



## DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Hannah Manson**

v

**Village Vet**  
(U2010/14347)

COMMISSIONER GOOLEY

MELBOURNE, 6 JUNE 2011

*Application for unfair dismissal remedy.*

[1] Ms Hannah Manson was employed by Turbo Direct Pty Ltd trading as Village Vet (the Respondent) from 4 December 2005 until her employment was terminated on 12 November 2010.

[2] Ms Manson lodged an application for relief pursuant to s394 of the *Fair Work Act 2009* (FW Act) alleging that she was unfairly dismissed. The application was referred to conciliation on 16 December 2010, and then for hearing on 6 April 2011.

[3] Mr Rodney Hepburn a legal practitioner appeared with permission for the Applicant and Mr Glen Pauline a legal practitioner appeared with permission for the Respondent.

[4] Ms Manson and Ms Melisa Groza gave evidence for the Applicant and Dr Rodney Graham and Ms Betty Andre gave evidence for the Respondent.

### **Jurisdiction of Fair Work Australia**

[5] There is no dispute that the Applicant is a person who was protected from unfair dismissal. The Respondent is a small business and therefore the *Small Business Fair Dismissal Code* (the Code) is relevant to this proceeding.

### **The Evidence**

[6] Ms Manson was employed by the Respondent as a Veterinary Nurse. Dr Graham is a Veterinary Surgeon and the owner of the Respondent. Dr Graham made the decision to terminate Ms Manson's employment.

[7] Much of the evidence in this matter is not in dispute.

[8] Before commencing work on 11 November 2010 the Applicant took a 1.5kg bag of Royal Canin cat food, a box of Royal Canin sachets and a Feliway diffuser and refill and placed the goods in her car.<sup>1</sup>

[9] Ms Manson did not invoice her account or pay for the goods on that day or the next day.

[10] It was her evidence that normally when she arrived at work she opened up the doors and turned on the computers.<sup>2</sup> On 11 November 2010 she opened up the doors and took the food and diffuser, sat on the back step and had a cigarette<sup>3</sup> and then took the goods to her car. She then returned and turned on the computers and the lights and opened the doors of the clinic for the customers.<sup>4</sup>

[11] Ms Betty Andre a dog groomer employed by the Respondent was also at work that morning and saw Ms Manson smoking outside the clinic. She saw that Ms Manson had some cat food and dog food with her. Soon after she saw Ms Manson coming back through the side gate. Ms Andre rang Ms Christine Bury who was the Head Veterinary Nurse and told her what she had observed. Ms Andre also thinks she rang Dr Graham.<sup>5</sup>

[12] Ms Andre was asked by Dr Graham to go and have a look in Ms Manson's car which she did. Ms Andre saw the goods she had seen with Ms Mason when she was sitting outside the clinic on the back seat of Ms Manson's car and she saw other items from the practice sitting on the floor in the back seat of the car.<sup>6</sup> She then informed Dr Graham of what she had seen.

[13] Dr Graham said that he received a phone call from his Head Nurse Ms Bury who told him that she had been rung by Ms Andre about Ms Manson's behaviour. Dr Graham confirmed Ms Andre's evidence that he asked her to go and look in Ms Manson's car.<sup>7</sup> It was not clear from the evidence whether Ms Andre rang Dr Graham or vice versa but nothing turns on this.

[14] Dr Graham attended the practice and took photographs of the back seat of Ms Manson's car.<sup>8</sup>

[15] Dr Graham then went to the Prahran Police Station and reported the incident. He was told the police would attend to investigate.<sup>9</sup> He left the police station at about 11.30am and returned to the clinic and waited for the police but they had not arrived by the time Ms Manson left work. He then called the police and advised that there was no point in them

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<sup>1</sup> Exhibit A1 at [6]

<sup>2</sup> Transcript PN 120

<sup>3</sup> Exhibit R7 at [2]

<sup>4</sup> Transcript at PN 121

<sup>5</sup> Exhibit R7 at [2] and [4]

<sup>6</sup> Ibid at [5]

<sup>7</sup> Exhibit R5 at [5]

<sup>8</sup> Ibid at attachment 1

<sup>9</sup> Ibid at [9]

coming as she had left. Dr Graham did not go inside the clinic prior to taking the photos or contacting the police.<sup>10</sup>

[16] Dr Graham then emailed a police officer who was dealing with earlier thefts from the clinic and told him what had happened.<sup>11</sup> That email advised that the value of the goods taken was in excess of \$172.50 and that he had decided to terminate Ms Manson's employment and that he wanted "if the evidence supports it, Ms Manson charged with theft."

[17] Dr Graham also said he checked on 11 November 2010 whether Ms Manson had invoiced the goods to her account and she had not,<sup>12</sup> however it was not clear at what time he made this inquiry.<sup>13</sup>

[18] Dr Graham gave evidence that overnight he reconsidered his decision to terminate Ms Manson's employment and decided that it was appropriate to give Ms Manson "the opportunity to provide an explanation for her behaviour."<sup>14</sup>

[19] What occurred the next morning is in dispute.

[20] It was Dr Graham's evidence that, at 8.20am on 12 November 2010, having checked that Ms Manson had not invoiced the goods that morning, he asked Ms Manson if she had taken anything from the clinic on 11 November 2010. Ms Manson replied that she had taken some food. Dr Graham then asked her if that was all and she replied "yes". Dr Graham then showed Ms Manson the photographs and pointed to the diffuser and a bag and asked her what they were. Ms Manson then replied it was for a client. He then asked who the client was and Ms Manson said she was friend. Ms Manson said she had the money for the diffuser in her wallet.

[21] There was then a brief conversation about other missing items.<sup>15</sup>

[22] Dr Graham decided that he did not believe Ms Manson. He decided that if Ms Manson had not been confronted about the goods she would not have paid for them. He then terminated her employment.<sup>16</sup> Dr Graham made a note of his conversation with Ms Manson immediately after the conversation.<sup>17</sup>

[23] Ms Manson's evidence differed. It was her evidence that when Dr Graham asked her what she had taken, she said "Royal Canin cat food and a Feliway diffuser."<sup>18</sup> She accepts that Dr Graham put the photo in front of her and asked "what's this". She said she then repeated her earlier answer.

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<sup>10</sup> Transcript PN 846

<sup>11</sup> Exhibit R 5 at attachment 2

<sup>12</sup> Ibid at [6]

<sup>13</sup> Transcript PN 858, 863

<sup>14</sup> Exhibit R5 at [13]

<sup>15</sup> Ibid at attachment 4

<sup>16</sup> Ibid at [17]

<sup>17</sup> Ibid at attachment 4

<sup>18</sup> Exhibit A1 at [15]

[24] She told Dr Graham that the cat food was for her and the diffuser was for a client. When asked which client she replied “Sparkles owner.”<sup>19</sup>

[25] She said Dr Graham asked her why the goods were not on her account and she said she had run out of time to do it the day before and she would invoice them today.<sup>20</sup> She said that Dr Graham then asked her what was in the bag on the back seat of the car and she said a Melways and paperwork.<sup>21</sup>

[26] Dr Graham told her her answer was not good enough and terminated her employment for theft. Ms Manson denied stealing.

[27] It was Dr Graham’s evidence that he had checked prior to going to the police station on 11 November 2010 whether Ms Manson had invoiced the goods though he could not recall who he had checked with.<sup>22</sup>

[28] Further it was his evidence that he had again checked whether she had invoiced the goods prior to speaking to her on 12 November 2010. Dr Graham had not known at the time he spoke to Ms Manson at about 8.20am on 12 November 2010 that she had arrived late for work at 8.10am.<sup>23</sup>

[29] It was also Dr Graham’s evidence that despite his advice to the police on 11 November 2010 that he had decided to terminate Ms Manson’s employment on that day, that had Ms Manson not given untruthful answers on 12 November 2010, he would have given her a warning about not invoicing the goods.<sup>24</sup>

[30] It was Dr Graham’s evidence that employees knew that they had to invoice goods on the day they took them.<sup>25</sup> This evidence was supported by Ms Andre.<sup>26</sup> Ms Manson denied this was the protocol. It was her evidence that employees should invoice on the day but if “it is forgotten or if we’ve run out of time too then we invoice it the next day. I’ve done it before, it’s never been an issue.”<sup>27</sup>

[31] It was Ms Manson’s evidence that she was “extremely busy”<sup>28</sup> on the 11 November 2010 and she was rostered to finish at 1pm but in fact did not finish until 1.45pm. It was her evidence that there was a surgery performed on that day<sup>29</sup> and that she was also out of the

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<sup>19</sup> Ibid at [17]-[18]

<sup>20</sup> Ibid at [23] and [24]

<sup>21</sup> Ibid at [19]-[20]

<sup>22</sup> Transcript PN 858-864

<sup>23</sup> Ibid PN 933

<sup>24</sup> Ibid PN 971

<sup>25</sup> Ibid PN 743

<sup>26</sup> Exhibit R7 at 15

<sup>27</sup> Transcript PN 158

<sup>28</sup> Ibid PN 153

<sup>29</sup> Ibid at PN 154

clinic for part of the day visiting pet shops.<sup>30</sup> Ms Manson said that 40 appointments would be a busy day.<sup>31</sup>

[32] It was Dr Graham's evidence that there were no surgeries that day and there was no evidence on the documents that there were any emergencies.<sup>32</sup> It was also his evidence that the appointment list and invoice list for 11 November 2010 show that it "was a low key day in the morning at least."<sup>33</sup> Further it was his evidence that if Ms Manson attended a pet shop on that day it would be on the appointment list and no visits were recorded on 11 November 2010.<sup>34</sup>

[33] It was Ms Manson's evidence that she took the second hand diffuser and refill for Ms Groza after Ms Groza requested the treatment for her cat.<sup>35</sup> It was her evidence that she took the second hand diffuser<sup>36</sup> rather than the new diffuser as she did not want to take the last boxed diffuser from the clinic.<sup>37</sup> Ms Groza supported Ms Manson's evidence that she purchased the diffuser and refill from Ms Manson on 11 November 2010. It was her evidence that Ms Manson suggested this treatment for her cat.<sup>38</sup> It was her evidence that she paid her \$120 and did not receive an invoice for the goods.

[34] Neither Ms Manson nor Ms Groza explained why Ms Groza was charged the full retail price for second hand goods.

### **The Small Business Fair Dismissal Code (the Code)**

[35] It was not contested that the Respondent was a small business.

[36] The Code provides as follows:

#### “Summary Dismissal

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

#### Other Dismissal

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<sup>30</sup> Ibid at PN 392

<sup>31</sup> Ibid PN 390

<sup>32</sup> Ibid PN 731-734

<sup>33</sup> Ibid PN 735

<sup>34</sup> Ibid PN728

<sup>35</sup> Ibid PN 144

<sup>36</sup> Ibid PN 459

<sup>37</sup> Ibid PN 132

<sup>38</sup> Exhibit A3 at [14]

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

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

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

#### Procedural Matters

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

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

[37] This was a summary dismissal as Ms Manson was not given notice of termination.

#### **The Applicant's submissions**

[38] The Applicant submitted that the investigation conducted by the Respondent is “paramount to determining the reasonability of the employer in reaching the grounds of belief used to justify immediate dismissal.”<sup>39</sup> The Applicant relied on the decision of Commissioner Roe in *Peter Taylor v Sota Tractors Pty Ltd*<sup>40</sup>.

[39] Further it was submitted that the Respondent must provide “clear and cogent evidence to support a finding that on the balance of probabilities, [the applicant] engaged in theft.”<sup>41</sup>

[40] It was also submitted that procedural fairness is “a paramount consideration in relation to the investigation and subsequent discussion with the employee.”<sup>42</sup>

[41] In summary the Applicant submitted that:

- a. There was no clear policy requiring goods to be invoiced on the day they were taken.

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<sup>39</sup> Applicant's final submissions at [2]

<sup>40</sup> [2010] FWA 5144

<sup>41</sup> Applicant's final submissions at [3]

<sup>42</sup> Ibid at [4]

- b. The Respondent had no reasonable grounds for believing that Ms Manson had stolen goods when he reported the alleged theft to the police on 11 November 2011.
- c. The Applicant was not advised of the allegations against her and given an opportunity to respond.
- d. The Respondent did not consider failing to invoice on the day as theft.
- e. The Respondent relied upon the Applicant's unusual conduct on the morning of 11 November 2010 but he had no knowledge of her usual conduct.
- f. The Respondent did not know that the diffuser was missing from the cat ward.
- g. The Respondent was aware that the Applicant had taken goods before without invoicing them on the day.
- h. The Respondent's evidence about his conversation with the Applicant on 12 November 2010 should not be accepted.
- i. The Respondent's investigation was deficient.
- j. The Respondent had decided to terminate Ms Manson's employment on 11 November 2010 and the Applicant was not given an opportunity to explain her behaviour prior to the decision being taken.

### **The Respondent's submissions**

**[42]** The Respondent submitted that the following facts were uncontested:

- a. The pet food, diffuser and refill were in the back of the Applicant's car at around 7.30am on 11 November 2010.
- b. The Applicant had not invoiced those goods on either 11 November or on the morning of 12 November 2010.
- c. The diffuser and refill were not boxed together as is the usual case when the product is sold to a client.<sup>43</sup>

**[43]** In summary the Respondent submitted that:

- a. It is not relevant whether the Respondent had a reasonable belief about the Applicant's conduct on 11 November 2010.
- b. The Applicant did not give truthful answers to the Respondent on 12 November 2010.

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<sup>43</sup> Respondent's final submissions at [5]

- c. Dishonesty in an investigation is itself a valid reason for the termination of employment.
- d. In relation to the diffuser - the Applicant took the clinic's spare diffuser rather than a product ready for sale; she did not get anyone's permission to take the clinic's diffuser; Ms Groza was not an existing client of the clinic and no account was created for her on 11 November 2010; the Applicant did not create a tax invoice for the goods; the diffuser and refill were not in a box; and the diffuser was second hand and Ms Groza paid the full retail price for the goods.
- e. Dr Graham's version of the conversation on 12 November 2010 is more credible than Ms Manson's.
- f. The Applicant lacked credibility because she denied knowledge of the requirement to invoice on the day yet she invoiced other staff's purchases on the day and both Dr Graham and Ms Andre gave evidence that this policy was stated on many occasions at staff meetings; she said she was too busy to invoice on 11 November yet it was not a busy day and she had time to have cigarette breaks and take the goods to her car. Further there was no evidence to support her claim that she was out of the clinic.
- g. The Code does not require a report to be made to the police.
- h. The Tribunal is not required to determine if the Applicant engaged in theft.

## **Findings**

[44] The question to be determined is whether the Respondent had reasonable grounds for believing that Ms Manson's conduct was sufficiently serious to justify immediate dismissal.

[45] While I accept Dr Graham's and Ms Andre's evidence that employees were told that they were required to invoice goods on the day they took goods from the clinic I also accept Ms Manson's evidence that this was not the first time she had failed to invoice goods on the day and that there may be legitimate reasons for an employee's failure to invoice goods on the day. In this case however Ms Manson's employment was not terminated because she failed to comply with the policy. Her employment was terminated because Dr Graham formed the view that, had it not been reported to him that Ms Manson had removed goods from the clinic, she would not have paid for them. In other words he formed the view that she would have committed theft.

[46] I accept Dr Graham's evidence that on 11 November 2010 he knew that Ms Manson had taken goods from the surgery without raising an invoice. I accept that he decided then that she had stolen the goods. I accept that he had decided on 11 November 2010 to terminate Ms Manson's employment. However I also accept his evidence that he re-considered his decision overnight and decided to provide Ms Manson with an opportunity to explain her conduct. None of this evidence was contested.

[47] I prefer Dr Graham's version of the conversation that occurred with Ms Manson on 12 November 2010 to that of Ms Manson. Dr Graham's contemporaneous notes of that conversation support his evidence that after Ms Manson said that she had taken some food he

asked her “is that all” to which she replied “yes”. I accept that Dr Graham then pointed to the diffuser and the bag and said “what’s that” to which Ms Manson replied “that’s for a client.” I accept that on the substantive issue, which is whether Ms Manson initially admitted taking the diffuser or not, Dr Graham’s evidence was consistent with his contemporaneous notes and his evidence was not shaken in cross examination.

[48] Ms Manson’s version of the conversation is not convincing. Ms Manson said she told Dr Graham that she had taken food and a diffuser. Dr Graham then pointed to the photo and asked what is that. That Dr Graham was pointing to the diffuser is supported by Ms Manson’s answer i.e. that it was for a client. Had Dr Graham been pointing to the bag her answer would have been different. I therefore do not accept Ms Manson’s evidence that she admitted when first asked that she had taken the diffuser.

[49] While the Respondent submitted that the response “that’s for a client” was also a lie I do not consider that much turns on the question of whether Ms Groza was or was not a client of the clinic at the time.

[50] It was Dr Graham’s evidence that it was Ms Manson’s answers to these questions that caused him to decide that she was not being honest and to conclude that had he not confronted her about these items she would not have paid for the goods.

[51] I consider that Dr Graham had reasonable grounds for believing this. I do not accept Ms Manson’s explanation about why the goods were not invoiced on 11 November 2010. Her claim that it was busy in the clinic was not supported by the evidence before the Tribunal. Her claim that she was too busy with surgery was not supported by the evidence of Dr Graham or the appointment schedule. Also her claim that she was out visiting pet stores was not supported by the evidence before the Tribunal. Further while it was Ms Manson’s evidence that she took the goods to her car before turning on the computers before the start of work, she did not mention in her witness statement that she had time to have a cigarette after taking the goods and prior to putting them in her car. She accepted that it only took a couple of minutes to invoice the goods. I do not accept that she did not have time to invoice the goods that day.

[52] Further Ms Manson did not mention arriving late at work on 12 November 2010 until giving oral evidence in chief. It is surprising given her explanation that she did not have time to invoice on the 12 November 2010 prior to speaking to Dr Graham that she failed to mention this late start in her witness statement.

[53] However even if her evidence were accepted on these matters, Ms Manson’s employment was not terminated because she did not invoice the goods on the 11 November or at the commencement of work on 12 November 2010. Of course, had she done so, the matter would have ended there. Her employment was terminated because she was not honest in her answers to Dr Graham’s questions on 12 November 2010. When she answered his questions she did not know that Dr Graham had photographs of the goods. It was only after being shown the photographs that she admitted to taking the diffuser and refill and advised Dr Graham that she had the money to pay for them.

[54] I agreed with the conclusion of Commissioner Ashbury that a small business employer who believes an employee has engaged in serious misconduct should discuss the allegations

with the employee particularly when the facts upon which the employer relies are in question or are capable of some other explanation.<sup>44</sup>

[55] However I do not accept the submissions of the Applicant that Dr Graham was required to put to her all the reasons why he suspected that she had stolen the goods.<sup>45</sup> It was sufficient for him to provide the Applicant with the opportunity to tell him what she had taken.

[56] In this case Dr Graham confirmed before his discussion with Ms Manson that the goods had not been invoiced. He gave Ms Manson an opportunity to admit that she had taken the goods that were in the photo. Her dishonesty in answering Dr Graham's questions caused him to conclude that she would not have paid for goods had he not confronted her with the photographs of the goods in her car. It was reasonable for Dr Graham to believe that Ms Manson's conduct was sufficiently serious to justify her immediate dismissal.

[57] I have therefore concluded that the termination of Ms Manson's employment was consistent with the *Small Business Fair Dismissal Code* and therefore the application is dismissed.



COMMISSIONER

*Appearances:*

*R Hepburn* for the Applicant.

*G Pauline* for the Respondent

*Hearing details:*

2011.

Melbourne:

April 6.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR510252>

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<sup>44</sup> *Said v Jokar Holdings Pty Ltd* [2011] FWA 977 at [43]

<sup>45</sup> Applicant's final submissions at [1(c)(iv)]