FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Applicant
v
Microsoft Australia Pty Ltd
(U2011/14677)

COMMISSIONER JONES MELBOURNE, 19 JULY 2012

Application for Relief of Unfair Dismissal.

Introduction

[1] On 16 December 2011, an application pursuant to s.394 of the *Fair Work Act 2009* (**the Act**) for remedy from unfair dismissal was lodged by the Applicant.

[2] The matter was the subject of conciliation however, the matter was not resolved and was consequently listed for hearing. At the hearings conducted on 19 April 2012, 20 April 2012, 30 April 2012 and 8 May 2012, the Applicant was represented by Mr D'Abaco of Counsel and the Respondent by Mr O'Grady of Counsel.

[3] The Applicant gave evidence on his own behalf. The following witnesses gave evidence on behalf of the Respondent:

- Ms Corry Roberts - Human Resources Business Partner;
- Mr Jeff Bullwinkel - Associate General Counsel & Director of Legal & Corporate Affairs;
- Mr Michael Duffin - Premier Field Engineer Team Manager; and
- Mr Callan Tenabel - Group Manager - Premier Field Engineers

[4] Final written submissions were subsequently provided by the Applicant on 18 May 2012, the Respondent on 4 June 2012, and the Applicant on 15 June 2012. An Agreed Statement of Facts was also provided at my request.

Background

[5] The Applicant commenced employment with Microsoft Australia Pty Ltd (**Microsoft**) in the position of Senior Premier Field Engineer on 15 March 2011. Prior to his employment with the Respondent, the Applicant worked for Microsoft Italy from 8 March 2004 and he

was appointed a permanent employee on 16 January 2006. The Applicant relocated to the United Kingdom and commenced employment with Microsoft in the United Kingdom on 12 January 2009. Between October 2010 and January 2011, the Applicant travelled to Australia on several occasions, to work on secondment for the Respondent.

[6] The Applicant was summarily dismissed on 5 December 2011 by Microsoft. The reasons given by Microsoft were that the Applicant:

> "*Improperly used his corporate credit card on multiple occasions for personal expenses;*
>
> *Sought and received reimbursement for personal travel between Melbourne and Sydney on more than one occasion; and*
>
> *Was less than candid in responding to questions put to him during Microsoft's investigation, and that his failure to cooperate in that investigation was unreasonable and unjustified.*"

[7] The Applicant submits he was unfairly dismissed and seeks an Order that he be reinstated to his former position of Senior Premier Field Engineer. In addition, the Applicant seeks an Order that he receive an award of compensation being lost remuneration from the date of his dismissal to the date of his reinstatement. Alternatively, the Applicant seeks compensation of six months remuneration.

Legislation

[8] I am satisfied that the Applicant is a person who is protected from unfair dismissal within the meaning of s.382 of the Act.

[9] S.390 of the Act provides that Fair Work Australia (**FWA**) may order a person's reinstatement or the payment of compensation to a person if FWA is satisfied the person was protected from unfair dismissal and the person has been unfairly dismissed.

[10] S.385 of the Act provides that a person has been unfairly dismissed if FWA is satisfied that the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy.

[11] There is no dispute, and I am satisfied that, the Applicant has been dismissed, the Respondent is not a small business and that the Applicant's dismissal was a not a case of genuine redundancy.

[12] Consequently, the issue I am required to determine is whether the Applicant's dismissal was harsh, unjust or unreasonable.

[13] S.387 of the Act provides:

> ***387 Criteria for considering harshness etc.***
>
> *In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:*

> *(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
>
> *(b) whether the person was notified of that reason; and*
>
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
>
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
>
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
>
> *(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(h) any other matters that FWA considers relevant.*

[14] In considering whether the Applicant's dismissal was unfair and, if it was unfair, the remedy which is appropriate, I have had regard to the particular characteristics of the Applicant's position as Senior Premier Field Engineer. Having considered the evidence, I am satisfied that:

(a) The Applicant's position was a senior position within Microsoft's operations;

(b) The position involved interacting with Microsoft's significant clients; [1]

(c) The interaction with clients comprised around 60% of the Applicant's time when he worked at the client's site; and

(d) During this time the Applicant was not directly supervised.[2]

Was there a Valid Reason

[15] The dismissal of the Applicant's employment included the Applicant's conduct in improperly using his credit card for personal reasons, claiming and receiving reimbursement for personal travel and in his conduct (being "*less than candid*" and "*his failure to co-operate*") during the Respondent's investigations.

Improper Use of the Credit Card

[16] The Respondent alleges that in breach of its policies in respect of company travel and the use of credit cards, the Applicant used his corporate credit card to pay for personal expenses on multiple occasions and, in breach of Microsoft's procedures, the Applicant used Microsoft's system (Serko) to book personal flights.[3]

[17] The Applicant does not dispute that the use of the corporate credit card and the flight booking system for personal reasons was inconsistent with the Respondent's policies and procedures. The Applicant submits, however, that:

(a) He was simply continuing a practice he applied whilst employed by Microsoft in Italy and the United Kingdom;[4]

(b) His practice was that he paid personal expenses on his credit card and only seek reimbursement on work related expenses. Prior to claiming reimbursement he would strike off personal expenses on the invoices. An example of this practice was given in relation to a hotel invoice dated 31 July 2011;[5]

(c) The Respondent had numerous policies;

(d) He was not provided with copies of the relevant policies and was not provided with training in relation to those policies; [6] and

(e) At the time he breached the policies he carried a significant workload.

[18] The Respondent submits "*the Applicant acknowledged that:*

(a) He was aware that there were country specific policies (PN 719 - 730);

(b) He was aware that Microsoft maintained global policies that were supposed to apply across the entire organisation (PN 731 - 732);

(c) He was aware of these policies before he came to Australia (PN 734);

(d) He had undertaken training prior to October 2011 that informed him that he needed to be aware of and understand the policies that might apply to his employment (PN 741 - 746); and

(e) The policies were available on the Microsoft intranet site (PN 838)."

Consideration

[19] The offer of employment signed by the Applicant provides that he was required to comply with all of the Respondent's policies published on its intranet site and that failure to do so may result in disciplinary action including termination.[7]

[20] I am satisfied that the Applicant's use of his credit card for personal expenses (even in circumstances where he did not claim reimbursement) was a breach of the Respondent's policies PROCUR 5.15 Global Expense Policy and PROCUR 5.15 Global Expense Policy - APAC.

[21] PROCUR 5.15 Global Expense Policy provides that:

"*1.2 The purchase of personal claims will not be reimbursed by Microsoft.*"[8]

and PROCUR 5.15 Global Expense Policy - APAC provides:

> "*1.3 An employee may not use the American Express (AMEX) corporate card for personal expenditures except as provided in Section 3.1 of this policy*".[9]

The exceptions in section 3.1 of the policy are limited to items ancillary to a business expense.

[22] The evidence discloses that the Applicant applied for a corporate credit card in March 2011 and was provided with a card in April 2011. At the same time an email was sent to the Applicant by the Respondent's HR Operations Advisors on 5 April 2011 stating:

> "*It is your responsibility to read and understand the T&E Policy and ensure you are using the card within these guidelines.*"[10]

[23] Ms Roberts' evidence, which was not disputed, is that the references to "T&E Policy" was hyperlinked to PROCUR 5.15 Global Expense Policy - APAC.[11]

[24] I am satisfied that utilising the Respondent's designated online booking tool, Serko, to book flights for personal reasons is in breach of the Respondents Global Travel Policy which provides:

> "*1.2 Business travel arrangements that are made or modified solely for personal gain are prohibited. An employee may not arrange a business meeting to coincide with a personal trip for the purpose of expensing the personal trip.*"[12]

[25] I am also satisfied that the use of Serko to book personal flights is in breach of the Respondent's Travel Policy - APAC which relevantly provides:

> "*1.1 Microsoft will reimburse employees for reasonable travel expenses incurred while conducting Company business.*
>
> *1.4 Microsoft assumes no obligation to reimburse employees for expenses that are not in compliance with this policy.*"[13]

[26] I am satisfied that the Applicant completed on-line training sessions on 4 July 2011 called 'Microsoft Standard of Business Conduct 2011,[14] which was described as including:

> *"....a series of scenarios that employees are run through. Some of those relate to expense policy, but as part of completing that training and getting credit for that as you must, within your commitments for that year, you're again directed to a link to the relevant policies which include the policies applicable around use of the credit card in Australia and you are required to affirm that you have, in fact, read, understood and that you will adhere to those policies."*[15]

[27] I am not convinced by the Applicant's submission that in circumstances where he was very busy, and the Respondent had numerous policies, he was excused from familiarising himself with a policy which differed from the practice he had followed in Microsoft Italy and in Microsoft United Kingdom.

[28] The provision of a corporate credit card is a privilege which carries with it obligations on employees in receipt of such card. This included an obligation on the Applicant to examine and familiarise himself with the Respondent's policy in accordance with his contract of employment and the email dated 5 April 2011.

Claiming and Receiving Reimbursements - Lack of Candour

[29] The reasons provided by the Respondent for summarily dismissing the Applicant's employment relate to two periods; in June 2011 and October 2011. The period in October 2011 was the primary focus of evidence and submissions, as the claims for, and the reimbursement of, personal expenditure in June 2011 were detected in the course of the Respondent's investigation into the October 2011 matters. Consequently, I deal with the October 2011 matters first.

[30] The agreed facts in so far as the October 2011 matters are concerned are as follows:

> *9. On or about 31 October 2011, the Applicant submitted expense claims 3000115523 and 3000115524 to the Respondent. The purpose of both expense claims was described as "ROSS2011051600339758, ROSS2011051200339045, coles". One of the expenses on the claim related to travel and accommodation for training which the Applicant was scheduled to provide in Adelaide for the period Tuesday 25 October 2011 – Friday 28 October 2011. The relevant expense was a flight with the route Melbourne to Sydney (departing Melbourne on Saturday, 22 October 2011), Sydney to Adelaide (departing Sydney on Monday, 24 October 2011) and Adelaide to Melbourne (departing Friday, 28 October 2011) for the amount of $354.79 (**the First Flight Booking**), and included one night's accommodation at the Westin Sydney for $262.00 (**the October Hotel Booking**). The expense claim form also included an expense for a flight Sydney to Melbourne (departing Sydney on Sunday, 23 October 2011) and Melbourne to Adelaide (departing Melbourne on Monday, 24 October 2011) for the amount of $642.62 (**the Second Flight Booking**). The expense claim also included claims for taxi receipts and a hire car for Sunday 23 October 2011 (**the Taxi and Car Claim**).*
>
> *10. The Applicant's manager, Michael Duffin, questioned the Applicant about this expense claim and ultimately did not approve it for reimbursement. The Applicant was not reimbursed for these expenses claimed.*
>
> *11. On 3 November 2011, the Applicant submitted expense claim 3000115785. The expense claim sought reimbursement for the First Flight Booking, the October Hotel Booking and the Second Flight Booking. However, the Applicant removed the Taxi and Car Claims from this expense claim. Mr Duffin rejected this claim for reimbursement on 4 November 2011. The Applicant was not reimbursed for the expenses claimed.*
>
> *12 On or about 3 November 2011, the Applicant submitted expense claim 3000115800 which was identical to expense claim 3000115785. The expense claim once again sought reimbursement for the First Flight Booking, the October Hotel Booking and the Second Flight Booking. However, as with expense claim 3000115785 the Applicant had removed the Taxi and Car*

> *Claims from this expense claim. Mr Duffin did not approve this claim for reimbursement. The Applicant was not reimbursed for the expenses claimed.*

[31] In considering the evidence in relation to the October 2011 matters I have approached the task by dealing with sequentially:

(a) The explanation given by the Applicant for the bookings made for his flights and accommodation to conduct a training workshop for Microsoft commencing 25 October 2011 in Adelaide;

(b) The explanation given by the Applicant for submitting the claims on 31 October 2011 for reimbursement for both business and personal expenses;

(c) The discussions between the Applicant and his direct Manager, Mr Duffin, which occurred over the period 31 October 2011 - 5 November 2011; and

(d) The explanations, responses and admissions made by the Applicant in the course of the investigations into the October 2011 matters by Ms Roberts and Mr Bullwinkle from 7 November 2011 to 17 November 2011.

[32] I further note that, whilst I have separated the consideration of the Applicant's conduct and reasons for his dismissal into discrete groups of analysis. I have had regard to the totality of the Applicant's conduct in satisfying myself as to whether or not there was a valid reason for his dismissal: *Selvalchandran v Petron Plastics Pty Ltd* (1995) 62 IR 371 at [373].

The October 2011 Matters

The Bookings

[33] It is a requirement under the Respondent's travel policy that in booking flights using Serko, employees have regard to low-cost alternatives.[16]

[34] In relation to the first booking he made, being a flight from Melbourne to Sydney (22 October 2011), staying 2 nights in Sydney, and flights from Sydney to Adelaide (on 24 October 2011) and returning, Adelaide to Melbourne on 28 October 2011 (**first flight booking**), the Applicant's evidence regarding his choice of routes for the first leg rather than a direct flight from Melbourne to Adelaide was:

(a) the cost of the first leg of his travel was cheaper. This took into account the fact that he intended to use his accumulated points for the cost of the second night of accommodation in Sydney;[17]

(b) his recollection of the total cost of the direct flight including the return leg, was around $986.00;[18] and

(c) on 31 October 2011, he had attempted to obtain evidence of the direct flight quotes he obtained but was unable to do so.[19]

[35] This issue was explored in detail in cross-examination, in the course of which the Applicant accepted that the route booked by him had the following components:

a) Melbourne to Sydney $211;

b) Sydney to Adelaide $256;

c) Adelaide to Melbourne $319; and

d) accommodation in Sydney (one night) $266.[20]

[36] Moreover, the Applicant conceded that he may have got his costings wrong but at the time it appeared the route was the cheapest option[21] and that the route for the first leg he booked enabled him to take advantage of the benefit of staying in Sydney given his state of health.[22]

[37] The Respondent, in their Submissions, relied on the fact that the fare for a direct flight from Melbourne to Adelaide on Monday, 24 October 2011 was $409.69.

[38] I am unable to satisfy myself that, at the time the Applicant made the first flight booking that, it was not the cheaper option. This is because, as the Applicant pointed out and not challenged by the Respondent, the options available to the Applicant at the time cannot be verified after the date the booking was made.

[39] I am satisfied that the flights, together with the one night accommodation, was around the ball park of the cheaper options available but that Applicant's choice was influenced by personal factors.

[40] The Applicant's evidence is that after he arrived in Sydney he received a telephone call from his girlfriend who told him that she was pregnant. The Applicant decided to change his plans and book a flight back to Melbourne to be with her. As his girlfriend wasn't returning to Melbourne until Sunday, the Applicant decided to stay in Sydney on Saturday night. The Applicant then booked flights from Sydney to Melbourne on 23 October 2011 and Melbourne to Adelaide on 24 October 2011 (**second flight booking**).[23]

[41] I accept the Applicant's explanation for the reasons for changing his travel plans and making the second flight booking. The Applicant accepts, and I am satisfied that, as a consequence the following bookings and expenses incurred were personal and not business expenses:

> "*(a) his flight from Sydney to Melbourne on Sunday 23 October 2011;*
>
> *(b) his accommodation in Sydney on 22 October 2011;*
>
> *(c) the taxi and hire car fares associated with his return to Melbourne on Sunday 23 October 2011.*"[24]

Claims for Reimbursement

[42] On 31 October 2011, the Applicant submitted claims for reimbursement for expenses associated with the business trip to Adelaide including claims to be reimbursed for personal expenses specified in [41] above.

[43] The Applicant's explanation for this, given that his usual practice was to remove personal expenses, was that:

(a) at the time he was exhausted from coping with a heavy workload, working an average of 60 hours a week;

(b) he was suffering from bronchitis;[25]

(c) he was attempting to meet the deadline of submitting his expense forms;

(d) he mistakenly included all receipts from the trip, rather than removing expenses which were personal;[26] and

(e) he included the flights from the first booking because the price of the fare on the invoice was not a full fare. He thought he had removed those flights.[27]

[44] The Respondent submits that the Applicant's explanations are not credible and consequently, "*It is difficult to escape the conclusion that these claims were made in the expectation that they would be processed in the ordinary way with Microsoft picking up the bill*".[28]

[45] I do not accept this characterisation of the Applicant's explanation. Rather, I find the Applicant displayed an unjustified lack of care in submitting claims for all personal expenses.

[46] It is instructive that the Respondent's policies allows for mistakes to be made by employees submitting claims to be rectified and impose an obligation on Managers to ensure all claims are valid.[29]

Discussions with Mr Duffin - 31 October 2011 - 4 November 2011

[47] The evidence of the Applicant and his Manager, Mr Duffin as to what transpired in the period 31 October 2011 to 4 November 2011 is in direct conflict as to almost everything, except that both agree that they discussed the Applicant's reimbursement claims during that period.

[48] Mr Duffin's evidence is, in summary, that the Applicant stated that he had:

(a) Flown the first flight booking (Melbourne - Sydney - Adelaide - Melbourne);[30]

(b) The second flight booking (Sydney - Melbourne - Adelaide) was caused by an error in Serko and that a credit would be forthcoming for this;[31]

(c) The taxi receipts for Sunday 23rd October 2011 in Melbourne were wrong and it could be the result of credit card fraud;[32] and

(d) He stayed two nights in Sydney - the 22nd and 23rd October 2011.[33]

[49] The Applicant consistently denied he gave these explanations.[34]

[50] Having considered the evidence of the Applicant and Mr Duffin, I have decided I prefer the evidence of Mr Duffin. I have taken this view because Mr Duffin's evidence is, in my opinion, supported by documentary evidence in the form of emails sent by the Applicant to Mr Duffin. I deal with each of these in turn.

[51] On 4 November 2011 at 10.54am, Mr Duffin sent an email to the Applicant stating:

> "*make sure you look into the inconsistencies with your original expense claim. I am concerned that we have had expenses submitted for the same date across multiple locations Sydney and Melbourne and we need to determine how this occurred*."[35]

[52] At 11.00am, the Applicant responded:

> "*The two taxi receipts in Melbourne while I was in Sydney show up on the same dates on the online statements as in the paper receipts but these two receipts are not in my expense claim anyway."*

[53] Scanned into that email were the two taxi receipts, one identified as "23 Oct", "City City"; the other, undated, identified as "Southbank to Albert Park".[36]

[54] These emails follow a discussion between Mr Duffin and the Applicant on 3 November 2011, in the course of which Mr Duffin provided the Applicant with an Excel spreadsheet[37] identifying inconsistencies Mr Duffin had identified in the Applicant's expense claims in respect of flights booked, accommodation and taxi fares.[38]

[55] There is some dispute between Mr Duffin and the Applicant as to the length of the discussion and precisely the nature of the discussion. I am satisfied, however, that the Excel spreadsheet[39] clearly set out issues which Mr Duffin wanted clarified which were:

(a) two sets of flights, identified as "Sydney - Melbourne, Melbourne - Adelaide" and "Melbourne - Sydney, Sydney - Adelaide, Adelaide - Melbourne";

(b) Sydney accommodation identified as "Westin Sydney - $262.00"; and

(c) Taxi fares incurred on 23 October 2011, identified as "taxi (Southbank - Albert Park) - $10.77" and "taxi (city - city) $14.87".

[56] In his evidence, the Applicant stated that, when he saw the spreadsheet, he realised the taxi fares were on Sunday and were in Melbourne. As a result he cancelled the expense claim form and filed a new one (which continued to attach the taxi receipts for the Sunday) without a claim for reimbursement for the taxi fares.[40] This new claim was submitted on 3 November 2011.

[57] The Applicant also states that he had not correctly conveyed his intention in the email:

> *PN1716* *THE WITNESS: Yes, that's - I didn't write it correctly. The point of the discussion were the taxis in Melbourne when I was in Sydney. This is not properly written. But the point is the taxi receipts, "I was in Melbourne when you say I was in Sydney," or sorry, the other way around. It's not properly written. But the point of this email was the*

fact that there was no delay. We checked the delay in the Amex system, the billing system. Maybe the delay was on - the receipt was saying one day and the statement the other one. Which I can say, "No, look, the dates are the same. There was taxi receipt in Melbourne while I was in Sydney," was to qualify this receipt. Is not properly written on this one.

.....

PN1724 *THE WITNESS: Well, the whole point of the discussion was that I was in Sydney on the Saturday. The taxis, I thought it was referred to Saturday, and what I brought here, the taxi receipt in Melbourne when I was in Sydney, it was just a way - not properly written, way to qualify those taxi receipts. Not saying that I was in Sydney. So the taxis were in Melbourne while I was in Sydney. That wasn't the point of the discussion. Said, "I had taxi receipt in Melbourne, but I was in Sydney," and then we were talking about on Saturday. So there was misunderstanding on the date around the point.*

[58] I found the Applicant's evidence in relation to this email unconvincing. I find that the email is to read in context.

[59] The taxi receipts scanned in are Melbourne based receipts and the date is identified as 23 October 2011, Sunday. The Applicant was on notice that this was an issue. His response clearly refers to two taxi receipts in Melbourne "*while I was in Sydney*" and continues but "*they are not in my expense claim anyway*".

[60] I have formed the view that a reasonable conclusion, having regard to the text of the email and the context in which it was sent by the Applicant, is that the Applicant was suggesting he spent the Saturday and Sunday in Sydney.

[61] At 11.09am on 4 November 2011, the Applicant sent a further email to Mr Duffin regarding flights. In the email he states:

"*The two flights MEL-SYD-ADL-MEL and MEL-ADL-MEL are on Serko but they show up with a different fare now, higher.*

My fear is that I made a double booking. Sometimes the Serko site doesn't show all the items in the cart.

I could have actually ticketed the two flights that I didn't fly while I was trying the different combination to find the cheapest.

For sure those are in my amex statement."[41]

[62] I agree with the Respondent's submissions that:

"*On an ordinary reading, this email suggests that all the flights were booked at the time same (Friday, 21 October 2011), with two flights being ticketed by mistake."*[42]

[63] I have formed the view that it is reasonable to conclude that the Applicant's explanation at the time was that he booked the two sets of flights at the same time, one of which was booked in error.

[64] The Respondent relies on the failure of the Applicant to remove the claims relating to the second booking (Sydney - Melbourne - Adelaide) from the amended expense claims submitted to the Respondent as evidence of the Applicant's deliberate intention to seek reimbursement for personal expenses. This characterisation of the Applicant's position is at odds with the evidence of Mr Duffin when asked whether the revised expense claim included claims for the personal flights. Mr Duffin responded:

> *PN 4593* *Which ones?--All of the flights were still in there. The only things that were removed were the taxis, and in hindsight that's because that was the only thing at that time I had raised with him. The taxis were the things that were odd. I was believing that he stayed two nights in Sydney, I was believing that he was going to get a credit for the flights....*[43] (my emphasis).

[65] I am satisfied that whilst the Applicant maintained at this time (4 November 2011) that he had spent the weekend in Sydney and that the second booking was in error, he had not turned his mind to altering the expense form to remove the claim for personal flights as this was not an issue which had been directly raised by Mr Duffin.

[66] In summary, I am satisfied that the Applicant:

(a) did not intentionally claim reimbursement for the personal expenses over the weekend;

(b) notwithstanding his lack of intention, the Applicant acted carelessly which resulted in a breach of the Respondent's policies which he, as a senior employee enjoying the benefits of a corporate credit card, was obliged to be aware of and comply with;

(c) displayed a lack of candour in his early discussions with his Manager maintaining that he had stayed in Sydney for the weekend and that the second flight booking was an error; and

(d) attempted to rectify the errors he had been made aware of, by removing the claims for the taxi fare which had been subject of his discussions with his Manager.

Investigations by the Respondent - 7 November 2011 to 17 November 2011

[67] After the Applicant's initial discussions with Mr Duffin over 31 October 2011 to 4 November 2011, there were four meetings between the Applicant and the Respondent in relation to the matters under investigation. These meetings are summarised in the Agreed Statement of Facts as follows:

- *On 8 November 2011, the Applicant attended a teleconference in Melbourne. The Respondent's HR Representative (Corry Roberts) and the Applicant's Manager*

(Michael Duffin) were present in Sydney. The Applicant and his "skip" manager, Callan Tenabel, were present in Melbourne. The Applicant was asked a series of questions about his expense claims for the First Flight Booking, the October Hotel Booking, the Second Flight Booking and the Taxi and Car Claims.

- *On 17 November 2011, the Applicant attended a meeting in Melbourne. Also present at that meeting was Ms Roberts and Jeff Bullwinkel, the Respondent's Associate General Counsel and Director of Legal & Corporate Affairs. The Applicant was asked further questions about his expense claim for the First Flight Booking, the October Hotel Booking, the Second Flight Booking and the Taxi and Car Claims.*

- *On 18 November 2011, Ms Roberts and Mr Bullwinkel met with the Applicant and Mr Tenabel. The meeting was conducted by way of videoconference, with Ms Roberts and Mr Bullwinkel in Sydney and the Applicant and Mr Tenabel in Melbourne. The Applicant was asked questions about the June Sydney Trip Reimbursement. After the conclusion of the meeting, the Applicant was suspended on pay.*

- *On 5 December 2011, the Applicant and his representatives met with the Respondent's representatives – Ms Roberts, Mr Bullwinkel and Mr Duffin. At the conclusion of the meeting, he was summarily dismissed. The Applicant's representatives asked the Respondent to reconsider its decision. By way of letter dated 8 December 2011, the Respondent confirmed its earlier decision to summarily dismiss the Applicant.*

[68] On 4 November 2011, Mr Tenabel, Mr Duffin's Manager, emailed Ms Roberts stating:

"*Can you please phone Michael or myself as soon as you are in the office. We have suspected miss-use of Amex card in the team which we need to work with you on immediately."*[44]

[69] This was followed by an email dated 7 November 2011 from Mr Tenabel to, amongst others, Ms Roberts, Mr Bullwinkle and other members of the Compliance Committee setting out in detail the summary of issues and summary of findings regarding the Applicant's claims.[45]

[70] Ms Roberts asked Mr Tenabel to schedule a teleconference between her, the Applicant and Ms Tenabel for 1.30pm on 8 November 2011. Ms Roberts advised Mr Tenabel that:

"*The outcome of the meeting is three-fold: 1-advise him that I am looking into this and 2- provide him with the opportunity for response or to seek outside support and 3-advise him of next steps..."*[46]

[71] The Applicant was advised by Mr Tenabel in the course of the morning on 8 November 2012 of the teleconference. The Applicant's evidence, which is not disputed, is that Mr Tenabel sent him text messages in the course of the morning which informed him there was to be a meeting and that HR would be involved "*as this is a credit issue*".[47]

[72] The Applicant was not informed of the agenda or purpose of the meeting, nor was he provided with written material specifying the particular allegations or concern of the Respondent. There is no dispute that Mr Tenabel sat with the Applicant and Ms Roberts and Mr Duffin participated by telephone. Moreover, Mr Tenabel brought copies of the expense

claims, showing them to the Applicant as they were referred to during the course of the teleconference.[48]

[73] I am satisfied that when first questioned by Ms Roberts, in the teleconference, the Applicant maintained the explanations he had provided to Mr Duffin in the period 31 October 2011 to 4 November 2011.

[74] I do so on the basis of the consistency in the evidence given by Mr Duffin and Mr Tenabel in cross-examination, when asked to recall the content of the meeting.[49] My observation of Mr Duffin and Mr Tenabel was that they presented their evidence in a straightforward manner without embellishment. Further, these individuals were the Applicant's managers with whom previously he had had a sound working relationship.

[75] I am also satisfied that when presented with documentary material or reference to documentary material which contradicted his explanation, the Applicant stated that he couldn't recall. Mr Duffin described this as:

> *...[the Applicant] then said he wasn't sure, that he flies a lot, he couldn't quite remember exactly what happened. Corry reminded him that he needs to be precise about what he's saying and try to recall and make sure he recollects it correctly. [the Applicant] was unable to sort of confirm exactly what happened once he had that evidence put to him, he was then not sure about what had happened"...*[50]

[76] The next day, 9 November 2011, the Applicant sent an email to Ms Roberts the relevant parts of which is reproduced below:

> "*I completely realise the severity of the situation and for this reason I went through the data in my possession to recreate a timeline of the events and answer your questions:*
>
> *- I understand that now the receipts of the flights can tell a different story, and I don't exclude the possibility to not have evaluated all the options when I made the booking, but at the time, the estimate I received on the booking tool for the flight to Adelaide via Sydney on Saturday including one night in hotel really looked to me the cheaper option to be in Adelaide on Monday.*
>
> *- I flew to Sydney on Saturday and spent one night.*
> *Once there however I had to fly back to Melbourne the following day and to fly to Adelaide from Melbourne.*
> *I couldn't remember this flight and checked yesterday with airline after the call.*
>
> *- The week after the delivery in Adelaide was also the last week of the month and were all under pressure to submit expenses.*
> *As I was unwell (I had to cancel a workshop delivery the same week because of the illness) I did my expenses in a bit of a rush and added all the receipts I have in my bag.*
>
> *- Michael checked my claim and told me I had taxi receipts in Melbourne and a hotel receipt in Sydney on the same day.*

He pointed out the checkout date was on the day I remembered I was flying to Adelaide from Sydney on the same day and I voluntarily cancelled the expense claim and resubmitted it without the receipts in Melbourne, keeping them for a later check and considering them personal trip.

When on the second submission Michael asked about the two flight receipts I told him that was probably a mistake in the booking tool because I couldn't remember on the moment the flight SYD-MEL."[51]

[77] The email also states he had now cancelled the expense claim for the wrong flights.

[78] I am satisfied that, notwithstanding the Applicant's earlier lack of candour with his manager, Mr Duffin and in the course of the teleconference on 8 November 2011, as from 9 November 2011, the Applicant had provided the Respondent with full and frank admissions as to what has transpired.

[79] I am further satisfied that the Applicant continued to concede in a later meeting with Mr Bullwinkle and Ms Roberts that he had provided an incorrect explanation to Mr Duffin. Mr Bullwinkle's evidence regarding the meeting held with the Applicant on 17 November 2011 is that:

"*What was [the Applicant] saying in respect of why he had said what he said to Mr Duffin?---Yes, well, in advance of this meeting, my understanding had been that [the Applicant] had told Mr Duffin when first questioned and questioned again by Mr Duffin, and then also had told Ms Roberts and Mr Duffin and Mr Tenabel, that he had in fact flown from Melbourne to Sydney, from Sydney to Adelaide, and Adelaide back to Melbourne. He was very, very clear on that, as I understood it, in a previous conversation, so when I first talked to him, I wanted to make sure I understood that as well. He then explained to me that's exactly what he told Mr Duffin and Mr Tenabel and Ms Roberts at that time but that his recollection had changed over the proceeding several days and that he remembered that there was a personal reason he had to fly back from Sydney to Melbourne rather than flying as planned originally from Sydney down to Adelaide."*[52]

[80] I note that the Applicant denied that he made these statements in the course of the 17 November 2011 meeting.[53] However I prefer the evidence of Mr Bullwinkle as it accords with the notes taken by Ms Roberts, which in my view can be accepted as an accurate record (even if it is not a complete record).[54]

[81] Two further matters arising from the Respondent's Submission must be addressed;

(a) first, the submission that the Applicant gave an unconvincing explanation as to why he did not return on Saturday, 22 October 2011 to Melbourne; and

(b) second, the issue of personal expenses claimed in June 2011 for which the Applicant was reimbursed.

[82] The first matter is dispensed with quickly. The Applicant's explanation is that his girlfriend was not returning to Melbourne. I am satisfied with this explanation.

[83] The second matter requires more detailed consideration.

[84] In the course of the investigation a review was conducted by the Respondent of all the Applicant's claims made in the course of his employment. This review produced claims for personal expenses which were reimbursed as follows:

(a) $362.22 for a return Melbourne - Sydney flight on 25 and 26 June 2011; and

(b) $252.25 accommodation in a Sydney hotel on 25 June 2011.

[85] The circumstances is which these claims were made are set out in the Agreed Statement of Facts as follows:

> *" 5. On 18 June 2011, the Applicant submitted expense claim 3000109120. One of the expenses on the claim was described as "Flight Perth" for the amount of $362.22, dated 15 June 2011. However, attached to the expense claim was a receipt for a return flight from Melbourne to Sydney on Saturday 25 June 2011/return 26 June 2011 for the amount of $362.22. The Respondent approved this expense claim and the Applicant received reimbursement.*
>
> *6. On 22 June 2011, the Applicant submitted expense claim 3000109561. One of the expenses on the claim was described as "Flight IMXCDK Perth" for the amount of $740.89, dated 22 June 2011. Attached to the expense claim was a receipt for a return flight from Melbourne to Perth on Sunday 3 July 2011/return Monday 4 July 2011 at a cost of $740.89. The purpose of the expense claim was described as "Customer onsite job". The Respondent approved this expense claim and the Applicant received reimbursement.*
>
> *7. On 23 August 2011, the Applicant submitted expense claim 3000112453. The expense claim was described as "TechReady13, Kickoff, Training". One of the expenses claimed was described as "Westin Sydney" and included a receipt dated 26 June 2011 for one night's accommodation on 25 June 2011 at the Westin Sydney for the amount of $252.25. The Respondent approved this expense claim and the Applicant received reimbursement."*

[86] The making of these claims and explanations for them were subject to investigation by the Respondent by a video conference held on 18 November 2011 involving the Applicant, Mr Bullwinkle and Ms Roberts.

[87] There is no dispute that, upon being informed by Mr Tenabel that he had made these claims, the Applicant stated they were an error on his part and offered to make good the amount he was reimbursed.[55]

[88] The Applicant's explanation for this claim was that he made an honest mistake which occurred because he confused the receipts for travel and accommodation with a 'kick-off' event held by Microsoft in Sydney at around the time he incurred the expense.[56]

[89] The Respondent submits that this explanation is not credible because:

(a) The 'kick-off' event is held each year at the end of the financial year and always in the middle of the week; and

(b) The various claims were either made on the same day or on the same expense form.[57]

[90] The Respondent submits the claims which resulted in reimbursement for personal expenses in "*themselves capable of constituting a valid reason for the termination of [the Applicant], or at least, reinforcing the concerns that Microsoft had in respect of the October/November expense claims.*"[58]

[91] In my view these claims for personal expenses were not the consequence of deliberate action to be reimbursed for personal expenses, but rather a reflection of the carelessness with which the Applicant treated the obligation on him to comply with the Respondent's policies and to approach the use of a corporate credit card at claiming expenses with the requisite diligence and care.

Findings

[92] In summary my finding as to the Applicant's conduct are:

(a) The Applicant was under an obligation, upon receipt of a corporate credit card, to read and understand the Respondent's policies regarding the use of corporate credit cards;

(b) The Applicant undertook online training which included training on the Respondents corporate credit card policy and airline flight booking policy;

(c) The Applicant breached the Respondent's policies relating to the use of the credit cards and booking flights;

(d) The first flight booking and hotel booking were not unreasonable having regard to the requirement of the Respondent to select the cheapest route for business travel;

(e) The Applicant's reasons for making the second flight booking were reasonable;

(f) The Applicant's claims for reimbursement for personal expenses incurred in June 2011 and October 2011:

i. Did not reflect a deliberate intent to claim reimbursement from the Respondent for those expenses; and

ii. Reflected a lack of care on the Applicant's part in the submission of claims for reimbursement;

(g) The Applicant breached the Respondent's policies in making the flight bookings and the use if the credit card for personal expenses;

(h) The Applicant's responses and explanations to his line Manager in the period 31 October 2011 to 4 November 2011 regarding the personal expenses claimed for the second flight booking and hotel booking and taxi fares, lacked candour;

(i) The Applicant maintained this lack of candour in his explanations given at the teleconference conducted by the Human Resources Business Partner held on 8 November 2011 for a period during the teleconference until he informed those present he could not recall the details;

(j) On 9 November 2011, by email to the Human Resources Business Partner, the Applicant made full and frank admissions, regarding the October 2011 claims for reimbursement of personal expenses;

(k) At a meeting with the Associate General Counsel and Director of Legal and Corporate Affairs and the Human Resources Business Partner held on 17 November 2011, the Applicant acknowledged his previous lack of candour with his line manager; and

(l) At a meeting with the Associate General Counsel and Director of Legal and Corporate Affairs and the Human Resources Business Partner held on 18 November 2011, the Applicant provided full and frank admissions in relation to the June 2011 bookings.

Conclusion

[93] I am satisfied that the conduct engaged in by the Applicant constituted a valid reason for his dismissal.

[94] In my opinion, the provision of a corporate credit card to an employee reposes in that employee obligations of trust and due diligence at all times. The Applicant was a senior employee of the Respondent who failed to take the necessary care in ensuring he was familiar with the relevant policies, failed to exercise due diligence required in the submission of his expense claims for reimbursement and failed to display the requisite level of candour in his dealings with his line manager and at the early stage of the Respondent's investigation into his conduct. I am satisfied that the reason for dismissing the Applicant was sound, defensive and well founded: *Selvachandran v Plastics Pty Ltd*.[59]

Notification of the reason - s.387(b)

[95] I concur with the Applicant's submission that this factor embodies concepts of procedural fairness. The essence of this concept was succinctly summarised by Senior Deputy President Lacy in *Wright v Telstra Corporation Limited*[60] as follows (footnotes omitted):

> *[86] The relevant principle of procedural fairness is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. Previous decisions of the Commission in this regard have made it clear that the doctrine of procedural fairness dictates that a respondent should notify an applicant of its reasons for terminating the applicant's employment:*

- prior to the decision to terminate;

- in explicit terms; and

- in plain and clear terms.[61]

[96] I am satisfied that the Applicant was made aware of the reasons prior to his termination and that these reasons were expressed in explicit, plain and clear terms. The Applicant was first made aware of the reasons following the provision by Mr Duffin of an Excel spreadsheet on 3 November 2011 to the Applicant.[62]

[97] Further, in the course of the telephone and video conferences held on 8 November 2011 and 17 November 2011, the Applicant was subject to questioning in relation to the reasons for his dismissal.

[98] The Applicant submits that he was not notified of the reasons prior to his dismissal on the basis that, at the conclusion of the meeting held on 18 November 2011 between the Applicant, Mr Bullwinkle and Ms Roberts, Mr Bullwinkle handed a letter of suspension.[63] Even if I accepted the Applicant's submission that I should infer the Respondent had made up its mind to suspend the Applicant, I am nevertheless satisfied that by this date the Applicant had been notified of the reasons for his dismissal.

[99] In addition, following the Applicant's suspension on 18 November 2011, the Respondent wrote to the Applicant's solicitors on 2 December 2011 setting out the investigation to date which included an outline of the issues of concern,[64] which subsequently formed the reasons for dismissal provided in the termination letter dated 8 December 2011.

Opportunity to respond - s.387(c)

[100] I am satisfied the Applicant was given an opportunity in the course of the investigation to respond to any reason related to his conduct. This opportunity was provided at the teleconference held on 8 November 2011 and the meetings held on 17 and 18 November 2011 and following correspondence from the Respondent to the Applicant's solicitor dated 2 December 2011, on 5 December 2011.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[101] I am satisfied that the Respondent did not unreasonably refuse to allow the Applicant a support person in the course of the investigation. Indeed, at a meeting with the Respondent on 5 December 2011, the Applicant was legally represented.

Warnings regarding unsatisfactory performance - s.387(e)

[102] As the Applicant was summarily dismissed for misconduct this factor is not relevant.

Impact of the size of the Respondent on procedures followed - s.387(f)

[103] I am satisfied that Microsoft is a large, multinational company with skilled legal and human resources personnel. Consequently, size is not a relevant factor and had no impact on the procedures followed in terminating the Applicant's employment.

Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[104] There is no dispute that the Respondent had available to it dedicated human resources management specialist or expertise. Hence, this factor is not relevant in this matter.

Other relevant matters - s.387(h)

[105] There are three matters that I consider relevant to the determination of whether the dismissal of the Applicant was harsh, unjust or unreasonable:

(a) The justification for summary dismissal;

(b) The investigation process; and

(c) The impact of the termination on the Applicant.

Summary Dismissal

[106] The first matter to be considered is the Respondent's decision that the Applicant engaged in serious misconduct.

[107] It is well settled that where an employee is dismissed for serious misconduct, a consideration as to whether the conduct amounted to serious misconduct is relevant to an overall characterisation of the termination,[65] specifically a consideration as to whether the sanction of termination was a reasonable response.[66]

[108] S.12 of the Act provides that serious misconduct has the meaning provided by the Regulations. Regulation 1.07 of the *Fair Work Regulations 2009* (**the Regulations**) provides:

> ***1.07 Meaning of serious misconduct***
>
> *(1) For the definition of serious misconduct in section 12 of the Act, serious misconduct has its ordinary meaning.*
>
> *(2) For subregulation (1), conduct that is serious misconduct includes both of the following:*
>
> *(a) wilful or deliberate behaviour by an employee 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.*

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault;

(b) the employee being intoxicated at work;

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

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3) (b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.

[109] The Regulations provide that serious misconduct has its ordinary meaning and specifies particular examples such as theft and fraud. I have not found that the Applicant engaged in theft or fraud. Nor am I satisfied that he engaged in acts of dishonesty, wilful disobedience or neglect.

[110] Having regard to my findings in relation the Applicant's conduct at [92], I am satisfied that the Applicant's behaviour constituted misconduct. However, I am not satisfied that the conduct amounted to serious misconduct, or that summary dismissal was warranted. I regard the Respondent's decision to dismiss the Applicant summarily, without cause, was harsh.

Investigation Procedure

[111] As noted above [71] to [73], following the initial discussions with his line Manager, regarding his conduct, a teleconference was convened by Ms Roberts on 8 November 2011. The Applicant was informed by Mr Tenabel, sometime that morning that there would be a telephone conference during the Applicant's lunch break. The Applicant was conducting training that day.

[112] It is to be noted that the Respondent had available a Summary of Issues prepared by Mr Tenabel his discussions and communications with Mr Duffin and sent under cover of email dated 7 November 2011 to Ms Roberts.[67] This summary, suitably modified, could have

formed a constructive basis for the Applicant to be put on clear notice as to the matters to be canvassed. In contrast, no notice or written information of the matters to be discussed at the meeting was provided to the Applicant.

[113] No doubt the Applicant was aware of the matters raised by Mr Duffin from their earlier discussions, however, it is clear the Applicant went into the teleconference cold, with no opportunity to bring relevant material. The extent of the notice given by the Respondent was a text from Mr Tenabel that morning that HR would be involved as there "*is a credit issue.*"

[114] I am satisfied that these deficiencies in procedure limited the capacity of the Applicant to respond in a timely and accurate manner to the questions posed by Ms Roberts, as was conceded by her in cross-examination.[68]

[115] This deficiency is, in my view, significant as it is probable that, armed with the particular issues of concern and material produced by Mr Tenabel in the course of (and not before) the teleconference, the Applicant would have made the full and frank admissions in the teleconference he ultimately did the following day.

[116] Thus, the lack of candour displayed by the Applicant in his dealings with his manager, Mr Duffin, which the Respondent stated continued into the investigative process and which informed its views as to summary dismissal, may have well been avoided had the Respondent adopted an investigative procedure to the standard to be expected of a multinational corporation like Microsoft.

[117] It is to be noted that, in a very short time after the teleconference held on 8 November 2011, Ms Roberts forwarded an email to Mr Bullwinkle and other Compliance Committee members (the body with the ability to decide on the disciplinary action to be taken in respect to the Applicant's conduct) in which she said:

> "*Following on from the issue raised by Callan Tenabel and my discussion with you yesterday, I would like to escalate my concern to you and the compliance team for immediate investigation and action and substantiate my current position of recommending a summary dismissal"*[69] (my emphasis).

[118] Ms Roberts also referred to the Applicant as having "*suddenly lost all recollection*", "*again stumbled*" and concluding that:

> "*Having provided (the Applicant) the opportunity for an explanation or possibly even an admission and apology - yet having him continue to be untruthful in the meeting today without taking any responsibility for his actions - makes me request strongly that this be investigated quickly and I would recommend a summary dismissal based on claiming personal expenses under the company expense system"*[70] (my emphasis).

[119] Contrary to Ms Roberts assertions, I am not satisfied the Applicant was given an opportunity to make an explanation or an admission or an apology. I have already commented on the impact of the failure to accord procedural fairness in the conduct of the teleconference on the Applicant's behaviour in the course of the conference. Ms Roberts' recommendations to summarily dismiss the employee in this communication lacked the proper foundation for urging such a serious step.

[120] I accept Mr Bullwinkle's evidence that he was the ultimate decision maker, this having been delegated to him by the Compliance Committee. I do not accept, however, that Ms Roberts was a junior employee, nor that Ms Roberts' conclusions in her emails did not operate to affect his consideration of the issue.[71]

[121] I find it unlikely that the strong and forthright statements by Ms Roberts did not have some impact on Mr Bullwinkle's consideration. I am satisfied, notwithstanding his statement to the contrary,[72] that Ms Roberts was his primary source of information. As Mr Bullwinkle states in respect of an email from Ms Roberts to him dated 11 November 2011, in which she provides strongly worded negative commentary of the Applicant's response dated 8 November 2011 :

> "*PN 2838* *I'm not asking you what's on her mind, sir. I'm asking what did you take away from this particular phrase used in this email which you read?---My interpretation at the time I read this email was that she was suggesting perhaps that this could be part of a pattern of conduct perhaps reflecting a level of, let's say, lack of candour, lack of truthfulness in connection with [the Applicant] at the time*."

[122] This is precisely the view taken by the Respondent of the Applicant and stated as a reason for his dismissal.

[123] These deficiencies in investigating process and their impact on the ultimate decision to summarily dismiss the Applicant operated harshly.

Impact of termination on the Applicant

[124] Although the Applicant's period of employment with Microsoft was limited (from March 2011 - December 2011), the Applicant had worked for Microsoft global operations as a permanent employee from 2006 in Italy and then the United Kingdom in 2009.

[125] There is no doubt that employment with Microsoft global operations in a senior position is prestigious and provides broad ranging career opportunities. I am satisfied that the Applicant had, in the course of his employment with the global organisation, enjoyed a successful career at a senior level and anticipated a long career with Microsoft.

[126] In this context, I accept that his dismissal has the consequence that any opportunity for employment in Microsoft globally is likely extinguished.

[127] Moreover, in taking up employment with the Respondent in March 2011, the Respondent sponsored the Applicant's 457 Visa enabling him to work and reside in Australia. In the absence of the Applicant securing an alternative sponsor the Applicant will be required to leave Australia.

[128] Having considered the evidence, I am not satisfied that Mr Bullwinkle took into account the Applicant's service with the global corporation and the effect of dismissal on his visa status. In my view, it is unreasonable for an employer to terminate an employee's employment without considering the employee's service and career with the organisation and

the impact of termination on the employee. The impact of the dismissal on the Applicant is, in my opinion harsh.

Conclusion

[129] Having considered the matters specified in s.387, I find that the dismissal of the Applicant's employment harsh. It was harsh because:

(a) the Applicant was summarily dismissed without reasonable cause; and

(b) the impact on the Applicant.

[130] I find that the Applicant was unfairly dismissed.

Remedy

[131] S.390 of the Act deals with remedies for unfair dismissal and provides:

390 When FWA may order remedy for unfair dismissal

(1) Subject to subsection (3), FWA may order a person's reinstatement, or the payment of compensation to a person, if:

(a) FWA is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) FWA may make the order only if the person has made an application under section 394.

(3) FWA must not order the payment of compensation to the person unless:
(a) FWA is satisfied that reinstatement of the person is inappropriate; and

(b) FWA considers an order for payment of compensation is appropriate in all the circumstances of the case.

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

[132] As I am satisfied that the Applicant was protected from unfair dismissal and has been unfairly dismissed, I turn to the question of whether I should grant a remedy.

[133] I am satisfied that, in the circumstances, a remedy should be granted to the Applicant. I am now required to determine whether reinstatement of the Applicant should be granted.

Reinstatement

[134] The Applicant seeks reinstatement as the primary remedy and submits that compensation is not appropriate as a remedy since it will not overcome the loss of the Applicant's visa sponsorship.

[135] The Respondent submits that reinstatement is inappropriate in summary because:

(a) The nature of the Applicant's position working within a discrete and senior area of the Respondent's operations;

(b) Working with its significant clients without direct supervision;

(c) The nature of the misconduct being dishonesty; and

(d) The Managers of Senior Premier Field Engineers (Mr Tenabel, who has responsibility for the Australia operations and Mr Duffin who is responsible for Melbourne and Adelaide operations), gave evidence as to their loss of trust in the Applicant arising out of his conduct and his lack of candour.

[136] The Applicant submits that:

(a) The operation of loss of trust and confidence does not arise because he is not guilty of the misconduct; and

(b) Although the Applicant's position is specialised there are around 63 Premier Field Engineers across Australia and there is evidence that the services of these employees are in high demand.

[137] In determining whether reinstatement is appropriate I have had regard to all the circumstances of this matter, including:

(a) The nature of the position of Senior Premier Field Engineer;

(b) The findings regarding the conduct engaged in by the Applicant which constituted a valid reason for dismissal; and

(c) The evidence of the Applicant's Managers.

[138] There is no dispute that the Senior Premier Field Engineer is a senior position which involves providing software expertise to the Respondent's premier clients.[73]

[139] The position involves knowledge transfer, computer environment review and risk assessment, including management, troubleshooting and issue resolutions.[74]

[140] The Senior Premier Field Engineer works for most of his time at the client's premises and generally without direct supervision.

[141] I accept the evidence of the Applicant's managers that it is an inherent part of the position that Senior Premier Field Engineers are, "*trusted to provide recommendations to a customer on how they should operate in their IT environment and to recommend changes to their IT environment.*"[75]

[142] I am satisfied that the position of Senior Premier Field Engineer is a critical position within Microsoft operations in the interface between Microsoft and its most valued clients.

Consequently, the position is not merely a senior position but one which is a high risk position from the organisation's point of view.

[143] Whilst I have found the Applicant was unfairly dismissed, I have found there was a valid reason for the Applicant's dismissal having regard to his breach of the Respondent's policies with respect to the use of his corporate credit card and flight bookings and claiming reimbursement for personal expenses, as well as his lack of candour in his dealings with his manager in the early stages of the investigation process.

[144] I am satisfied that this conduct directly raises the issue of trust having regard to the critical and high risk position of Senior Premier Field Engineer.

[145] The evidence of the National Manager of Premier Field Engineer operations and the Manager responsible for Melbourne and Adelaide Premier Field Engineers was consistent. Their evidence was that, having regard to the critical nature of the position and the dealings with the Applicant (which I have found lacked candour), the basis for a working relationship with the Applicant has been undermined, as is the trust they formally placed in the Applicant.[76]

[146] In *Perkins v Grace Worldwide (Aust) Pty Ltd*,[77] the Full Court of the Federal Court relevantly observed that an employer or senior officer who accused an employee of wrongdoing justifying summary termination may often be reluctant to shift from their view that the wrongdoing has occurred, irrespective of the Court/Tribunal's findings. Consequently, their Honours urged careful scrutiny of any claim by an employer that reinstatement is impractical because of a loss of confidence in the employee.[78]

[147] Their Honours' observation is instructive:

> "*Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.*"[79]

[148] I have considered all the circumstances carefully and, in particular, those matters detailed at [137] to [145]. I am satisfied that reinstatement of the Applicant would not be appropriate.

Compensation

[149] I am satisfied that, in the circumstances, compensation is appropriate.

[150] S.392 of the Act provides:

392 Remedy—compensation

Compensation

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

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), FWA 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 FWA considers relevant.
Misconduct reduces amount

(3) If FWA is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, FWA 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 FWA 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 FWA 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.

Note: subsection 395(5) indexed to $59,050 from 1 July 2011

(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.

Remuneration that would have been received: S.392(2)(c)

[151] The Applicant's remuneration package with the Respondent was as follows:

"As at 5 December 2011, (the Appliacnt's) remuneration package at Microsoft Australia was as follows:

Base Salary	*$120,357*
Car Allowance	*$15,000*
After hours allowance	*$8,460*
Superannuation	*$12,943"*[80]

[152] I am satisfied that it is reasonable to assume that, but for the dismissal, the Applicant's employment would have continued with the Respondent for a period of 6 months. I have come to this conclusion having regard to the Applicant's relatively short service with the Respondent and my findings as to his lack of care in relation to his obligations as the holder of a corporate credit card and claiming reimbursements for expenses. It is likely that the Applicant's failure to apply requisite standards of diligence and care would have continued unabated.

[153] Accordingly, I calculate the remuneration that the Applicant would have received or would have likely to receive, if his employment had not been terminated, at $78,380.

[154] Between his dismissal on 5 December 2011 and the Order of compensation on 19 July 2012, therefore the remuneration the Applicant would have received, or would have likely to

received if his employment has not been terminated, remains at $78,380 as this period exceeds 6 months.

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

[155] The Applicant has not obtained alternative employment, hence it not necessary to deduct any amount for remuneration earned by the Applicant during the period between the dismissal and the making of the Order for compensation.

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

[156] As the Applicant has not obtained alternative employment, it is not necessary to deduct any income reasonably likely to be earned by the Applicant between the making of the Order for compensation and the actual compensation.

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

[157] As the date of the Order for compensation exceeds the 6 month period I have found the Applicant would have likely remained in employment, it is not appropriate to make any adjustments for contingencies.[81]

[158] There are no other matters I consider relevant to determining the amount of compensation instead of reinstatement, apart from those in ss.392(2)(a), (b) and (d), s.392(3) and s.392(5) with which I now deal.

Viability: s392(2)(a)

[159] There is no evidence that an Order of $78,380 gross payable to the Applicant by the Respondent would affect the viability of the Respondent's enterprise.

Length of Service

[160] I do not consider the Applicant's period of employment with the Respondent provides a basis for reducing any compensation to him.

Mitigating efforts: s.392(2)(b)

[161] I am satisfied that the Applicant has taken reasonable steps to mitigate the loss he suffered because of his dismissal by the Respondent. I accept the Applicant's evidence that his lack of success in securing alternative employment in large part reflects the requirement for a new employer to sponsor him under a s.457 visa.[82]

Misconduct: s.392(3)

[162] I am satisfied that the Applicant's misconduct contributed to his dismissal. Consequently, I must determine an appropriate amount by which the amount of $78,380 should be reduced. In the circumstances I have deducted 25% having regard to the nature of the misconduct. This deduction results in an amount of $58,785. This amount does not exceed the compensation cap pursuant to s.392(5).

Conclusion

[163] I am satisfied that an Order for payment of compensation of $58,785 gross by the Respondent to the Applicant is appropriate in all the circumstances of the case. It accords a fair go all round to both the Applicant and the Respondent.

[164] An Order will be issued requiring the Respondent to pay the Applicant an amount of $58,785 gross, less taxation as required by law, on or before 19 July 2012. An Order to this effect will be issued shortly.

COMMISSIONER

Appearances:

Mr J. D'Abaco - Counsel for the Applicant
Mr C. O'Grady - Counsel for the Respondent

Hearing details:

19 April, 20 April, 30 April and 8 May 2012

Final Submissions:

18 May 2012 - Applicant's Final Written Submissions
4 June 2012 - Respondent's Final Written Submissions
15 June 2012 - Applicant's Final Written Submissions in Reply

Decision Summary

TERMINATION OF EMPLOYMENT – misconduct – breach of company policy – s.394 Fair Work Act 2009 – allegations of misconduct and breach of respondent's policies in respect of company travel and use of credit cards – applicant used corporate credit card to pay for personal expenses and used employer's systems to book personal flights – applicant had worked for respondent in Italy and United Kingdom and contended that this was continued practice from his work whilst overseas – applicant was sponsored by respondent on Visa enabling him to work and reside in Australia – applicant sought reinstatement as compensation would not overcome the loss of his visa sponsorship – satisfied applicant's breach of workplace policy constituted valid reason for dismissal – satisfied summary dismissal was harsh due to impact on applicant – reinstatement not appropriate as applicant's conduct and lack of candour led to breakdown in trust – compensation of $58,785 ordered.

Applicant v Microsoft Australia P/L

U2011/14677 [2012] FWA 3353
Jones C Melbourne 19 July 2012
Citation: *Applicant v Microsoft Australia P/L* [2012] FWA 3353 (19 July 2012)

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[1] Transcript of Hearing - 19 April 2012 at paragraphs [114-115], [1033 - 1034]

[2] Transcript of Hearing - 30 April 2012 and 8 May 2012 at paragraphs [4211], [4660], [4353] and [4662]

[3] Respondent's Outline of Submissions

[4] Witness Statement of Applicant, Exhibit D3 at [9]

[5] Transcript of Hearing - 20 April 2012 at [2474] - [2480] and Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-35

[6] Ibid at [2128] - [2198]

[7] Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-2

[8] Ibid at Annexure CR-7

[9] Ibid at Annexure CR-8

[10] Ibid at Annexure CR-13

[11] Ibid

[12] Ibid at Annexure CR-5

[13] Ibid at Annexure CR-6

[14] Ibid at Annexure CR-16

[15] Transcript of Hearing - 20 April 2012 at [2898]

[16] Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-6

[17] Witness Statement of Applicant, Exhibit D3 at [14] - [15], Transcript of Hearing - 19 April 2012 at paragraph [186] and [1085]

[18] Transcript of Hearing - 19 April 2012 at [1118] and [1120]

[19] Transcript of Hearing - 20 April 2012 at paragraph [2240] - [2252]

[20] Transcript of Hearing - 19 April 2012 at [1126], [1128], [1132] and [1142]

[21] Transcript of Hearing - 19 April 2012 at paragraph [1172], [1374] and [1376]

[22] Ibid at [1172]

[23] Witness Statement of Applicant, Exhibit D3 at [16], Transcript of Hearing - 19 April 2012 at [160]

[24] Transcript of Hearing - 20 April 2012 at paragraphs [1871] - [1874] and [1910], Witness Statement of Applicant, Exhibit D3 at [22] - [23]

[25] Witness Statement of Applicant, Exhibit D3 at [19] and [20]

[26] Transcript of Hearing - 20 April 2012 at paragraph [1876]

[27] Transcript of Hearing - 20 April 2012 at paragraph [2472]

[28] Respondents Final Submissions at paragraph [54]

[29] Witness Statement of Corry Roberts, Annexure CR-6 - PROCURE 5.14 Global Travel Policy - APAC at 26.2

[30] Witness Statement of Michael Duffin, Exhibit M3 at [6]

[31] Ibid

[32] Ibid at [9]

[33] Ibid at [9], Transcript of Hearing - 30 April 2012 at [4149]

[34] Transcript of Hearing - 19 April 2012 at [232], [240], [245] - [246], [248] [282], [298], [1356], [1456] and [1466]

[35] Witness Statement of Michael Duffin, Exhibit M3, Annexure MD-3

[36] Ibid, Annexure MD-4

[37] Ibid, Annexure MD-2

[38] Ibid

[39] Ibid

[40] Transcript of Hearing - 19 April 2012 at [1440] to [1448]

[41] Witness Statement of Michael Duffin, Exhibit M3, Annexure MD - 5

[42] Respondent's Final Written Submissions at [77]

[43] Transcript of Hearing - 8 May 2012 at [4593]

[44] Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-17

[45] Ibid

[46] Witness Statement of Callen Tenabal, Exhibit M4 at [15]

[47] Witness Statement of Applicant, Exhibit D3 at [32]

[48] Witness Statement of Callen Tenabel, Exhbit M4 at [18]

[49] Transcript of Hearing - 30 April 2012 and 8 May 2012 at [4326], [4327] and [4820]

[50] Transcript of Hearing - 30 April 2012 at [4327]

[51] Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-26

[52] Transcript of Hearing - 30 April 2012 at [3388]

[53] Transcript of Hearing - 19 April 2012 at [145] and [147]

[54] Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-34

[55] Witness Statement of the Applicant, Exhibit D3 at [47], Transcript of Hearing - 8 May 2012 at [4891] - [4898]

[56] Ibid at [53]

[57] Respondent's Final Submission at [125] - [131]

[58] Op.Cit at [133]

[59] (1995) 62 IR 371 at [373]

[60] PR929340

[61] Ibid at [86]

[62] See [55] above

[63] Applicant's Outline of Submission, Exhibit D1 at [27]

[64] Witness Statement of the Applicant, Exhibit D2, Annexure MB-18

[65] *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200 at [16] - applying the decision in *Annetta v Ansett Australia* (2000) 98 IR 233 at [9] - [10].

[66] *Royal Melbourne Institute of Technology v Asher* [2010] FWAFB 1200 at [37] and [46]; *Wright v Telstra Corporation Limited*, PR 929340 at [99]

[67] Witness Statement of Callan Tenabel, Exhibit M4, Annexure CT-5

[68] Transcript of Hearing - 30 April 2012 at [3685] - [3693], [3809] - [3811]

[69] Witness Statement of Corry Roberts, Exhibit M2, Annexure CR-21

[70] Ibid

[71] Transcript of Hearing - 20 April 2012 at [2809], [2815] and [2832]

[72] Transcript of Hearing - 20 April 2012 At [2822]

[73] Including ANZ Bank, National Australia Bank, Coles and AGL: Witness Statement of Applicant, Exhibit D3 at [6]

[74] Ibid

[75] Transcript of Hearing - 30 April 2012 at [4215]

[76] Transcript of Hearing - 30 April 2012 at [4207], [4212] - [4215] and 8 May 2012 at [4585] - [4589], [4938] - [4945].

[77] [1997] 72 IR 186

[78] Ibid at page 191

[79] Ibid

[80] Witness Statement of Corry Roberts, Exhibit M2 at [11]

[81] *Enhance Systems Pty Ltd v Cox*, PR910779 at [31], [39]

[82] Witness Statement of Applicant, Exhibit D3 at [65]