid reason for dismissal in circumstances where private use had previously been allowed and no indication had been provided to Mr Lamacq that this situation had changed.

[78] I do not accept that the cash job undertaken by Mr Lamacq on 31 March 2018 provided a valid reason for Mr Hickey to have dismissed Mr Lamacq. Mr Lamacq obtained approval from Mr Hickey to carry out the cash job. It does not appear that Mr Hickey asked for any information about the job before approving it and accepted that it was for someone's auntie. There is also some degree of probability that at the point he approved the job being done, Mr Hickey knew that the former employee was involved. If he did not know this at the relevant time then Mr Hickey certainly knew by 14 May 2018 that this was the case. There is also some degree of probability that Mr Hickey's reaction to the cash job being undertaken occurred because the former employee had reported him to some authority as evidenced by the text message exchange with Mr Lamacq on 14 and 15 May 2018.

[79] It is also the case that even at the point this matter was heard, Mr Hickey could not state with any certainty who the cash job was performed for or the basis for his assertion that it was performed for a customer of Smerff. The documentary evidence in relation to this matter that was tendered by Mr Hickey simply indicates the street in which the job was performed and that Mr Hickey door-knocked houses in that street and was sure it was a particular house because of the reaction of the resident when asked about the job.

[80] For reasons set out above, Mr Lamacq's failure to comply with the ultimatum given to him by Mr Hickey in relation to providing the address at which the cash job was performed was also not a valid reason for dismissal. The manner in which the request for information was couched and the fact that there was also a request that Mr Hickey provide the address of the former employee's new workplace, made it entirely reasonable that Mr Lamacq did not respond.

[81] I am also of the view that Mr Hickey's conclusion that Mr Lamacq knew that the former employee had engaged in theft from Smerff was not a valid reason for dismissal. Firstly, even if all of the evidence provided by Mr Hickey was accepted, it is unlikely that it would support an allegation of theft against that employee in the context of how Mr Hickey operated his business including the provision of fuel cards and vehicles. Further, even if the former employee did engage in theft, Mr Hickey's conclusion that Mr Lamacq knew that this was the case, was not sound, defensible or well founded. To the contrary, Mr Hickey's conclusion in this regard appears to have been based entirely on the fact that Mr Lamacq was on friendly terms with the dismissed employee, performed a cash job with him on 31 March 2018, and that Mr Lamacq failed to respond to the ultimatum to provide the address of the cash job and the workplace of the former employee to Mr Hickey. For reasons set out above, which I do not repeat, it was entirely reasonable for Mr Lamacq to have not responded to the ultimatum given to him by Mr Hickey

on 15 March 2018 and this was not evidence that Mr Lamacq was concealing theft on the part of the other employee.

Was Mr Lamacq notified of the reason for dismissal – s. 387(b)?

[82] Section 387(b) of the Act is included is part of a statutory framework by which the Commission is required to consider whether the dismissal of an employee is attended with substantive and procedural fairness. An important aspect of procedural fairness is that the reason for an employee's dismissal is notified to the employee before the decision to dismiss the employee is taken. The plain meaning of the term "notified" is that information is provided in a formal manner. Notification of the reason for dismissal informs the subsequent matters required to be considered by the Commission in ss. 387(c) and (d) of the Act. As a Full Bench of the Commission observed in *Crozier v Palazzo Corporation Pty Ltd*:[41]

"As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify the employee and give them an opportunity to respond after the decision to terminate their employment."

[83] Sections 170CG(3)(b) and (c) of the former Workplace Relations Act were in similar terms to the present sections 387(c) and (d) of the present Act and respectively provided that for the purposes of arbitrating an application alleging that a dismissal was unfair the Commission must have regard to whether the employee was notified of a reason for termination of employment related to capacity or conduct and whether the employee was given an opportunity to respond to any such reason. As the Full Bench held in *Crozier*, ss. 170CG(3)(b) and (c) of the former Act were clearly related to the concept of procedural fairness.[42] The same can be said in relation to sections 387(c) and (d) of the current Act.

[84] I do not accept that the text messages and the email sent by Mr Hickey to Mr Lamacq in the period from 14 to 16 May 2018 constituted notification of the reasons for dismissal. The text messages and the email make clear that Mr Hickey had already made a decision about Mr Lamacq's guilt and would only change that decision if Mr Lamacq responded in the manner required by Mr Hickey. For reasons I have set out above, Mr Lamacq had no real option to respond and it was not reasonable that he do so. Accordingly, I find that Mr Lamacq was not notified of the reasons for his dismissal in a manner that is consistent with s.387(b) of the Act.

Was Mr Lamacq given an opportunity to respond to the allegations – s. 387(c)?

[85] The consideration of whether an employee was given an opportunity to respond to reasons for dismissal based on conduct includes whether the employee was aware of the allegations so as to be able to respond to them and whether the employee was given an opportunity to defend the allegations and attempt to persuade the employer not to terminate his or her employment.

[86] I do not accept that Mr Lamacq was given an opportunity to respond to the allegations against him. Mr Lamacq was given an ultimatum to which he could not reasonably have responded and the effect of Mr Lamacq's response or non-response to the application was pre-ordained in any event. In effect the communication from Mr Hickey gave Mr Lamacq a choice to respond in the manner sought by Mr Hickey in which case his "*theft*" would be overlooked or to not respond in which case Mr Hickey would conclude that Mr Lamacq was guilty of theft.

Was a support person unreasonably refused in discussions relating to dismissal – s. 387(d)?

[87] The issue of whether Mr Lamacq was refused a support person does not arise because there were no discussions held in relation to his dismissal prior to it being effected and Mr Lamacq did not make such a request.

Was Mr Lamacq warned about unsatisfactory performance – s. 387(e)?

[88] In relation to s.387(e), it was Mr Hickey's submission that Mr Lamacq was dismissed for misconduct and not for unsatisfactory performance and therefore this consideration is not directly relevant. Some of the matters said to be misconduct could, in the context of the manner in which Mr Hickey operated his business, be construed as unsatisfactory performance.

[89] There is no evidence that Mr Lamacq was warned that the extent of his private use of a his assigned work vehicle was considered by Mr Hickey to be unreasonable or that he had misused the Company fuel card or that there was a concern about the number or type of cash jobs that MR Lamacq was performing. To the extent that it may be relevant Mr Lamacq was not warned about unsatisfactory performance.

Did the size of Smerff's enterprise and lack of human resource management impact on dismissal procedures – s. 387(f) and (g)?

[90] I accept that Smerff is a small business and does not have dedicated human resource management specialists or expertise. However there are many small businesses lacking such resources and I have not previously encountered a small business owner with such a deplorable attitude to human resource management. The contract of employment used by Mr Hickey to engage employees is illustrative of this attitude stating as it does that "*If you are unhappy with your wage you can fuck off. Nobody is forcing you to work here.*" Mr Hickey informed me that he found the contract on the internet.

[91] I note – based on the website of Smerff to which Mr Hickey provided a link in his material – that Mr Hickey appears to have some experience navigating his way through legal matters and can cite defamation law in some detail. It also appears that Mr Hickey has time to compose lengthy diatribes to post on his website about a wide range of subjects and has some skill in the use of the internet. On balance I do not accept that the size of Smerff or any lack of human resource management expertise excuses or mitigates the appalling manner in which Mr Hickey dismissed Mr Lamacq.

Are there any other relevant considerations – s. 387(h)?

[92] In relation to other relevant matters as provided in s.387(h), I accept that Smerff was not a workplace with strict or even definitive workplace practices. I also accept that Mr Hickey provided benefits to his employees such as private use of work vehicles and that it is arguable that Mr Lamacq was abusing these privileges. As previously noted this is a matter that Mr Hickey had the right to take up with Mr Lamacq. However, any legitimacy about the issues that Mr Hickey may have raised with Mr Lamacq is lost by virtue of being couched in terms so offensive that no employee should be expected to endure such treatment.

Conclusion in relation to whether dismissal was unfair

[93] I am satisfied and find that the dismissal of Mr Lamacq was unfair. There was no valid reason for dismissal and the manner in which the dismissal was carried out was devoid of procedural fairness and quite simply appalling. The dismissal was harsh because of its consequences for Mr Lamacq. Mr Lamacq was a first year apprentice and lost his apprenticeship. The dismissal was unjust because Mr Lamacq was not guilty of the misconduct alleged against him. The dismissal was unreasonable because it was decided on inferences that could not reasonably have been drawn from the material before the employer.

REMEDY

[94] Given that I have found that Mr Lamacq's dismissal was unfair, it is necessary to consider the question of remedy. As required by s. 390 of the Act, I am satisfied that Mr Lamacq was protected from unfair dismissal and that he was unfairly dismissed. I am also of the view that Mr Lamacq should have a remedy for his unfair dismissal. Mr Lamacq did not seek reinstatement. In my view reinstatement is not appropriate. It is clear that the relationship between Mr Lamacq and Mr Hickey, the owner of Smerff has irretrievably broken down. Given my findings about Mr Hickey's human resource management practices, I am satisfied that reinstatement is not appropriate and that an award of compensation is appropriate. In relation to the assessment of compensation, s. 392 of the Act provides as follows:

"**392 Remedy—compensation**

Compensation

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

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

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

Shock, distress etc. disregarded

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

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[95] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.[43] That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;[44] *Jetstar Airways Pty Ltd v Neeteson-Lemkes*[45] and *McCulloch v Calvary Health Care* (*McCulloch*).[46]

[96] I turn now to the particular criteria I am required to consider in deciding the amount of compensation to be awarded to Mr Lamacq for his unfair dismissal.

<u>The effect of the Order on the viability of Smerff – s. 392(2)(a)</u>

[97] Other than stating an intention not to pay a cent to Mr Lamacq regardless of any Order that might be made by the Commission, Mr Hickey placed no evidence before the Commission in relation to the effect of an Order on the viability of the Company. It also stated in Mr Hickey's text message exchanges with Mr Lamacq that Mr Hickey has everything that he has made because of hard work and I am satisfied that Mr Hickey has the financial capacity to pay the amount of compensation to Mr Lamacq that I intend to award.

Length of Mr Lamacq's service – s. 392(2)(b)

[98] Mr Lamacq was employed on a full time basis from 6 September 2017 until his dismissal on 15 May 2018. Prior to commencing full time employment Mr Lamacq was employed on a casual basis by Smerff from January 2017. Notwithstanding my finding that the casual service was continuous with Mr Lamacq's service as a full time employee, Mr Lamacq did not have a lengthy period of service and I have had regard to this.

Remuneration Mr Lamacq would have or would likely have received – s. 392(2)(c)

[99] This consideration requires an assessment of how long Mr Lamacq would likely have remained in employment but for his dismissal (the anticipated period of employment) and is necessarily speculative. Mr Lamacq contends that he would have completed his four year apprenticeship but for his dismissal. Mr Hickey made clear that Mr Lamacq would not have remained in employment for much longer. Both Mr Hickey and Mr Lamacq accepted that the issues which led to Mr Lamacq's dismissal changed their relationship.

[100] I also consider that it is more probable than not that had Mr Lamacq remained in employment, Mr Hickey would have cracked down on the amount of private use of Mr Lamacq's company vehicle and the Company fuel card. Mr Hickey may also have been entitled to take a dim view of the fact that the vehicle was fuelled on the Company account and driven to the Sunshine Coast for the purposes of Mr Lamacq's birthday celebrations and that, to add insult to injury, Mr Lamacq got a parking fine. While Mr Lamacq maintained that Mr Hickey approved his use of the vehicle on the occasion of his birthday and Mr Hickey did not contradict this evidence, there is at least a possibility that this was not the case or that Mr Hickey would have taken issue with the Company vehicle attracting a parking fine or being driven for private use to that extent. It is also probable that even if the relationship had survived the fact that Mr Lamacq had done a cash job with a former employee who was *persona non gratis* to Mr Hickey, some other issue would have arisen.

[101] In all of the circumstances I have concluded that Mr Lamacq would likely have remained in employment for a further period of twelve weeks. I make this finding with some difficulty. To find that Mr Lamacq would not have remained in employment for any lengthy period because of the appalling manner in which he was treated by Mr Hickey has the effect of limiting the amount of compensation that can be awarded to Mr Lamacq and rewarding Mr Hickey for that behaviour. However, on the basis of the evidence before me I cannot be satisfied that employment would have extended beyond the twelve weeks that I have determined.

[102] Mr Lamacq was paid a rate of $25.00 per hour. Extrapolating that to a weekly amount on the basis of a 38 hour week, gives a total of $950.00. In the twelve week anticipated employment period, Mr Lamacq would have earned an amount of $11,400.00.

Mr Lamacq's efforts to mitigate loss – s. 392(2)(d)

[103] I am satisfied that Mr Lamacq has made reasonable efforts to mitigate his loss by seeking alternative employment. Mr Lamacq states that he has faced additional difficulty because he wants to continue his apprenticeship and Mr Hickey has contacts in the industry and may be hindering Mr Lamacq gaining employment. Mr Lamacq stated that he has attended job interviews and that the interviews end when his previous employment is brought up. I accept that it is more probable than not that the

dismissal is impacting on Mr Lamacq's ability to obtain employment and that Mr Hickey is actively working against Mr Lamacq in this regard.

[104] Mr Hickey's text message exchange with Mr Lamacq contains explicit threats to the effect that Mr Hickey knows lots of electrical employers and will do everything in his power to make sure that Mr Lamacq does not gain alternative employment. In those circumstances, and in consideration of the amount of compensation I have determined in principle to award, it is not appropriate to apply a discount for failure to take reasonable steps to mitigate loss.

The amount of any remuneration earned since dismissal – s. 392(2)(e)

[105] Mr Lamacq had not earned any remuneration from other employment at the point this application was heard on 27 August 2018. Mr Lamacq had received Youth Allowance in the amount of $560 per fortnight. Consistent with the Full Bench Decision in *Sprigg* I make no deduction for those amounts. Given that the amount of compensation I have determined to award covers a period that does not extend past the date that Mr Lamacq's unfair dismissal application was heard, I make no deduction for contingencies.

The amount of any income reasonably likely to be earned during the period between the making of the order for compensation and the actual compensation – s. 392(2)(f)

[106] In light of the amount of compensation I have determined in principle to award, it is not necessary to make an adjustment for this factor.

Any other matter that the FWC considers relevant – s. 392(2)(g)

[107] There are no other relevant factors.

Deduction for misconduct – s. 392(3)

[108] Given my finding that there was no valid reason for dismissal and that Mr Lamacq did not engage in misconduct, I make no deduction in relation to this matter.

Compensation cap – s. 392(5)

[109] Section 392(5) imposes a legislative "*cap*" on the amount of compensation the Commission can order. The amount of compensation I have decided to award is less than the compensation cap and it is not necessary to apply it.

Conclusion in relation to compensation

[110] After considering the matters required by s. 392 of the Act, I have decided to award Mr Lamacq the amount of $11,400.00 being twelve weeks' ordinary wages, to be taxed according to law. The amount is to be paid within 21 days of the date of release of this Decision and an Order to that effect will issue with this Decision.

DEPUTY PRESIDENT

Appearances:

Mr J. Lamacq appeared on his own behalf.

Mr S. Hickey appeared on behalf of the Respondent.

Hearing details:

Brisbane.

27 August.

2018.

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[1] Transcript of proceeding on 27 August 2018 at PN10 – PN15.

[2] (2012) 219 IR 128.

[3] Ibid at 136.

[4] Transcript of proceeding on 27 August 2018 at PN85 and PN87.

[5] Ibid. at PN23, PN33 and PN49.

[6] Ibid at PN67, PN74-PN79.

[7] Transcript of Proceedings PN67 – 73.

[8] Ibid. at PN348-PN371.

[9] Ibid. PN84-PN93.

[10] Ibid at PN109.

[11] Ibid. at PN285.

[12] Ibid PN285-291.

[13] Ibid at PN294-PN302.

14 Ibid. at PN391.

15 Ibid. at PN145.

16 Ibid. at PN372-PN380

17 Ibid. at PN144-PN151.

18 Ibid. PN160-PN163.

19 Ibid. at PN96-PN97.

20 Ibid at PN109-PN143.

21 Ibid at PN109, PN167.

22 Ibid at PN173.

23 Ibid atPN294, PN391 and PN 402.

24 Ibid. at PN410.

25 Ibid. PN417.

26 Ibid. at PN421-PN424.

27 Ibid at PN201-PN280.

28 Ibid. at PN202-PN222.

29 Ibid. at PN236-PN267.

30 Ibid. at PN223.

31 Ibid at PN231-234 and PN264-PN273..

32 [2010] FWA 2078 at [70] citing with approval *Yaraka Holdings Pty Ltd v Giljevic* (2006) ACTCA 6 at [65] per Crispin P and Gray J.

33 [2012] FWA 5552.

34 [2006] ACTCA 6.

35 Ibid. at [91] per Madgwick J.

36 (2010) FWAFB 5709.

37 *Mendicino v Tour-Dex Pty Ltd* [2010] FWA 9144 citing *Mohazab v Dick Smith Electronics* [1995] IRCA 625.

38 *Spencer v Dowling* (1997) 2 VR 127 at 160 per Hayne JA.

39 *Cook v CPF Management Pty Ltd* [2006] QCA 215 at [19] citing *Spencer v Dowling* (1997) 2 VR 127 at 160 per Hayne JA.

40 (2012) 219 IR 128 at [30].

41 (2000) 98 IR 151 at [73].

42 Ibid at 151 para [70].

43 (1998) 88 IR 21.

44 [2013] FWCFB 431.

45 [2014] FWCFB 8683.

46 [2015] FWCFB 2267.