[2020] FWC 2569 [Note: An appeal pursuant to s.604 (C2020/4575) was lodged against this decision - refer to Full Bench decision dated 21 August 2020 [[2020] FWCFB 4250] for result of appeal.]

DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal (consent arbitration)

Mrs On Ni Liu

v

Compuworld Pty Ltd
(C2019/2083)

DEPUTY PRESIDENT ASBURY BRISBANE, 22 MAY 2020

Application to deal with a general protections dismissal by arbitration.

INTRODUCTION

[1] This Decision concerns an application by Mrs On Ni (Anna) Liu (the Applicant) under s. 365 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (the Commission) to deal with a dismissal dispute. The Applicant was employed by Compuworld Pty Ltd (the Respondent) in the position of Receptionist/Accounts on a full-time basis. The Applicant commenced employment with the Respondent in September 2008 and alleges that adverse action was taken against her when she was dismissed on 30 November 2018 in contravention of the general protections provisions in Part 3 – 1 of the Act.

[2] The Respondent is a family run business involved in sales of business equipment – mainly desktop and notebook computers – to registered businesses. The Directors of the Respondent are Mr Wallace Chen and Mrs Janice Chang. Their sons, Mr Michael Chen and Mr Kevin Chen undertake management roles for the Respondent. Mr Michael Chen describes his role as Payroll Officer/Manager and Mr Kevin Chen states that his role is Product, Accounts and Sales Manager and that he is the "controller" Manager who makes all business decisions.[1]

[3] It is not in dispute that at the time the Applicant's employment ended, she was pregnant and suffering from gestational diabetes. Prior to her employment ending, the Applicant raised issues in relation to her entitlement to take sick leave to attend pre-arranged medical appointments relating to her pregnancy and her associated medical condition. The Applicant also asserts that the Respondent's Directors and Managers knew that she was pregnant and that she intended to take maternity leave. The Applicant had also raised previous issues concerning her leave and award entitlements.

[4] On 30 November 2018, the Applicant was given a letter under the signature of Janice Chang headed "Termination of your employment by reason of redundancy. The letter stated that the Applicant's employment with the Respondent in a full-time position would "*sieze*" as a result of a review of operational requirements due to a downturn in sales. The letter also made

reference to the possibility of a casual position being offered to the Applicant. The Applicant did not take up the offer of a casual position and contends that she was dismissed. There is a dispute between the parties as to whether the Directors and Managers of the Respondent knew about the Applicant's pregnancy and related medical condition and the timing of her application for maternity leave and the letter of 30 November advising of changes to her employment.

[5] The Applicant alleges that the Respondent took adverse action against her within the meaning in s. 342(1)(a) by dismissing her from employment:

1. Because she had exercised one or more workplace rights; and/or
2. Because of her pregnancy or physical disability (gestational diabetes).

[6] In the alternative the Applicant claims that the Respondent took adverse action against her by threatening to alter her position to her prejudice by dismissing her from a full-time position and offering her casual employment. The Respondent denies the allegations and maintains that it decided to reduce the Applicant's working hours due to a downturn in its business and offered to "transfer" her to a casual position or part-time position.

[7] The Applicant seeks compensation in respect of statutory entitlements, loss of past and future earnings and hurt humiliation and distress. The compensation sought by the Applicant includes an amount for underpayment of wages based on an assertion that the Respondent had incorrectly paid the Applicant under the *Business Equipment Industry Award 2010* thereby resulting in an underpayment of her accrued annual leave and long service leave entitlements and that the Respondent debited the Applicant's accrued annual leave but did not pay the Applicant four weeks' wages in lieu of notice on termination of her employment. The Applicant also asserts that her dismissal resulted in a loss of entitlement to Paid Parental Leave because she did not meet the work test required by Centrelink to receive such payment.

[8] The matter was not resolved by conciliation and the parties consented to the Commission determining the dispute by arbitration. Directions were issued to the parties to file and serve submissions, documents and any witness evidence on which they intend to rely. Directions were also set to deal with the matter of permission to be represented. Those directions specified that the Commission would not accept material filed after the expiry of time allowed by the directions. Both parties sought to file additional material following the time provided for in the directions.

[9] The evidence in respect of the consent arbitration was heard on 28 June and 6 August 2019. Evidence was given by the Applicant on her own behalf. Evidence on behalf of the Applicant was also given by Dr Mei Shan Lei the Applicant's treating psychiatrist. Evidence for the Respondent was given by:

- Ms Clarissa Chiang, CKG Partners, the Respondent's Accountant and Tax Agent[2];
- Mr Thanh D Nguyen, Salesperson[3];
- Mr Kevin Chen, Manager[4]; and
- Mr Michael Chen, Manager[5].

[10] At the conclusion of the evidentiary hearing the parties were given the opportunity to consider the Transcript of proceedings before filing written closing submissions.

PRELIMINARY MATTERS

Consent arbitration

[11] Section 369 of the Act empowers the Commission to deal with general protections dismissal disputes (such as the present matter), by consent arbitration. Subsection 369(1) sets out the requirements which must be met before the Commission may deal with such a dispute by arbitration:

(i) the Commission issues a certificate under s.368(3)(a) in relation to the dispute (s.369(1)(a));

(ii) the parties notify the Commission that they agree to the Commission arbitrating the dispute (s.369(1)(b));

(iii) the notification is given within 14 days of the certificate being issued, or within such period as the Commission allows or an application made during or after those 14 days (s.369(1)(c)(i)); and

(iv) the notification complies with any requirements prescribed by the procedural rules (s.369(1)(c)(ii)).

[12] There is no dispute that the requirements referred to above have been met. The parties notified the Commission that they had agreed to the Commission arbitrating their general protections dismissal dispute by filing a completed Form F8B. I am satisfied that I may deal with the dispute by arbitration.

Permission for legal representation

[13] The Applicant sought permission to be represented by a lawyer. The Respondent objected to permission being granted. Submissions were received from both parties in relation to permission. The submissions for the Applicant included letters from her treating general practitioner stated that the Applicant:

- is from a non-English speaking background and does not have command of the English language;
- gave birth by caesarean section to her first child a few months prior to the hearing and was still recovering from the birth; and
- had been diagnosed with post-natal depression and referred to a psychiatrist by her General Practitioner due to the seriousness of her symptoms.

[14] The referral from the Applicant's general practitioner dated 30 April 2019, which was tendered by the Applicant, indicates that an opinion and management is sought in relation to the Applicant's post-natal depression and that she has suicidal ideation. A medical certificate also tendered by the Applicant dated 30 April 2019 states that the Applicant's General Practitioner saw her on that date and that she was suffering from postnatal depression and that her Edinburgh postnatal depression scale is 20.

[15] It was submitted that the Applicant did not have the physical or mental ability to represent herself in a competent and effective manner and that in the interests of fairness and efficiency, permission should be granted. It was submitted for the Respondent that allowing the Applicant to be represented by a lawyer would be grossly unfair and would significantly disadvantage the Respondent. It was also submitted that the Respondent would like to understand why the Applicant felt hurt and confused and that she had been discriminated against

and that if the Applicant was represented the Respondent would not have the opportunity to understand the true reasons behind the case.

[16] I decided to grant permission for the Applicant to be represented by a lawyer on the basis that I was satisfied that it would be unfair not to allow the Applicant to be legally represented. The Applicant was suffering from postnatal depression at the time the application was made and when it was heard. In addition, the Applicant was recovering from a caesarean birth and her first language is not English. I was satisfied that the Applicant would not be able to effectively represent herself. I was also of the view that any unfairness to the Respondent was balanced against the fact that Mr Michael Chen and Mr Kevin Chen of the Respondent were effectively permitted to conduct the Respondent's case jointly and displayed a good command of the English language. Further, I gave the Respondent's representatives every opportunity to put their case and allowed the Respondent to tender documents outside the time required in the Directions.

[17] In granting permission for the Applicant to be represented by a lawyer, I also had regard to the complexity of the matter and concluded that to allow the Applicant to be legally represented would enable it to be conducted more efficiently.

GENERAL PROTECTIONS

[18] Part 3 – 1 of the Act under which the application is made, prohibits, amongst other things, an employer from taking adverse action against an employee because, that employee exercises a workplace right or because of proscribed matters including pregnancy and physical disability. Workplace rights are dealt with ins s. 340 of the Act which relevantly provides:

> "(1) A person must not take adverse action against another person:
>
> (a) because the other person:
>
> (i) has a workplace right; or
>
> (ii) has or proposes to exercise a workplace right; ..."

[19] The meaning of "workplace right" is found in s. 341 which provides that a person has a workplace right if the person is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or an order made by an industrial body…". In *Keep v Performance Automobiles Pty Ltd*[6] (*Keep*) a Full Bench of the Commission said in relation to s. 340:

> "An employer contravenes s.340 if it can be said that the exercise by the employee of a workplace right was a 'substantial and operative factor' in the employer's reasons for taking the action which constitutes 'adverse action' within the meaning of s.342.[7]
>
> …
>
> The task of the FWC in a consent arbitration proceeding such as this is to determine three factual questions:
>
> (i) Was the employee exercising a workplace right, within the meaning of s.341?
>
> (ii) Did the employer take 'adverse action' against the employee, within the meaning of s.342?
>
> (iii) Did the employer take the adverse action against the employee because of a prohibited reason, or reasons which included that reason?
>
> In the context of this case the applicant bears the onus of establishing that he had exercised a workplace right at the relevant time and that adverse action was taken against him. If so established, the respondent

then bears the onus of establishing that the adverse action was not taken because Mr Keep had exercised a workplace right."[8]

[20] Section 351 of the Act deals with protection against discrimination and provides that an employer must not take adverse action against a person (including an employee or prospective employee) because of attributes including the person's pregnancy or physical disability. In relation to s.351 of the Act, the plurality (O'Callaghan and Thawley JJ) in *Western Union Business Solutions (Australia) Pty Ltd v Robinson*[9] (*Western Union*) summarised the operation of the relevant provisions as follows:

"The general operation of s 351 can be stated in the following way.

First, putting to one side whether any of the exceptions in s 351(2) apply, the Court's task in determining the application of s 351(1) is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason – see: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 at [5] (French CJ and Crennan J); at [101] (Gummow and Hayne JJ).

Secondly, where adverse action is taken as a result of a decision made by an individual within a corporation, the identification of the operative reasons for taking the adverse action turns on an inquiry into the mental processes of the relevant individual: *Barclay* at [140] (Heydon J); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 253 CLR 243 at [7] (French CJ and Kiefel J); [85] (Gageler J).

Thirdly, the object of that inquiry is to determine the actual reasons. These are determined from all of the facts and circumstances and inferences properly drawn from them. In light of s 361, one would ordinarily expect direct evidence from the individual responsible for the employer's action as to their reasons for that action, which may properly include positive evidence that the action was not taken for a prohibited reason. Of course such statements must be assessed against all of the facts and circumstances. In *State of Victoria (Office of Public Prosecution) v Grant* [2014] FCAFC 184; (2014) 246 IR 441 at [32], Tracey and Buchanan JJ summarised the following propositions from *Barclay* at 517 (French CJ and Crennan J); 542 (Gummow and Hayne JJ); 545-546 (Heydon J) and BHP at [19]-[22] (French CJ and Kiefel J); [85]-[89] (Gageler J):

- The central question to be determined is one of fact. It is: "Why was the adverse action taken?"
- That question is to be answered having regard to all the facts established in the proceeding.
- The Court is concerned to determine the actual reason or reasons which motivated the decision-maker. The Court is not required to determine whether some proscribed reason had subconsciously influenced the decision-maker. Nor should such an enquiry be made.
- It will be "extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer."
- Even if the decision-maker gives evidence that he or she acted solely for non proscribed reasons other evidence (including contradictory evidence given by the decision-maker) may render such assertions unreliable.
- If, however, the decision-maker's testimony is accepted as reliable it will be capable of discharging the burden imposed on the employer by s 361.

Fourthly, s 351(1) does not apply, even though it otherwise would have applied, if the relevant action falls within s 351(2). Where s 351(2)(b) is raised as an issue, the Court's task involves determining whether the adverse action was "taken because of the inherent requirements of the particular position concerned". If adverse action was taken because of the inherent requirements of the particular position, or for reasons which included such a reason (s 360), the adverse action is not prohibited by s 351(1), even though it would have been so prohibited absent the existence of such a reason.

Section 346, which was considered by the High Court in Barclay and BHP, prohibits adverse action being taken for reasons which include any of the industrial action related matters identified in paras

> (a) to (c) of s 346. Section 346 does not contemplate any exceptions. Section 351(1) prohibits adverse action being taken for identified reasons of discrimination. However, s 351 does contain exceptions, one of which is an exception which also revolves around the state of mind of the employer, namely s 351(2)(b).
>
> Fifthly, and assuming s 351(2)(a) and (c) are not in issue, once all of the reasons for the adverse action are identified, the question or questions which remain to be answered are:
>
> > (1) section 351(1): whether one of the operative reasons of substance for the adverse action included a prohibited reason;
> >
> > (2) if s 351(2)(b) is in issue: whether one of the operative reasons of substance for the adverse action was "the inherent requirements of the particular position concerned".
>
> The primary judge, and Katzmann J in *Shizas v Commissioner of Police* [2017] FCA 61; (2017) 268 IR 71, asked first whether s 351(1) applied and, secondly, whether s 351(2) applied. An alternative approach is to look first at s 351(2)(b), because s 351(1) cannot apply unless s 351(2)(b) does not. A third approach is to examine the state of mind of the employer and determine whether s 351 is engaged in light of both s 351(1) and s 351(2)(b). Because s 360 applies to the whole of s 351, the different approaches should yield the same result."[10]

[21] In his judgement in *Western Union* Kerr J also observed that:

> "It is settled law that for the purposes of s. 351(1) of the Fair Work Act it is the reasons of the effective decision maker which are to be looked to in determining whether or not adverse action has been taken because of an employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsiblities, pregnancy, religion, political opinion, national extraction or social origin."

[22] Sections 360 and 361 of the Act are important provisions in the legislative scheme concerning general protections. In *Keep* a Full Bench of the Commission made the following observations in relation to those provisions:

> "Sections 360 and 361, in Div 7 of Pt 3-1 of the FW Act, make it easier than it otherwise would be for an employee to establish a contravention of the protective provisions in Pt 3-1, including s.340. Section 360 provides that, for the purposes of Pt 3-1, 'a person takes action for a particular reason if the reasons for the action include that reason'. Section 361(1), casts an onus of proof on an employer to show that it did not take action for a prohibited reason, it says:
>
> "If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took ... action for a particular reason ...; and
>
> (b) taking that action for that reason ... would constitute a contravention of this Part;
> it is presumed, in proceedings arising from the application, that the action was ... taken for that reason or with that intent, unless the person proves otherwise."
>
> It is important to note that s.361 does not obviate the need for an applicant to prove the existence of the objective facts which are said to provide the basis of the respondent's conduct. The onus does not shift from the applicant to the respondent until the applicant establishes the elements of each of the general protections upon which it seeks to rely. It is not enough for the applicant to merely make assertions regarding these elements, they must be determined objectively.[11]

[23] In *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited*[12] Wigney J distilled the following principles in relation to s. 361 of the Act from the High Court Decisions in Board of Bendigo Regional Institute of TAFE v Barclay[13] and Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd[14]

> "As has already been noted, s 361 creates a statutory presumption that operates in cases where it is alleged that a person contravened s 340. Relevantly, where it is alleged that a person has taken adverse action against another person because that other person has a workplace right, or has exercised a workplace right, it is presumed that the action was taken for that reason, unless the person proves otherwise. Here, the CFMEU alleged that De Martin & Gasparini took adverse action against its employees for reasons that included that the employees had or had exercised workplace rights. Those workplace rights were the benefit of the Enterprise Agreement (a workplace instrument), and the ability to approve or not approve a variation of the Enterprise Agreement (a process under the Fair Work Act). By reason of s 361, it is to be presumed that De Martin & Gasparini took the adverse action for those reasons unless it proves otherwise.
>
> One might be forgiven for thinking, at least at first blush, that the question whether a person took certain action for a particular prohibited reason is a fairly straightforward question. It is, however, a question which, in the context of s 340 and cognate provisions (for example s 346 of the Fair Work Act), has excited some considerable debate and controversy. Following the decisions of the High Court in *Barclay* and *BHP Coal*, however, it could now be said that the relevant principles are relatively well-settled. The key principles, in simple terms, are as follows.
>
> First, the question is one of fact: *Barclay* at [41], [45], [101]; *BHP* at [7].
>
> Second, the question is why the adverse action was taken: *Barclay* at [5], [44]. The focus of the inquiry is the reason or reasons of the relevant decision-maker: *Barclay* at [101], [127], [140], [146]; *BHP Coal* at [7], [19], [85]. More particularly, the question is whether the alleged prohibited reason was a "substantial and operative" reason for taking the adverse action: *Barclay* at [56]-[59], [104], [127]; or an operative or immediate reason: *Barclay* at [140].
>
> Third, the test does not involve any objective element: *Barclay* at [107], [121], [129]; *BHP Coal* at [9]. To speak of objectively obtained reasons risks the substitution by the court of its view, rather than making a finding of fact as to the true reasons of the decision-maker: *Barclay* at [121]; *BHP Coal* at [9].
>
> Fourth, the inquiry is not concerned with mere causation, in the sense that it is not sufficient that there is factual or temporal connection between the relevant protected workplace rights and the adverse action: *BHP Coal* at [18]-[20]. Any such connection, however, may necessitate some consideration as to the true motivation or reasons of the decision-maker: *BHP Coal* at [22].
>
> Fifth, the question must be answered having regard to all of the relevant facts and circumstances and the inferences available from them: *Barclay* at [45], [127]; *BHP Coal* at [7].
>
> Sixth, direct testimony from the decision-maker as to why the adverse action was taken is capable of discharging the burden imposed by s 361: *Barclay* at [45], [71]; *BHP Coal* at [38]. However, declarations that the action was taken for an innocent reason may not discharge the onus if contrary inferences are available on the facts: *Barclay* at [54], [79], [141]. The reliability and weight to be given to such evidence must be assessed having regard to the overall facts and circumstances: *Barclay* at [127].
>
> Seventh, it is not necessary for the decision-maker to establish that the reason for the adverse action was entirely disassociated from the relevant protected workplace right: *Barclay* at [62].[15]

[24] I have applied these principles to my consideration in the present case. I turn first to consider the evidence. Given that the Respondent was not legally represented, the significance of the allegations made by the Applicant and the reverse onus in s. 361, I have set out the written statements made by the Respondent's witnesses and their oral evidence fulsomely to ensure that the Respondent had every opportunity to present its case and to discharge the onus in s. 361 to the extent necessary.

THE EVIDENCE

The Applicant

[25] The Applicant commenced employment with the Respondent on 8 September 2008 working in the role of Receptionist/Accounts. The Applicant's employment was not subject to a written contract of employment. Her evidence was that she worked full-time hours, Monday to Friday, 9am to 5:30pm and her duties included:

> "…chasing overdue payment from customers, accounts reconciliation, issuing purchase invoices to customers, updating the website with sales promotion, data entry for all payment methods, handling cash flow, data entry, handling incoming phone calls."[16]

[26] The Applicant states that as early as 2016, she engaged in discussions with the Respondent concerning leave and award entitlements. In her written statement of evidence the Applicant said that she received payslips for the first time in 2016 which stated that she had a negative annual leave balance in the amount of 1.77 hours. When the Applicant queried this she established that days she had taken as sick leave had been deducted from her annual leave balance and was informed that previous medical certificates she had submitted in support of applications for sick leave had been destroyed by Mr Kevin Chen who told her that he did this because he had too much paperwork.

[27] The Applicant said that Mr Michael Chen informed her that she would need to provide evidence that leave she had previously taken was sick leave by resubmitting her medical certificates. The Applicant expended her own time calling doctors she had visited between 2008 and 2016 and attended appointments with a number of those doctors to have her medical certificates reissued and provided this information to Mr Michael Chen. In support of her assertions in this regard the Applicant tendered an email she sent to Mr Michael Chen dated 3 June 2016 setting out dates where she had submitted medical certificates for sick leave absences and other days where she had been at work and not on leave and referring to: "Missing record from Kevin [Chen]".

[28] Mr Michael Chen responded by email dated 24 June 2016 indicating that he had recredited some of the days to the Applicant's annual leave balance but requested to be provided with copies of the medical certificates the Applicant had previously submitted so that he could "update the information accordingly". The email concluded by stating that: "In regards to leave loading, I have checked with Wallace [Chen] and he has advised that we don't have leave loading to all staff. This is consistent with the payments made in the past few years."[17]

[29] The Applicant states that on 30 June 2016 she spoke to Mr Wallace Chen in regard to her award entitlement and annual leave issues and was informed by Mr Wallace Chen that: "*no one has annual leave loading and the Respondent did not follow award entitlements*". The Applicant states that her concerns were not fully resolved at this time.

[30] There was evidence tendered by the Applicant indicating that in May 2018, Mr Michael Chen sought advice from the Fair Work Ombudsman in relation to the Applicant seeking to be paid personal leave (sick leave) for 11 May 2018 for attending a medical appointment. The evidence tendered by the Applicant shows that the Applicant informed Mr Michael Chen that her medical certificates for this day stated that she was unfit for work and that she was entitled to sick leave regardless of whether she had a medical appointment arranged in advance of the

day for which she sought payment of sick leave. This day was treated by the Respondent as sick leave consequent upon the issue being raised by the Applicant.[18]

[31] In her written statement the Applicant said that on 30 October 2018 she submitted a medical certificate to Mr Michael Chen requesting approval to take three hours sick leave to attend a doctor's appointment.[19] At the hearing, the Applicant's evidence was that she used a Company form entitled Annual Leave Application which also deals with sick leave[20]. The Applicant confirmed that the document she handed to Mr Michael Chen on 30 October is Annexure 6 to Exhibit A5. The application form, dated 30 October 2018 and signed by the Applicant, seeks sick leave for a three hour period from 2.30 pm to 5.30 pm on 1 November 2019. In the field for additional comments, the application states:

> "I recently been diagnosed with diabetes due to my pregnancy. For this reason, I have been advised to seek medical attention from the specialist."

[32] After handing Mr Michael Chen the annual leave application, the Applicant states that Mr Chen asked her whether she was pregnant, and the Applicant responded indicating that she was pregnant. The Applicant states that Mr Michael Chen initially rejected her request for sick leave and informed her that she would need to take the time she required as annual leave. After the Applicant informed him that she had spoken to the "*Fair Work Commission*", Mr Michael Chen "*reluctantly*" approved the leave as personal leave.

[33] The Applicant also tendered a medical certificate dated 1 November 2018 issued by Dr Cynthia Ong, Brisbane Diabetes Endocrinology. The medical certificate states:

> "This is to certify that the above named patient attended a medical appointment with me today. She has gestational diabetes and will need ongoing regular reviews for the treatment of this condition throughout pregnancy. Thank you."[21]

[34] The Applicant's evidence is that she gave this certificate to Mr Michael Chen on 2 November when she returned to work. [22] The Annual Leave Application form used by the Applicant to request sick leave on 1 November 2018 is multi-purpose and covers other forms of leave. The form has a box to indicate whether a medical certificate is attached. In her evidence at the hearing the Applicant said that also around the 2nd of November, the Applicant requested to move from the reception desk to the back office. The Applicant said that she discussed this with Ms Janice Chang and told her that she wanted to move seats because painting work was being undertaken in reception and it "*may be harmful for my baby*".[23] The Applicant said that three days later, Ms Janice Chang asked the Applicant to move back to the reception area, and the Applicant refused to do so stating that it "*will be hurtful to my baby*".[24]

[35] Further, the Applicant alleged that Ms Janice Chang frequently asked her to sweep the showroom floor and told her it would be good exercise for her given her pregnancy. The Applicant maintained that Mrs Janice Chang first instructed her to sweep the floor after 30 October when the Respondent had moved premises and after the Applicant had provided medical certificates confirming her pregnancy.[25] In relation to Ms Janice Chang the Applicant had the following exchange with Mr Michael Chen during cross-examination:

> "MR M CHEN: Do you ever take work directions from Janis? Does she regularly give you jobs to do? --- She ask me to sweep the floor, is constantly asking me to do this because she told me she want the good impression for the walk-in customer, so you just have to sweep the floor on the entrance office every day in the morning, and I told her, "I don't want to do this, why you don't ask the sales to do this? Thanh and Pierre always walk out of the office and then walking in." Then she just said, "Oh, don't be - you got

> pregnant, you should do more exercise and sweep the floor is good for your pregnancy", and what can I say?
>
> Apart from sweeping the floor, do you take any other directions from Janis? --- Not much, not much talking with her. I just seen her every day but it's not much talking with her."[26]

[36] The Applicant took a further period of sick leave on 29 November 2018 and on 30 November provided a medical certificate to Mr Kevin Chen because Mr Michael Chen was not in the office that day. The medical certificate tendered by the Applicant again states that the Applicant is suffering from gestational diabetes and will need ongoing regular reviews for treatment of this condition throughout her pregnancy.[27] The Applicant states that this certificate was given to Mr Kevin Chen at 4pm on 30 November 2018.[28]

[37] The Applicant states that also on 30 November 2018, at approximately 4:30pm, she went into Mr Kevin Chen's office and informed him that she wanted to take maternity leave from the end of February or early March 2019, returning to work in early January 2020. The Applicant did not have a maternity leave application form with her for that discussion and maintained that she gave the form to Mr Kevin Chen in a later discussion.[29] According to the Applicant's evidence, Mr Kevin Chen responded by stating that there would be some changes starting in early 2019 and that the role currently held by the Applicant may not be required. Mr Kevin Chen further stated that consideration was being given to changing the Applicant's position to a casual position or making the position redundant.

[38] The Applicant said that Ms Janice Chang then entered the room and joined the discussion. Ms Chang told the Applicant that the Respondent was not doing well as sales were declining. Ms Chang reiterated that "*she*" was considering putting the Applicant in a casual position or dismissing her from her employment altogether. Should sales improve, Ms Chang stated that the Respondent would consider filling her position again but on a casual rather than a full-time basis and would give the Applicant priority over someone else with experience if she was interested.

[39] The Applicant said that she explained to Ms Janice Chang and Mr Kevin Chen that she would be returning to her position in the new year after her leave and that they could not simply announce that her position was no longer needed. Mr Kevin Chen responded by saying that the change would be effective early the next year, following the new year break. The Applicant also said that Mr Kevin Chen and Ms Janice Chang asked who would care for her baby once it was born and the Applicant confirmed that her baby would go to childcare. Mr Chen and Ms Chang recommended to Mrs Liu that she should not return to work after maternity leave.

[40] According to the Applicant, Ms Chang then stated:

> "…because I was pregnant and of an older age, I could not help lift or move items when needed, and that I needed to be more careful and have more rest at home. Janice Chang also said that I had many sicknesses such as gestational diabetes and was no longer suitable to work full-time."[30]

[41] The Applicant states that she told Mr Kevin Chen and Ms Chang that she needed to think about this as it was a shock and Mr Kevin Chen stated that he would give her a letter to summarise the discussion. The Applicant said that she felt that her employment had been terminated,[31] and that shortly after, at 5:30pm on 30 November 2018, Mr Kevin Chen and Ms Janice Chang approached the Applicant at her desk and handed her a letter. The Applicant refused to take the letter and said that "*at the same moment*" she attempted to give Mr Kevin

Chen a copy of her application for maternity leave. According to the Applicant, Mr Kevin Chen refused to take the document and walked away. Ms Janice Chang took the application form. That application for maternity leave was for the period 4 March 2019 to 6 January 2020.

[42] At approximately 5:42pm, Mr Kevin Chen sent the Applicant a termination letter by email signed by Ms Janice Chang. The email was sent to the Applicant's hotmail email address and is dated 30 November 2018 and has a subject line: "*Termination letter*" and an attachment "*Termination of your employment by reason of redundancy*". The attached letter under the signature of Mrs Janice Chang states:

> "Dear Anna,
>
> **Termination of your employment by reason of redundancy**
>
> The purpose of this letter is to inform you that your employment with Compuworld as full-time position will seize as a result of the company's review over its operational requirement and what this means for you.
>
> Over the last few years Compuworld has experienced ongoing reduction in sales and business activities (including less face to face dealings with customers) and, overall requiring less staff, the position of a full-time administrative clerk is no longer required. With regrets, this means your employment with terminate with Compuworld Pt Ltd.
>
> Alternatively, we are seeking to offer a casual position for similar work as per operational requirements of Compuworld, which will be further reviewed in early 2019.
>
> Base on your length of service, your notice period and redundancy is four weeks. Your termination date will be decided after further discussion with you. You will be paid all of your leave entitlements according to the General Retail Industry Award.
>
> We thank you for your valuable contribution during your employment with us. Please do not hesitate to contact us if you have any questions in the meantime.
>
> Best Regard
>
> Janice 30/Nov/2018
> Janice Chang
> Director"

[43] At 5:43pm, the Applicant states that she sent an email to Mr Kevin Chen and Mr Michael Chen from her "hotmail" email address. Attached to that email is a document on Compuworld letterhead. The document is titled "Annual Leave Application". The "LEAVE TYPE" of the application is selected as "Other" and the Applicant has inserted "Maternity Leave". The proposed period of the leave is 4 March 2019 to 6 January 2020.[32] The form has been signed and dated 30 November 2018. The Applicant states that she sent the email attaching the maternity leave application before she received the email attaching the termination letter. At 6.01pm Mr Kevin Chen sent the Applicant a second termination letter by email in identical terms to the first letter.

[44] The Applicant said in her written statement that she was due to commence maternity leave on the day of her dismissal.[33] Subsequently, the Applicant clarified her evidence and said that she was scheduled to commence a period of annual leave on that date and to return to work on 7 January 2019, following her annual leave. The annual leave was requested and approved in September 2018 and the Applicant was scheduled to travel to Hong Kong. The Applicant states that upon return from her annual leave she would have worked full-time until 4 March

2019, when she planned to commence maternity leave. The Applicant also intended to return to work full-time at the conclusion of her maternity leave.[34]

[45] The Applicant states that because of the birth of her child she has not sought further employment since her dismissal. The Applicant's baby was delivered on 3 April 2019 and, at the time of her statement, the Applicant was not in a position to obtain new employment. In oral evidence the Applicant said that she required a caesarean section and found the experience traumatic. The Applicant states that she is still recovering from the birth of her child.

[46] The Applicant also gave evidence concerning the difficulties she has encountered in obtaining a separation certificate from the Respondent. Because of these difficulties, the Applicant was not able to claim unemployment benefits from Centrelink. Further, as a result of her dismissal the Applicant did not meet the work requirements for the Commonwealth Government paid parental leave scheme.

[47] Since the termination of her employment the Applicant states that she has had a very difficult time. The Applicant states that she was dismissed, without notice, when she was 7 months pregnant. The Applicant also said that she was not paid "*monies owing*" and has been without income since 28 December 2018. Further, the Applicant has been diagnosed with post-natal depression and asserts that this was contributed to by the termination of her employment "*and what followed*".[35]

[48] Under cross-examination the Applicant agreed that apart from the events the subject of her application she has not experienced or witnessed any form of discrimination by the Respondent.[36] The Applicant did not accept that she had noticed a decline in customers during her time with the Respondent[37] but did accept that towards the end of her employment the Respondent's managers were attempting to find different work for her and that this was work she had not done previously.[38] The Applicant ultimately conceded that her normal duties did decline when compared with previous years and, as such, needed to complete different duties for the Respondent.[39]

[49] The Applicant was also cross-examined about who she had reported her pregnancy to and said that she found out she was pregnant in June 2018 and told Mr Nguyen in August or September. The Applicant also said that she told other work colleagues about the pregnancy around this time. The Applicant said that she did not tell Mr Kevin Chen or Mr Michael Chen because she felt unsafe and was worried they would do something to her. The Applicant maintained that she did not need to tell Mr Kevin Chen or Mr Michael Chen about her pregnancy given that she had been providing them with medical certificates since October 2018 indicating that she was suffering from gestational diabetes.[40] The Applicant also said that she was waiting for the right time to inform Mr Kevin Chen and Mr Michael Chen of her pregnancy as she was concerned about being required to use annual leave to attend doctor's appointments for the management of her gestational diabetes.

[50] The Applicant also maintained that she felt unsafe discussing her pregnancy with Mr Michael Chen or Mr Kevin Chen because of the earlier issues relating to her sick leave and that Mr Michael Chen and Mr Kevin Chen had not "*done right*" with respect to their dealings with her on this issue and in particular by debiting her annual leave and requiring her to get medical certificates reissued before rectifying this issue.

[51] The Applicant accepted that offers had been made by the Respondent for her to continue to work on a casual basis in order to access paid parental leave but maintained that she did not accept those offers as the relationship had been too damaged and she could not continue to work for the Respondent.[41] Further, the Applicant said that she had already rejected offers of casual employment made to her by Mr Kevin Chen at the time her employment was terminated. It is also the case that the offers to settle her claims against the Respondent after the termination of her employment were not made until February 2019.

[52] The Applicant also maintained under cross examination that she went in to Mr Kevin Chen's office at 4.00 pm on 30 November 2018 to give him a copy of the medical certificate issued by her doctor on 29 November and again at 4.30 pm to advise that she needed to take maternity leave from March 2019.[42] The Applicant further maintained that she went in to Mr Kevin Chen's office a third time, at 5.30 pm, to give Mr Kevin Chen a maternity leave application form and at the same time, Mr Kevin Chen gave the Applicant the termination letter. The Applicant denied that she had a meeting with Mr Kevin Chen at 2.00 pm on 30 November 2018. The Applicant agreed that she did not state to Mr Kevin Chen that she was pregnant but maintained that he must have known because Mr Michael Chen knew and had offered his congratulations.

[53] The Applicant agreed that in the meeting at 4.30pm on 30 November 2018 she was told that sales were going down and that Mr Kevin Chen needed to do something about this. The Applicant maintained that it was the first time she was told about this issue. The Applicant maintained that Ms Janice Chan was present at the 4.30 pm and 5.30 pm meetings on 30 November. The Applicant agreed that she refused to take the termination letter signed by Ms Janice Chang and in response to a question as to why she had refused, stated that she had already refused to work as a casual employee and there was no reason for her to take the letter.

[54] At the resumed hearing in this matter and after she had given evidence, the Applicant sought to tender further emails, copies of which had not previously been filed in the Commission or served on the Respondent, by putting them to Mr Kevin Chen in cross-examination. The Applicant's representative explained that the emails had been discovered by the Applicant between the first and second days of the hearing. The Respondent objected to these documents being tendered by the Applicant. I determined to allow the emails to be tendered on the basis that they were relevant to the issues in dispute and the Respondent would be given an opportunity to cross-examine the Applicant in relation to them and to call any further evidence it wished to call.

[55] The Applicant was recalled to give evidence about the emails. In response to a question from me about why those documents were not provided to the Commission in accordance with the directions set at the commencement of proceedings the Applicant said:

> "Because my lawyer just asked me see anymore information and I just start to think, am I doing something else that I can't really remember. So I just check in my sent folder and I searched Michael Chen, because they always emailed me the payslip fortnightly, so I just see what I emailed them and they emailed me before. So just checking, then I saw (indistinct), I already emailed those things before."[43]

[56] The first document is a medical certificate, dated 2 November 2018 stating that:

> "This is to certify that Mrs On Liu,
>
> Is receiving medical treatment and for the period 02/11/2018 to 02/11/2018 inclusive.

> She is unfit to continue her usual occupation.
>
> This Certificate was completed on 02/11/2019"[44]

[57] The Applicant's evidence is that she gave this medical certificate to Mr Michael Chen on 5 November 2018, being the next business day.[45] The second document is an email dated 5 November 2018 at 10:53 pm from the Applicant to Mr Michael Chen with the "*Attention needed: regarding my sick leave*" and states:

> "Hi Michael,
>
> Please check the reference and attached information"

[58] The email then sets out the following:

> "Hello,
>
> I have emailed our fact sheet for personal leave to you. It paraphrases the Fair Work Act legislation. The following has been copied form it.
> 'An employee may take paid personal/carer's leave:
> - If they are unfit for work because of their own personal illness or injury (including pregnancy-related illness),'
>
> Most people would regard diabetes as a serious medical condition and so visits to a specialist are likely to be viewed by a court as entitling you to use available personal leave to cover the time off work required to attend the appointment. Medical certification should be provided to the employer as the paraphrased Fair Work Act information stated in the fact sheet stated:
> 'An employer is entitled to request evidence that would substantiate the reason for leave'. "[46]

[59] The Applicant's evidence is that she sent this email from her personal email address to Mr Michael Chen on 5 November 2018 because they were in dispute at this time about whether the Applicant was entitled to paid personal leave for attending the appointment on 2 November 2018. The third document is an email sent Thursday, 22 November 2018 at 11:41 pm addressed to Mr Kevin Chen and Mr Michael Chen with the subject: "*Sick leave*" and has an attachment entitled "*sick leave – anna.pdf*". The body of the states that a sick leave application form is attached.[47]

[60] The attachment to that email is another "*Annual Leave Application*" on the Respondent's letter head. That application is for the purposes of "*Sick Leave*" with an additional comment of "*Gestational diabetes appointment*". The period of leave is said to be 29 November 2018 with a comment that the Applicant would "*take off after 4pm*". The Applicant said that she emailed the document to Mr Michael Chen and Mr Kevin Chen from her personal email address and also asserted that she gave this document to Mr Kevin Chen on 23 November 2018.[48] A medical certificate was provided after the Applicant attended this appointment.[49]

[61] The final document is also an email sent to Mr Kevin Chen and Mr Michael Chen sent on Thursday, 29 November 2018 at 10:33pm, with the subject "*medical certificate attached*" and an attachment called "medical cert – Anna.pdf".[50] The attachment to that email is the 29 November 2018 medical certificate of Dr Ong stating that the Applicant has gestational diabetes and will need ongoing regular reviews for the treatment of this condition throughout her pregnancy.[51] The Applicant's evidence is that in addition to emailing the certificate, she placed a copy on Mr Kevin Chen's desk on the 30th of November at approximately 4.00 pm,[52] before going back into Mr Kevin Chen's office at 4:30pm to advise Mr Chen, verbally, that she would

be applying for maternity leave.[53] The Applicant was cross-examined about these documents. The Applicant said in relation to the medical certificate that she put it on Mr Kevin Chen's desk and told him it was a medical certificate relating to her absence on 29 November 2018. The Applicant agreed that she did not tell Mr Kevin Chen that she was pregnant and said that she thought Mr Kevin Chen already knew, because Mr Michael Chen knew and had offered his congratulations.[54]

[62] The original versions of the additional emails tendered by the Applicant during the hearing showed the sender as "Anna Liu" with a string of computer text following Ms Liu's name. This was explained by the fact that the emails were forwarded from the Applicant to her legal representative and then printed out for the purposes of tendering them to the Commission. Versions were later tendered establishing that the emails were sent from the Applicant's private Hotmail account. I note that this account was used on occasion by the Respondent to send email correspondence to the Applicant.

[63] The Applicant also tendered a report from her treating Psychiatrist Dr Mei Lee in the form of a letter dated 13 June 2019. That letter states (with formalities removed):

> "I am [Mrs Liu's] treating psychiatrist. I have been treating Anna since 9/5/2019. She first presented with symptoms of post-natal depression. At that time, she was 5 weeks post-partum.
>
> Anna was dismissed by her employer on 30.11.2018. Leading up to her dismissal, she was quite stressed due to her employer's increasing work demand, outside her job's description. Her role was a bookkeeper/accounting. However, she was also expected to do cleaning and other manual jobs. During Mrs Liu's pregnancy, she was diagnosed with gestational diabetes. Her employer did not allow her to access sick leave to attend medical appointment (sic) because it was deemed as 'non-urgent' and 'pre-planned' therefore she was not entitled for (sic) it. Instead, they deducted her annual leave. This added a lot of stress for her. Anna officially informed her employer about her pregnancy on 1.11.2018. She submitted maternity leave application on the 30.11.2018. She was shocked to receive the dismissal letter on the same day, which was also the day before her departure to Hong Kong for 5 weeks annual leave.
>
> The dismissal caused Anna and her husband a lot of financial stress, especially they do not have close family support in Australia. It was hard for her to attain employment due to her pregnancy (28 weeks pregnant by January 2019). She lost her rights to access maternity leave as well. She was financially relying on her parents. Her level of anxiety understandably increased given her situation, and she felt quite hopeless. After the traumatic labour for her child, she became depressed.
>
> Though Anna's mental state has gradually improved, the ongoing dispute with her employer through the Fair Work Commission has been very distressing for her. I am concerned of the impact of this on her recovery. I hope that this matter can be resolved soon."

[64] Dr Lee gave evidence by telephone at the hearing. Since initially seeing the Applicant on 9 May 2019, Dr Lee had, at the time she gave her evidence, seen her on 5 occasions.[55] The Applicant was referred to Dr Lee by her general practitioner concerning antenatal or postnatal depression and because the Applicant was suicidal.[56] Prior to the events of 30 November 2018, Dr Lee states that the Applicant did not present with a medical history including a diagnosis or treatment for depression or having previously consulted a Psychiatrist.[57] The Applicant's evidence at hearing was consistent with this history.[58]

[65] Dr Lee discussed her diagnosis of the Applicant as follows:

> "So Anna presented with depressed mood and lots of guilt and a lot of hopelessness and helplessness regarding her current situation. And that was also - that's, I think, happened after she had a very traumatic birth. So that's the best I can give you.

Do you consider that she was also - you say that she had a sense of helplessness around her current situation. Did Anna talk to you about other things apart from the birth? Was there other things that she was talking to you about in terms of why she was feeling that way?---Yes, so when Anna first came to me she was very much in distress, not just regarding the trauma that she endured during the labour. There's also the care of her child. And during our first consultation she also mentioned about how she was terminated by her employer and that affected her and her husband's financial quite significantly and that she didn't think that she could secure any employment subsequent to the termination because she was quite heavily pregnant. She also had gestational diabetes during her pregnancy and that also added to her level of stress. And Anna also seemed to feel like there has been some difficulty to get sick leave to attend to her medical appointment which again adds to her stress level. So after the termination I think she incurred debt with parents. She really relied on her parents a lot for financial help. Obviously she's unemployed now and she has a baby and the husband is their sole income earner. Now, seeing there are a lot of factors involved, not to mention Anna lacks family support network in Australia, her and her husband's family are all based overseas. I note that their parents have been taking turns to come to provide as much support as they can, yes.

Thank you. So when you diagnosed postnatal depression, you say that that diagnosis was 9 May, is that correct?---Yes.

You say that the traumatic birth was one of the factors. Can you confirm whether there were other factors at play? You have mentioned the financial distress and also that she had spoken about the termination by her employer. Do you consider that those were also factors that formed part of that diagnosis?---(Indistinct) can definitely predispose her to develop depression. There are a lot of stress but I don't think it's possible to pinpoint exactly which one is the main causes. I think these are all cumulative, in fact, over a period of time with multiple things happening at the same time so - yes.

Another question I've got is that if you've diagnosed her with postnatal depression was there any other diagnosis in terms of general depression or can you only have one diagnosis? Would there have been other concerns around mental health or was it just postnatal depression?---It's postnatal depression. So postnatal depression basically means that it's a depression arising within a close period after a person had a delivery of a child."[59]

[66] And further:

"Are you able to tell me whether there are other factors, apart from traumatic delivery of the baby, that contributed to the diagnosis?---All I can say is mental illness is quite complex. It doesn't just base on one thing. We have to look at the biological and psychological and the social situation of a person. All those can contribute to a person's vulnerability to depression. Now, I don't think anyone can confidently say that a birth of a child is the main cause of depression, not can the loss of job or loss of income. I think it's the combination of those factors if you understand what I mean. I don't think that - you know, obviously loss of income, incurring debt and loss of an employment and those are predisposing factors. It increases Anna's vulnerability. And subsequently I think the last blow would have been the traumatic birth and that, you know, just the final blow. I think every individual have their own threshold to handle stress.

All right, thank you. Anna consulted with you yesterday. What is your current diagnosis of Anna?---I think she still has postnatal depression but she is improving slightly. However, yesterday I can see that she was quite distressed. So the first four times I saw her she seemed to have made some improvement. Yesterday I think she came to me in distress because of this upcoming court hearing which understandably anyone can be quite anxious about this hearing."[60]

[67] Dr Lee stated that her understanding of the trauma involved during the Applicant's delivery was related to the fact that she was required to have a caesarean section. As to how the Applicant's diagnosis may affect her capacity to re-enter employment, Dr Lee stated:

"That is a very difficult question for me to answer because first of all I can't predict a person's recovery or their ability to return to the workforce. A lot of people who have depression, actually can return to workforce with adequate treatment and support and obviously the removal of stressors. But I cannot predict what's going to happen in future.

> …
> Do you think that Anna was in a position - sorry, I'll start this again. Do you think that from what you saw of Anna and particularly from 9 May that she was in a position to be at work or did you feel that her mental status was such that she wasn't able to be working?---On 9 May when I saw her I've given her the diagnosis of postnatal depression of moderate severity. I do not think she could have worked at that time but I cannot speculate whether she could work again in the future."

[68] Dr Lee accepted that her statements, both in her letter and during cross-examination, are based upon matters reported to her by the Applicant.[61] As a treating psychiatrist, Dr Lee is limited to what she is told by her patients and cannot predict or investigate the truth.[62] Dr Lee stated that she did "*not think that* [the report] *has suggested that the unemployment or the dismissal plays a big chunk in* [the Applicant's] *diagnosis*"[63] and that Dr Lee did not diagnose that her depression was "*because of her loss of employment*"[64]. Dr Lee stated that the "*social situations*"[65] are contributing to the Applicant's symptoms, matters that Dr Lee has elaborated on further in a report that she prepared for the Applicant's general practitioner. Dr Lee did not give an opinion on what was the biggest factor contributing to the Applicant's diagnosis.[66] Dr Lee confirmed that as she only saw the Applicant on 9 May 2019, her diagnosis is based on the her assessment of the Applicant on 9 May 2019.[67]

The Respondent

[69] The first witness called by the Respondent was Ms Clarissa Chiang, Partner of CKG Partners Chartered Accountants. Ms Chiang's statement was in the form of a letter dated 7 June 2019, stating:

> "We, CKG Partners, act as the Accountant and Tax Agent for [Compuworld].
>
> We confirm that as the Accountant for the Company, we have regular meetings with the Directors to discuss the financial position of the Company and make approprecate recommendations.
>
> Due to the economic climate, the business has experience downturns both in sales and profit in the recent times. During our meeting with the Directors in October 2018, we recommended that the Company should reduce its operation costs in order to avoid losses.
>
> From a review of the Sales Reports (excluding GST), we note that the turnover for each of following quarters for the 2018 & 2019 financial years had quite significant decrease. Please refer to details as follows:-

[70] The table set out in Ms Chiang's letter indicates a reduction in sales in sales when the following quarters in the 2018 and 2019 financial years are compared, as follows:

- July – September 16.06%;
- October – December 17.51%
- January – March 23.22%

[71] The total reduction in the three quarters is 19.05%. I have not set out the complete table on the basis of my assumption that it contains sensitive business information showing total dollar values of sales in the 2018 and 2019 financial years. I have considered the totality of the information. Ms Chiang said that she has been the Accountant and Tax Agent for the Respondent for over 15 years[68] and that the "*regular meetings*" referred to in her letter occur quarterly to coincide with the preparation of BAS statements.[69] In relation to the particular meeting referred to as occurring with the Directors in October 2018, Ms Chiang agreed under cross-examination that she had discussed reducing expenses and operating costs generally

rather than on a line by line basis. Ms Chiang also said that she did not advise a reduction in employee numbers.

[72] Ms Chiang said that she stated that if sales did not increase then current expenses needed to decrease or the Company would be going through a loss situation. Ms Chiang also said that she advised that they look at the high costs.[70] Further, Ms Chiang said that hit is not her job to micromanage the client's business and that she simply informed the Respondent's managers and directors that they needed to increase sales and reduce costs and make sure that profit margin is the same.[71] Ms Chiang also agreed that she did not specifically recommend that wages be reduced but rather that costs be reduced.[72] Ms Chiang accepted that BAS statements do not give an indication of the profitability of a business although sales are quite important[73] and maintained that the provision of sales data does give some indication as to the financial health of the business.[74]

[73] Mr Thanh Nguyen's evidence as set out in his witness statement is as follows:

> "To who this may concern,
>
> I, Thanh Nguyen, am an employee of [Compuworld]. I have been employed from April 2014 to current. I have worked with Anna for period of April 2014 to December 2018. Since Anna has left her position in December.
>
> - The position has not be filled by a new employee. We have another staff member in that position for approximately an hour in the morning and afternoon, he does technician work and warehouse the remainder of the day.
> - We get approximately 3-10 customers physically coming into store on any given day, so I feel that the receptionist position has become redundant.
> - Myself and another salesperson have been taking turns taking payments from walk-in customers, which was done previously by Anna throughout the day.
> - My desk is located opposite Anna's desk and I do not recall on any occasion of discrimination against her.
> - Aside from occasionally taking phone calls and taking a message when sales was already on phone call, lunch or away from desk. Anna didn't help with sales specific task, like keying in orders and providing presales/post-sales support
> - Anna's role did not require any heavy lifting to be done, she only needed to move bundles of invoices.
> - Anna was not required to do cleaning on a daily basis. I only recall one time she was asked if she could sweep dried leaves that have blown into the showroom."[75]

[74] Further evidence in chief was called from Mr Nguyen at the hearing. Mr Nguyen understands that "*Janice*" is the wife of the Director Mr Wallace Chen. Janice comes and goes but doesn't do much in relation to the business[76] and attends the business premises once or twice a fortnight.[77] Mr Nguyen stated that Ms Janice Chang was often at the business premises when it first moved. Mr Nguyen also stated that he has heard Ms Janice Chang ask all staff to sweep the showroom floor in circumstances where the door opened causing leaves to be blown in.

[75] In relation to the duties performed by the Applicant, Mr Nguyen has not seen the Applicant perform cleaning duties on a daily basis, and not like the cleaners do[78]. Mr Nguyen's evidence is that employees have their own bins, which they are responsible for.[79] Mr Nguyen has never seen the Applicant being required to do heavy lifting[80] although Mr Nguyen clarified that if "heavy lifting" included lifting a box of invoices then he has seen the Applicant perform heavy lifting.[81] This lifting of boxes of invoices occurred once every few months.[82]

[76] Mr Nguyen was present at work on the Applicant's final day of employment with the Respondent. Mr Nguyen said that he did not recall whether Ms Janice Cheng was present on that date but later said that Ms Janice Cheng may have been there and that she comes and goes.[83] He recalls the Applicant going into a room to speak with Mr Kevin Chen at about 3 or 4 o'clock in the afternoon. [84] Mr Nguyen thought that the Applicant was going in to advise Mr Kevin Chen of her maternity leave.[85] Mr Nguyen was able to hear a loud commotion[86] but not able to hear the conversation that occurred while in the room[87] and was not able to hear anything specific[88]. The loud commotion that Mr Nguyen heard was only the Applicant's voice.[89]

[77] Mr Nguyen said that he recalls having a conversation with the Applicant later in the afternoon, after the discussion with Mr Kevin Chen took place[90] and that the Applicant was upset or angry.[91] Mr Nguyen said that the Applicant stated that Mr Kevin Chen had told her he wanted to change her work hours to casual,[92] and that she would not accept the change in her hours.[93] Mr Nguyen does not recall saying to the Applicant that she should go to the Fair Work Commission[94] although it is possible that he did[95]. During this discussion the Applicant also told Mr Nguyen that she felt that the Respondent was getting rid of her because she was pregnant and because she was going to go on long service or maternity leave.[96]

[78] Mr Nguyen was aware that the Applicant was pregnant[97] and said that she informed him and the other sales representative of this before October 2018.[98] Mr Nguyen maintains that Mr Kevin Chen did not know that the Applicant was pregnant and said that the Applicant had not "*formally*" told them.[99] Mr Nguyen later conceded in cross-examination that he could not be sure whether Kevin or Michael Chen knew about the Applicant's pregnancy.[100]

[79] Mr Nguyen also agreed that he was aware that the Applicant had some concerns regarding her pay and recommended that she raise the issue with Mr Kevin Chen or Mr Michael Chen.[101] While the Applicant discussed this with Mr Nguyen multiple times he is not aware if she ever raised the issue with Mr Kevin Chen or Mr Michael Chen as suggested.[102] Mr Nguyen has not had discussions with Mr Michael Chen and Mr Kevin Chen about the financial status of the company[103] but, given the visibility of his sales figures, he was aware that sales had decreased "*quite a lot*"[104]. Mr Nguyen also said that in October 2018 the business moved premises from East Brisbane to Coopers Plains. The warehouse increased in size, but the office space decreased and the showroom was removed.

[80] Mr Kevin Chen is the product manager, accounts sales manager and "*controller manager*" but is not a Director of the Respondent although he makes all business decisions.[105] Mr Kevin Chen was the Applicant's manager and allocated duties and tasks to her.[106] Mr Kevin Chen's evidence concerning the events of 30 November 2018 was provided to the Commission in an unsigned and undated statement as follows:

> "1. I had meeting around 2 pm, Friday 30th November with Anna regarding the company direction for next year.
>
> 2. We went into my office room as it has better privacy and no one else was present at that time. Janice (my parent) was not in the room.
>
> 3. I explained to Anna that we no longer need a full-time Accounts position due to the downturn of business activities and she's quite aware of this too. Alternatively, we offered her a part time / casual position should she still be interested in stay with the company. I therefore provided her the notice of termination of this full time position and she refused to accept it.

4. After our conversion, Anna for the first time ever, mentioned to me about wanting to take maternity leave. She has never discussed or asked prior to our conversation about wanting to take maternity leave. She then storm out of the office with the meeting unconcluded and did not give me any notice.

5. After the meeting she start making many long phone calls for the whole afternoon. We let her calm down and consult with her husband (who was a past employee at Compuworld too) or other people whom she was calling that afternoon.

6. At the end of the business day, after every one has left the office. Janice and myself approached her at around 5:30pm in an attempt to provide a satisfying solution for both parties. We started by thanking her for her services, and again offer her the position for a part time or casual position. She did not accept the offer and gave us any indication if she will return.

7. We have reiterated to her again that our business is struggling as there is not enough sales to generate enough work for a full time position. So I handed her the notice of termination for the full time position again. She left the notice on her desk and left without giving us any indication as to what will happen next year.

8. Shortly after that, Anna used our office template to hand write a maternity leave notice and gave it to the Janice and myself. We made it very clearly to her that she is entitled to the 18 week parental leave and she will not lose that and we will also keep the part time job offer for her.

9. I then scanned and emailed the termination notice to her email address, making sure that both parties have a record of it.

10. After the letter of termination has been emailed, I received her Maternity notice via email.

11. The company has reduced a number of staff over the last couple of years as sales and profit margains have dropped every year.

12. Janice and myself are very shocked and disappointed to hear about the false accusations of discrimination against her at work (i.e. that the company has dismissed her due to her pregnancy at old age, asking her to move heavy items etc). This is totally untrue. She has not given me any medical report nor advised me about her pregnancy until after the meeting that I had with her. Until now I still have not received any medical report and have no idea as to when she is expecting.

13. The meeting is private and confidential, Anna has made false accusations and has spread these information to other third party which has damages our company's reputation." [107]

[81] Mr Kevin Chen gave further evidence concerning the events of 30 November 2018 as follows:

"When did you give Anna the notice in regards to the changing of position from full time to part time or casual?---Briefly, I gave her the notice on 30 November. Around 2 pm to 3 pm I called Anna to my office where there's no one present. The meeting was private and confidential. I hand her the notice of the redundancy to change her role from full time to casual or part time. This is the first time she told me face to face she's pregnant and she start raising her voice, get angry at me and walk out the meeting. After the meeting I quickly ducked out, I can see her, she's outside making phone call. So I leave her alone for the rest of the afternoon. That's the first meeting that we have.

So when did Anna actually give you - actually handed you the maternity leave application?---After 5.30 pm, 30 November 2018.

Can you briefly explain what happened in that first meeting?---Second meeting, or first meeting?

The first meeting, first?---The first meeting, she walk out the meeting, without give a - I tried - I did my best try to explain the company situation that we need to make a change for next year.

> What about during the second meeting?---During the second meeting I call - I ask my mum Janice to come with me after 5.30. We make sure there's no one in the office. The meeting was private. We approach Anna, we thank her for all her service. We hand her the notice want to change her position again. She refused to take it. She then hand us over the maternity leave application. We accept it. I have no problem for her to take maternity leave. In fact it help the company to cut costs and she mention only - she briefly mentioned to us, pay maternity leave, she will lose the paid maternity leave. We addressed that question. We told her we are just changing your position to part time or casual. You will still be getting paid maternity leave. She left without giving us any indication and she just left. She didn't take the notice at all. Afterward, I assumed she would still be back work in 2019 because she left a lot of stationary behind. Her chair back support was still in the office. I assumed she would still be coming back working in January 2019."[108]

[82] Mr Kevin Chen maintained that Ms Janice Chang was not present at the first meeting with the Applicant but was present at the second meeting.[109] In relation to the duties performed by the Applicant and to "*highlight*" the reason why Mr Kevin Chen says that the Respondent no longer requires a full time employee for the duties, Mr Kevin Chen filed a second statement setting out comments about the duties the Applicant claimed that she undertook and why these were no longer required or were required less frequently.[110] Mr Kevin Chen also said that through 2018 the Respondent had 8 employees[111] and 6 employees in 2019.[112] There has been a shift in the Respondent's customer base such that in 2017 approximately 50 - 60% of sales were conducted online and in 2019 that proportion has increased to 70%.[113]

[83] Mr Kevin Chen denies that he was aware of the Applicant's email exchanges with Mr Michael Chen in 2016 concerning annual leave and other entitlements.[114] Mr Kevin Chen also denies that he knew that the Applicant was pregnant prior to 30 November 2018.[115] Mr Kevin Chen said that he has not heard any talk in the office about the Applicant being pregnant prior to 30 November 2018.[116] In relation to the first of the additional emails produced by the Applicant at the second day of hearing in relation to this matter, Mr Kevin Chen denies having received the email or having seen the email.[117] Mr Kevin Chen suggested in his evidence, given that the identification of the sender of the email is not clear that potentially it had been filtered out into his spam folder.

[84] In relation to the second of the additional emails produced by the Applicant at the second day of hearing in relation to this matter, Mr Kevin Chen denies having received this medical certificate prior to the 30 November meeting.[118] Mr Kevin Chen was asked whether he discussed the possibility of terminating the Applicant's employment with Mr Michael Chen or Ms Janice Chang and responded as follows:

> "Our intention is to change her from – from full time position to a part time, casual position. That's our intention. We have a discussion in October 2018, where the business is struggling, the sales has dropped quite a lot, money coming, there's not enough money coming in, so that's why we need to make a decision in 2018, to change the business direction or else we will be in trouble in 2019. That's our intention to change her role."[119]

[85] Mr Kevin Chen maintained that the Applicant did not come to speak with him at 4.00 pm on 30 November or provide him with a copy of the medical certificate at that time but agreed that on 30 November 2018 the Applicant did give him a copy of the medical certificated dated 29 November.[120] Mr Kevin Chen also maintained that the Applicant did not speak to him at 4:30pm advising that she would be taking maternity leave.[121] Mr Kevin Chen maintained that Ms Janice Chang was not at the meeting at 4:30 pm[122] but conceded that at some point Ms Janice Chang was there with him and they both gave the Applicant the letter of dismissal.[123] I asked Mr Kevin Chen why, if his mother didn't play a significant part in the business, he would have had her sign the termination letter and he responded as follows:

> "I should have just signed it. That's my mistake. I thought because my mum was there that afternoon, I thought it was respect, I should get the direct it to - I'm not a director of the company. I thought make it formal. That's my mistake. Next time I will sign it myself. I wish I can go back time and fix it. I wish I can do something better, not get into this - - -
>
> Okay. I understand you thought that would make it formal because your mother is a director and you're not?---Yes, that's right. I'm not a director of the company.[124]

[86] While Mr Kevin Chen maintained that the Respondent did generally discuss the poor performance of the business with employees[125] he ultimately accepted that there were no formal meetings with the Applicant to discuss the position of the business.[126] In relation to the Applicant's evidence concerning the discussions in the final meeting about her age and pregnancy, Mr Kevin Chen denied that Mrs Janice Chang mentioned anything about the Applicant's pregnancy or that 30 years of age was too old to have a baby and maintained that the Applicant's evidence in relation to this matter was a lie.[127] Mr Kevin Chen also maintained that the he did not refuse to accept the Applicant's application for maternity leave[128] Mr Kevin Chen further maintained that the Respondent does not have a problem with employees accessing parental leave entitlements and, from the Respondent's perspective, it doesn't make a difference, because paid parental leave entitlements are paid by Centrelink.[129]

[87] The Respondent's evidence about when the decision to terminate the Applicant's employment was made and who was involved in the decision making process is not clear. Mr Kevin Chen stated that everyone – his parents and Mr Michael Chen – was aware of the decision in October 2018 and that it was going to be implemented in November.[130] Mr Kevin Chen was cross-examined about the letter of termination and the timing of the termination as follows:

> "This letter, the termination letter which is exhibit, it's part of the applicant's material it's A2, item 1, which is the termination letter, can I – I've only got one copy of it, you have all of those copies, there's one here. Can I just ask you to speak to that please, thank you. May I ask when this was typed?---This was typed in November, some time in November, before 20 December. Before 30 of November.
>
> It's dated 30 November?---Yes, that's right.
>
> So you typed it - - -?---Because I – yes, but I have the draft typed up – actually I copy and paste, copy some, paste some of them from a template.
>
> If you had it drafted earlier than 30 November, why were you leaving it until 30 November to give to her?---Because let her know because the company is part of (indistinct) we decided in October, we decided in - - -
>
> Did you make a decision to change her role?---We decided in October 2018, we're going to cut costs, we're going to let one people go, let the technician go, let the warehouse go and make the account receivable position, change for the account receivable position from a full time to a part time or casual position because we don't need – there's just not enough work.
>
> But you chose - - -In October – in October we have decided, me and Michael have spoke about it. We want to make this happen for the New Year.
>
> Why did you wait until 30 November?---Why did we wait? To let her know, it's - - -
>
> Why did you wait until 30 November?---Because we had to – we had to – we had to let the other two employee know, it's all part of process, all right.
>
> They knew in October, why did you wait until 30 November?---No, no, no, one of them was let go in October. One of them was let go in early November, so we had to wait. We had to wait until the process.

> THE DEPUTY PRESIDENT: What process? --- The process, you know, we had to let one person go and make sure they're okay, then let the next person go and then lastly we want to change her position from a full time to a part time or a casual position. We decided to – I decided, you know, you ask me why I decided? I wish I could do it earlier, I wish I can, you know - - -
>
> MS KEYES: What was stopping you from doing it earlier?---Because I was busy, I was doing other – I was focused on other stuff and then I reminded myself - - -
>
> How often were you seeing Ms Liu?---How often I seen Ms Liu?
>
> You said in evidence it was on a daily basis?---Yes, I see Ms Liu on a daily basis, yes.
>
> Why did you wait until 30 November?---Because – why do I wait until 30 November, because 30 November is the last day before she taking holidays. So I want to let her know before, you know, what will happen next year. I don't want to let her know after when she come back. I want to let her know, you know, what we were doing next year. And at that time, the company was continue struggling.
>
> So how long had Ms Liu been your employee?---How long? For ten years.
>
> So was she one of your longest standing employees?---Yes, she is but is been - - -
>
> Had she always been in a full time role?---Yes.
>
> Okay. So I put it to you that for a longstanding employee who was about to go on annual leave, it is rather strange – sorry, for you to leave it until 30 November at the end of the day to tell her, her employment was changed, why did you wait that long?---Well, is all part of the – all part of the, you know, is all part of business decision, you know. You're going to ask me the question why did you tell – why did you let her go, it's all part of the business decision. The business has been struggling, I was hoping the business will pick up, you know, the business been struggling from August, September, October, November, the business had been struggling. We tried to let her – tried to let her – we was hoping that, you know, maybe the business will pick up in November but it didn't pick up in November, it actually drop compared to last year.
>
> Did you consider speaking to Ms Liu to talk through these things - - -?---I did.
>
> - - - prior to 30 November rather than at the end of the day before she's about to go on leave?---We are – we were talking to her, that's why we having the conversation but she refused to talk to us.[131]

[88] The Respondent asserted that the decision to dismiss the Applicant was based solely on the need to make changes as a result of the poor financial state of the business in October 2018.[132] Mr Kevin Chen said that the decision was made to select the Applicant for redundancy because she was doing accounts receivable rather than sales and could not do other tasks within the Respondent's business.[133] Mr Kevin Chen also said that attempts had previously been made to train the Applicant to perform sales work but she had refused.[134] Further, Mr Kevin Chen said that prior to the Applicant's dismissal the Respondent had dismissed two other staff being a person in the warehouse and a technician. The technician left around October 2018 and the person in the warehouse left around early November 2018.[135]

[89] Mr Kevin Chen's evidence about these two prior dismissals was challenged during cross-examination. In relation to the warehouse staff member, it was put to Mr Kevin Chen that the person was only employed for approximately one month and left of his own accord and not because the Respondent dismissed him as a result of the Respondent's financial position.[136] Mr Kevin Chen did not accept that this employee was employed for only one month and maintained that the employee was dismissed because of redundancy. Mr Kevin Chen accepted that he did not dismiss the employee concerned. In relation to the second employee – "*Jack*" – Mr Kevin Chen stated in cross-examination that he did not know how long Jack had worked for the

Company but that it was less than 12 months and that Jack left before the Respondent moved premises. Mr Kevin Chen stated that Jack did not speak to him about leaving of his own volition but could not recall having a conversation with Jack about leaving the Respondent's employment. Mr Kevin Chen also stated that Jack was made redundant and was not replaced.[137]

[90] In relation to the issue of the reason for the Applicant's dismissal, Mr Kevin Chen's evidence under cross-examination was as follows:

> "I put it to you that the reason that she was let go was that she was pregnant, and you were aware of that?---This is not true.
>
> At a very minimum on your evidence you said that she was aware that she - when she told you that she was taking maternity leave orally?---When did she tell me that?
>
> In her evidence she said that she orally told you earlier in the day?---When? When? What time?
>
> She says at 4.30. Actually at 4 o'clock she went to see you and handed you the medical certificate on the 29th?---We never had a meeting at 4 o'clock, so she's telling something is - -
>
> You both have different evidence. Okay?---We hadn't - - -
>
> But you were aware prior to handing her the termination letter that she was pregnant?---No, I don't know she's pregnant.
>
> So your evidence that you didn't have any recollection, any knowledge of her pregnancy until you handed her the termination letter?---Until I spoke to her face to face.
>
> Spoke to her, okay?---Yes. At between 2.00 and 3 pm at the first meeting we she storm off.[138]

[91] Mr Michael Chen is the payroll officer or manager of Compuworld,[139] although he also does sales, purchasing and marketing.[140] Mr Michael Chen is responsible for the financial aspects of the Respondent and prepares documents for BAS and financial records.[141] Mr Michael Chen provided two witness statements in the Respondent's case. Mr Michael Chen's first statement is as follows:

> "Due to business downturn over the past years, we have been forced to make changes over the past 6 months in order to ensure the business's survival. We are in an extremely competitive industry with very low margin and heavy competition. The reduction of consumer spending, emergence of online competitors (Ebay, Amazon & overseas retailers) has resulted in a sharp decline of our revenues and the closure of many of our customers. This is an industry wide situation which has seen many businesses in our industry either gone into bankruptcy or undergone severe changes.
>
> The decision to change the employment status Anna Liu amongst other employees was not taken lightly but ultimately a decision that we need to make to ensure the business can continue to survive. The decision made by myself & Kevin Chen was due to insufficient amount of work available and not in any way discriminatory towards the applicant.
>
> Statements regarding our decision to change her employment to Part Time/Casual:
>
> - The Applicant's statement of her role being unrelated to the declining sales is not accurate. As the sales drop there are significant reduction of work in all areas. This includes less customer pickup & account related issue which are her main duties.
> - Statement from Anna Lieu regarding no other redundancy is incorrect. We have 2 other employees who have left within 2 months prior to her. Keith Leung finished on 09/11/19 and Jack Liu finished on 12/10/19. Due to no work available, we had to let other employees go.
> - Our overall employees numbers have also reduce significantly over the past few years. Despite the reduction of staff, we are still struggling to sustain the overheads.

- The decision to change her employment to Part time/Casual is reflective of the work available and has nothing to do with her pregnancy as claimed. We have never discriminated against any employee and have never had this kind of claim made against us.
- We still have not been require to replace her role with another employee. Her previous work which only requires 1-2 hours a day is currently being handled by existing employees and myself due to it being very quiet.
- We have records including phone records, work logs, sales records which all support the reason for our decision to change the employment status. This is purely a business decision and non-discriminatory.
- During meetings in early Oct with Kevin, we reviewed our expenditures and discuss the work available. We made the difficult decision to reduce the number of staff due to drastic fall in sales number. These changes was made gradually in Oct/Nov so we can monitor the changes while trying to maintain as many staff as possible.
- During the reconciliation process, we have on numerous occasions try to discuss with her lawyer (as Anna wouldn't communicate with us) by offering as much work as possible. We have mentioned that we hold no ill-will and would welcome her back to work. However, we were advised that Anna would not entertain the idea of returning to work and would not provide a proper reason. We don't believe she has a genuine intention to work and would rather seek compensation above all else.
- I also made further attempts to contact Anna by phone & also by email on 12th Feb 2019. My intention was to try to work out a suitable solution for both parties by offering her as much work as possible. She did not respond to any of my communication.
- Anna's claim that we discriminated against her because of her inability to lift heavy item by Janice is untrue. You will notice in her own submission of her tasks that there are no requirements to list heavy items or any items at all. Also Janie, my mum has not had an active role in the company for at least over 5 years and is not taking any pay. She is rarely in the office and when she does come in does not partake in business operation.
- Anna is late for work every day and is not at the office at 9am as required. Despite talking to her multiple times and given multiple written warnings, the situation has not improved. We can provide the time clock cards as evidence.

Regarding her maternity leave application

- As the payroll officer, I was never informed about her pregnancy or her intention to take maternity leave. I have only received 1 sick leave request on 30th Oct.
- I was on holiday in from 10/11 to 03/12. I have no knowledge of Anna wanting to take maternity leave before or during my holiday.
- I was advised by Kevin after returning from my holiday that Anna had submitted a leave request after we tried to change her employment status.
- As an employer we weren't given details form or informal about her intentions prior to 30th Nov. This certainly wasn't a part of the reason for the change to her employment status.

As with many small businesses around Australia, we don't have enough work to fulfil a full time Receptionist/accounts. We try to allocate as much work as possible to Anna but still we couldn't find enough work for her. It is with great regret that we had to make the decision to reduce her working hours but it is certainly not discriminatory. I trust that we will be given the opportunity to present all the evidence which lead to our decision and it certainly is not what the applicants has claimed."[142] (errors in original)

[92] Mr Michael Chen's second statement, in so far as is relevant to the alleged contravention of the general protections provisions, states:

"On 11th and 26th Feb, we again offered Anna continued employment by email while we were working through this issue. We didn't want her to miss out on her maternity pay entitlement, but she refused. See Appendix 2 & 3.

On 11th Feb, we offered the applicant a settlement offer of [redacted]. This payment includes re-calculating her wages based on Business Equipment Award and also includes the long service leave of 8.9335 weeks as requested by the applicant (Appendix 1). This was later refused on 26th Feb.

On 26th Feb (Appendix 3(, in the interest of settling the dispute and for the 3 months of compensation pay that the applicant is seeking, we have suggested that she return to work for the 3 months and we will try

to find some work for her. We also mentioned on numerous occasions that there is no ill-will and we would welcome her back to work and we are willing to be flexible to her requirements. However, she chooses not to work and want to seek compensation instead. We don't believe there is any genuine intention for the application to work or try to settle the dispute.

The reason for the change of the applicant's employment status is because there is a drastic drop in Sales & GP in the 6 months leading to the incident on 30th Nov 2018. We are forced to reduce our expenses in order to cover our cost with big decline in both sales & GP as follows. …

Year on year comparison shows a drop of up to 30% in sales and up to 40% drop in GP in some month. There is a significant overall drop in both revenue and GP compared to same period last year. See Appendix 4 for 2018 data and Appendix 5 for 2017 data.

Monthly bank records showing decline of -62%, -31% and -34% in total card sales for the 3 months Sep, Oct, Nov 2018 compared to same time last year. See attachment Appendix 6.

We identified in Sep/Oct 2018 that we have excess staff for the work required. 2 staff were let go in Oct prior to Anna. We also noted that there is insufficient amount of work for Anna. However, we kept her on with hopes of business condition improving which unfortunately it hasn't. Kevin and I then made the difficult decision to notify Anna at end of Nov to change her employment from full time to either part time or casual.

The applicant rarely helps with incoming calls and makes on average around 2 outgoing calls per day. Attached are the entire phone records for the month of Oct, Nov 2018 (Appendix 7 & 8). This shows all the incoming/outgoing calls made by each station. Anna's station is Account (109).

	External Outgoing Calls made
Oct 2018	43 Calls
Nov 2018	38 Calls

Applicants claims that she helps with sales as part of her work duty which we dispute. She keyed a total sales of $75 for September 2018, $966 for Oct 2018 and $2124 for Nov 2018 (Appendix 9). Most of these are also personal sales to myself "Michael Chen".

Account reconciliation which are listed as one of her main duties, shows minimum daily entries with some days with 0 entries. The last week's record from 26th to 30th Nov is provided for reverence (Appendix 10).

Handling cash is listed as one of her main duties and we have record that shows most days are without any cash receipt (Appendix 11)

The applicant are late to work almost every day. We have given warning in the past but situation has not improved. Please see sample time record cards showing that she is late almost every day (Appendix 12).

I don't believe there is any genuine intention for the application to reconcile this matter. Since 30th Nov, she has refused all communication and have not also rejected the commission's offer for face to face conciliation. There has also been no indication that she wanted to continue to work and compensation is the only consideration for her.

With sincerity to resolve this matter, we have paid out the long service of 8.9335 weeks on 07th June for $6441.09 gross. This is so we can also complete the separation certificate in regards to long service leave (Appendix 13).

Our industry is doing extremely tough with many of our customers having filed for bankruptcy (Appendix 14). This has contributed to lack of amount of available work as our business has also been drastically affected."[143]

[93] Mr Michael Chen gave further evidence in chief concerning his state of mind in relation to the Respondent's performance and Mrs Liu's maternity leave as follows:

> "Can you explain the company financial position around end of 2018?---The financial position of the company has been declining over the years. Sales and gross profit has been dropping gradually but surely. There's no real fluctuation in regards to numbers, but there is one alarming sort of factor though we sort of noticed towards the end of 2018. Towards the second half of 2018 there was a massive drop in terms of sales and gross profit. I think, you know, certain months it could be down by 30 or 40 per cent, so it is very noticeable, yes.
>
> What did you decide to do about this downturn?---You know, when there's a pretty big drop, you try and look at various sort of areas - you know, you sort of look at your expenses, you look at ways you can improve sales, but I think in general the industry is doing it very tough. The economy is sort of declining as well. So it's pretty evident there's probably not a lot more we can do to invest to try and increase the sales; you know, if we do that, you know, it's probably really putting money down the well really. So we sort of decided to have a look internally, look at our expenses, find out what we can sort of do to make sure the business can still survive, moving into this year and beyond. So naturally wages is the biggest expense for the company, and we generally just, you know, noticed it hasn't been busy - you know, when the sales have dropped by 30 or 40 per cent in some months then business activity will be down naturally. So we looked at possibly cutting, you know, employee numbers to try and sort of rectify the situation.
>
> Do you have any issues with Anna taking maternity leave?---There would never be an issue of anyone taking maternity leave. It's never really even a consideration for us; you know, we have employees that have gone through a difficult time so some of them have been sick; they've taken time away for being sick; you know, we have people away because of family reasons, being overseas; you know, myself I have two kids as well, I've been away as well. So I know it's important to be away for your family, so there's no reason - there's absolutely no reason why we would sort of, you know, have any problem with someone taking leave of that regard."[144]

[94] Mr Michael Chen was involved in discussions with the Applicant during 2016 in relation to her leave and pay inquiries. Mr Wallace Chen, the father of Mr Kevin Chen and Mr Michael Chen was originally responsible for payroll and the business. During 2016 Mr Michael Chen took over this responsibility, which involved him trying to reconcile and computerise the system.[145] Mr Michael Chen maintains that he was the one to initiate the discussion with the Applicant about her leave and pay inquiries.[146] In relation to the Applicant's evidence that she was required to have her medical certificates reissued, Mr Michael Chen stated that most of the issues raised by the Applicant were "removed" straightaway (ie. the Applicant's sick leave was debited and her annual leave credited) and that the Applicant was happy. In relation to the reissuing of the Applicant's medical certificates, Mr Michael Chen said that it would have been helpful to have these on the record but was not required.

[95] In response to the proposition that he had required the Applicant to have medical certificates for a four year period reissued, Mr Michael Chen had the following exchange with the legal representative for the Applicant:

> "So you're saying - your evidence is that you would have accepted no medical certificates supplied by her and you would have updated your records accordingly?---Yes. Yes, I'm happy to resolve this, because I know there are is sort of shortcoming on our side. So I was more than happy to resolve this.
>
> So you were happy to do it, to resolve the situation, without medical certificates?---Yes.
>
> So you're saying that she went to all that trouble to obtain medical certificates off her own bat?---She offered to provide them on the email before and I said, "Yes, you can provide it."
>
> I put it to you that she was required by you to actually obtain the medical certificates so that you could update the records?---I've already answered that question. I said no, it's not required. That's probably about the fourth time, okay. I said it's not required, okay."[147]

[96] In relation to the medical certificate of 11 May 2018, Mr Michael Chen's evidence in cross-examination was that he found it "*unusual*" and "*rather strange*" that the Applicant tried to apply for sick leave in advance and that she would know that she would be unfit for work the day before. In relation to whether he received the medical certificate Mr Michael Chen said he did not recall but did not say that he did not receive it. In relation to the reason for the sick leave Mr Michael Chen had the following exchange with the Applicant's legal representative:

> "So were you aware of what this leave was being sought for?---No.
>
> So you didn't ask her what it was being sought for?--- No, I didn't, no. I don't think it was in the email conversation, was it? No, I don't think so.
>
> So you didn't know that it was regarding - pregnancy related?---Was she pregnant at the time? I wasn't sure.
>
> I'm just asking you the question?---I don't think so, no, but I do know she has been trying to get pregnant for a while. I do know that, so that part is okay. It's never been in question. I think she's been trying maybe for a year or two, maybe, now.
>
> …
>
> THE DEPUTY PRESIDENT: Yes?---So in regards to that - like I said before, she's been trying, as far as I know, for one or two years to get pregnant, so, yes, that's the reason I - - -
>
> MS KEYES: So you were aware - - -?---I'm pretty sure she's taken similar leave before to try and - you know, try and get pregnant, so yes.
>
> So you've said here that she wanted to take leave to see an obstetrician?---Yes.
>
> How did you feel when Ms Liu was querying this? Did you have any particular emotions regarding Ms Liu querying - - -?---Not really. I think it's within her rights to question, you know. I think we all just want to make sure it's correct, that's all, so there's no issue with that, yes."[148]

[97] As to his knowledge of whether the Applicant was pregnant in mid to late 2018, and discussions about this with other employees, Mr Michael Chen's evidence is:

> "Did you know she was pregnant at this stage?---No.
>
> Had you heard anything from other employees about her being pregnant?---No, none.
>
> So in her evidence on 28 June, Ms Liu said that prior to 30 October she didn't tell you or Kevin herself that she was pregnant. She had told some other members of staff. They were aware of it, but she didn't tell either of you that she was pregnant?---Yes. I think during the first day of the hearing she did mention that, yes."[149]

[98] Mr Michael Chen maintains that the Applicant did not, at any time, come to him and say "*Michael, I'm pregnant*".[150] Mr Michael Chen disputes the Applicant's evidence that at the time of applying for sick leave on 30 October 2018, she handed him an application form for sick leave and told him that she was pregnant, although Mr Michael Chen did concede that it is possible that the Applicant applied for personal leave on 1 November 2018 to attend a medical appointment.[151] Mr Michael Chen was not sure whether he received the leave application for this date[152] but when referred to his own witness statement[153] agreed that he did in fact receive the application for sick leave dated 30 October 2018.[154] In response to the proposition that he had been provided with a leave application form on 30 October referring to the Applicant being pregnant and suffering from gestational diabetes and a medical certificate on 2 November

referring to gestational diabetes that would need to be reviewed throughout the Applicant's pregnancy, and was therefore aware that the Applicant was pregnant, Mr Michael Chen said:

> "There's all this assumption in place but I've never been told….
>
> …when someone is pregnant you would expect someone to tell you. You know, it shouldn't be based on circumstantial sort of evidence or assumptions.
>
> …There's assumptions that she could be, but I can't be sure, hundred percent, no."[155]

[99] Mr Michael Chen also said that he does recall a conversation with the Applicant on 2 November 2018 concerning the smells from refurbishment and that she wished to move and sit in another area but could not recall that the Applicant referred to the fumes being harmful to her baby.[156]

[100] Mr Michael Chen was on leave at the time that the Applicant's employment ended, but was aware prior to 30 November that the Applicant's position was going to be redundant, although he was not aware that the redundancy was going to be communicated to the Applicant on 30 November 2019.[157] Mr Michael Chen also said that he had a "*general discussion*"[158] with Mr Kevin Chen in early October 2018 about identifying which roles were no longer required. [159] Mr Michael Chen found out that the Applicant's position had been made redundant after he returned from leave.[160] Mr Michael Chen did not make the decision to terminate the Applicant's employment and had not had a conversation in relation to this specifically.[161]

[101] Mr Michael Chen said that he is equally involved with Mr Kevin Chen in financial aspects of the business.[162] In response to the proposition that the evidence provided to the Commission by the Respondent in relation to financial matters is limited to sales reports over a couple of years, Mr Michael Chen said that sales are the most important aspect of the business "by far" given that the Respondent is in the business of buying and selling.[163] Mr Michael Chen accepted that Ms Chiang did not advise the Respondent to reduce wages specifically, but maintained that Ms Chiang did advise the Company to reduce expenses, and that wages are the biggest expense.[164]

[102] In relation to other staff reductions, Mr Michael Chen's evidence is that he spoke with two employees – "*Keith*" and "*Jack*" – when they were both let go prior to the termination of the Applicant's employment.[165] Mr Michael Chen's evidence about those discussions was as follows:

> "What conversations did you have with them?---Well, I talked to Jack quite often, I told him business is not really that busy. He does technical work, system builds, repairs, but we rarely get any job. So I sort of had spoken to him many times throughout the year saying, you know, changes are going to happen because you know, it's not just more the employer to employee, you know, I sort of like talk to them on a personal level as well. So I said changes were coming, yes.
>
> With respect to Jack, did you terminate him or did you come to an agreement that there wasn't enough sales and to part ways?---Well, it was – it was bit of both. You know, I explained to him, you know, more than likely, you know, you wouldn't be able to continue and he agreed because he realised there is no work for him.
>
> So there was a conversation with him?---Yes.
>
> And there had been a number of conversations with him about that?---Yes formal and informal. We talk all the time back then, so yes.

So you had discussions with Jack about, you know, the problems with the sales decreasing et cetera and possible problems - - -?---Not so much – sorry, go ahead.

Sorry. So you have had informal and formal discussions with Jack about your concerns about the financial aspect of the business, is that correct?---I don't disclose the financial side of – to the employees because that's really not a good thing to do.

Slowing down in the business?---Yes, slowing down a business, yes. He recognised that as well, yes.

Did you raise with him the possibility of you not being able to keep him?---Yes.

And you had a number of those conversations with him?---Yes, yes, we talked. Yes.

Do you say that it was – it could more properly be interpreted as a mutual agreement for him to leave?---Well, it's recognised, yes. So he agrees as well there's not enough work, yes, understand. Yes.

So he was happy enough when he left?---Definitely, yes. There was no – there was no issue with Jack. Yes, because he recognised there wasn't enough work and he understands, yes.[166]

…

"Okay. Do you recall Keith, was he one of the employees that also left around about that time?---That's correct, yes.

How long do you recall him working for you?---It wasn't a long time. We got him in to replace someone in the warehouse, maybe around one or two months I'm not sure. I don't have the details exactly in front of me.

Could it have been around a month?---I can't say for sure but it could've been maybe, yes.

What was the circumstances of his departure, was there a discussion with him that you couldn't afford to keep him?---Well, it wasn't very busy in the warehouse. So we did discuss about that. He was only new. He hasn't been with us for a long time so - so I kind of had that discussion with him to explain - you know, we thought we were coming into a busy period sort of towards end of the year but it wasn't the case, which unfortunately, you know, explained to him, you know, there may not be the work that we thought there would be coming towards the end of financial - sorry, end of the year.

Do you accept that his employment with Compuworld was significantly less than Ms Liu's employment with Compuworld?---Yes, but that they're a completely different role.[167]

[103] Mr Michael Chen also had the following exchange with me during his evidence:

"You were cutting back two other staff?---Yes.

In advance of you ending their employment - - -?---Yes.

- - -you gave them a heads up, to put it in vernacular?---Yes.

You gave them a heads up?---Yes.

"Things aren't going well. We might have to lay you off. I know you've only been here for a month. You understand, we understand"?---Yes. Yes.

You gave them a heads up, okay?---Yes. So that's - yes, I definitely like to do that, yes.

The proposition that's being put is the applicant was treated differently. She didn't get a heads up?---Mm-hm.

She got called in on the day before she was going on leave. There was no discussion. The letter she was handed said "Termination of your employment". There was no warning that that was going to

happen. She was about to go on annual leave till 7 January, and then she wanted to take maternity leave a few months later?---Yes.

Why was the sudden desperate urgency to put her off on that date?---I think Kevin was trying to have that discussion with her on that day.

What discussion was being had in circumstances where she was being given a letter that said, "Your employment is terminated"? What was the - so it's really a discussion about, 'This is what we're going to do'. It's not really a discussion. It's a, 'This is what we're going to do', isn't it?---Yes. Yes, I agree my style and Kevin's style is different, and I acknowledge that. So, yes, I do agree with you. We have different ways of doing things for sure, yes…"[168]

[104] Mr Michael Chen accepted that he did not have a conversation with the Applicant concerning the downturn, the effect the downturn could have on her job or about her role changing.[169] Further, contrary to his earlier evidence, Mr Michael Chen accepted that he was aware of the Applicant's pregnancy prior to her dismissal in the following exchange with the Applicant's representative during cross-examination:

"Yes. So I put it to you - I'm wrapping up you'll be pleased to know - that you were aware of her pregnancy before she was terminated, or her position was changed. You were aware of it? --- Yes, based on the record you gave me now, yes, there's always assumptions, but I never really paid attention to it, if that's what you're saying. That what I answered before."[170]

[105] However notwithstanding this, Mr Michael Chen maintained that the pregnancy was not a factor in the Respondent's decision to dismiss the Applicant.[171]

SUBMISSIONS

The Applicant's submissions

[106] In the Applicant's outline of argument filed prior to hearing, the Applicant submitted that the true reasons for her dismissal were:

"a. That she was pregnant and applied for maternity leave;

b. That she had physical disability, namely gestational diabetes; and

c. that she exercised a workplace right, namely her entitlement to benefit from the remuneration and leave entitlements under an award."

[107] And further:

"Given the temporal proximity of the Applicant's pregnancy, maternity leave announcement and renewed enquiries regarding her award entitlements, it is highly improbable that these factors and the termination of her employment was purely coincidental. They were clearly the substantial and operative reasons behind the termination of the Applicant's employment."

[108] In final written submissions it was contended for the Applicant that on 30 November 2018, the Respondent dismissed her from employment and that the dismissal constituted adverse action against her in contravention of Part 3–1 of the Act:

- because she had exercised or proposed to exercise workplace rights (s 340(1)), namely:
    - her entitlement to benefit from the remuneration and leave entitlements under an award; and

  - her entitlement to apply for maternity leave.
- because of her physical or mental disability or pregnancy (s 351(1)), namely:
  - her pregnancy; or
  - a physical disability (gestational diabetes).

[109] In relation to exercise of a workplace right, the Applicant submits that she was dismissed because she exercised or proposed to exercise her entitlement to benefit from the remuneration and leave entitlements under an award. While the parties do not agree on the Award that applied to the Applicant's employment it is submitted that this is not relevant because each of the Awards in contention – the *Clerks Private Sector Award 2010* or the *General Retail Industry Award 2010* as submitted by the Applicant or the *Business Equipment Award 2010* as submitted by the Respondent – provide for annual leave and sick leave and also for consultation in cases of redundancy. It is submitted that that given the absence of consultation with the Applicant about the supposed redundancy, the Commission is entitled to infer that redundancy is a retrospective pretext for the dismissal.

[110] It was also submitted that the Applicant had been employed by the Respondent since 2008. Further, there is uncontroverted evidence establishing that the Applicant repeatedly raised concerns with the Respondent that she was not receiving her award entitlements to remuneration, annual leave and sick leave. The Applicant plainly had workplace rights and exercised or proposed to exercise them within the meaning of s 341 of the Act. In relation to disability or pregnancy, the Applicant submits that she was dismissed because she had a physical disability (gestational diabetes) or was pregnant.

[111] The Applicant contends that the Respondent's oral and written communications of 30 November 2018 constituted adverse action in that the Respondent;

- threatened to dismiss the Applicant in the conversations at 4.30pm and 5.30pm on 30 November 2018;
- actually dismissed the Applicant in the letter dated 30 November 2018; and
- altered the Applicant's position to her detriment in the conversations at 4.30pm and 5.30pm and the letter dated 30 November 2018 in that her employment and her entitlements under it were terminated.

[112] The Applicant's primary case is that the Respondent's actions of 30 November 2018 amounted to dismissal, and the Applicant's dismissal is adverse action (s 342(1), item 1(a)). But if that case is not accepted, the Applicant submits that by those actions, the Respondent altered her position to her prejudice, and that alteration is also adverse action (s 342(1), item 1(c)).

[113] In this regard, the Applicant submits that the Respondent's actions of 30 November 2018 terminated that employment at the Respondent's initiative and constituted a dismissal in terms of s 386(1)(a). The Applicant also submits that even if it is accepted that the Respondent's directors and managers position did not believe they were terminating the Applicant's employment but merely changing her status to part-time or casual, this may constitute termination. In support of this contention reference was made to the Decision in *Ucchino v Acorp Pty Ltd*[172], where the employer terminated an employee's employment and offered new casual employment which the employee refused. The employer asserted that the employee's refusal terminated the employment. The Court held that the employer had terminated the employment and observed that the fact that performance issues had not been raised previously

"*tends to impact negatively on the credit of* [the employer] *and the respondent's case generally*".[173]

[114] Reference was also made to the Applicant's evidence to the effect that the 30 November meeting was the first time she had heard of problems with the business or the possibility of redundancies, and it was submitted that her evidence in this regard is also supported by the evidence of the Respondent's witness Mr Thanh Nguyen. *Ucchino* demonstrates that the unilateral action of an employer to end permanent employment and 'offer' inferior part-time or casual conditions constitutes termination, not mere modification, of the permanent employment. The unilateral nature of the Respondent's actions is highlighted by the apparently consultative and consensual nature of its dealings with the other employees Jack and Keith.

[115] According to the Applicant's submission, the evidence establishes that each of the reasons she advances was a substantial and operative reason for the dismissal. Given the temporal proximity to the dismissal of the Applicant's pregnancy, maternity leave announcement and renewed enquiries regarding award entitlements, it is highly improbable that these factors were purely coincidental in the dismissal. The Applicant also submits that the evidence does not support the Respondent's assertions about business downturn, and that even if it did, the mere existence of one reason does not negate a proscribed reason as provided in s. 360 of the Act.

[116] Further, the Applicant points to an absence of any rationale for the Applicant's alleged redundancy and that this combined with the lack of consultation made it unjust and unreasonable, consistent with the decision in n *Kukaleve v Prosegur Australia*[174]. Further, it was submitted that if the Applicant could not help in sales or there was not enough work, why still offer her casual or part-time work? The inescapable inference is that there was enough business, but the Respondent was seeking to avoid the imagined costs and imposts of a full-time employee compared to a part-time or casual employee.

[117] Reference was made to s. 361 of the Act which creates a statutory presumption that the adverse action (the dismissal) was taken by reason of her pregnancy, gestational diabetes and exercise of a workplace right unless the Respondent proves otherwise.[175] Reference was also made to the principles established in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*[176] which it is submitted require the Commission to determine the question of fact as to why the adverse action was taken. Further, it was submitted that the facts in *Ucchino* were similar to those in the present case.

[118] The facts in *Ucchino* were that the employee was pregnant, and on 2 February 2010 her supervisor made unfavourable comments about the employee's pregnancy and attempted to change her status from full-time to casual employment after she applied for maternity leave. When the change in status was refused, that employer terminated the employee's employment by treating her refusal of casual employment as a repudiation of the employment contract. In *Ucchino* the Court held that it was reasonable for the employee not to accept the alternative casual employment[177], that the employer had terminated the full-time employment[178], and that the employer had not discharged the onus cast on it by s 361.[179]

[119] The Applicant submits that in the present case, Ms Janice Chang's comments to the Applicant are of a similar kind to those of the supervisor in *Ucchino* and that the Applicant need not demonstrate that the Respondent's categorical language causally linking the pregnancy and the termination. The Commission should infer from Ms Chang's remarks that the Applicant's

pregnancy was, either directly, or indirectly, because of her gestational diabetes, a substantial and operative reason for the termination.

[120] It was further submitted that s. 361 puts the onus on the Respondent to rebut the presumption that the adverse action was taken for a proscribed reason, and *Bendigo TAFE v Barclay* establishes that it will be extremely difficult to do so if no direct evidence is given by the employer's decision-maker. In the present case, the extreme difficulty of rebutting the section 361 presumption in the absence of evidence from Ms Janice Chang or any other Directors of the Respondent is not overcome by the incomplete evidence of Mr Kevin Chen, Mr Michael Chen, Ms Clarissa Chiang and Mr Thanh Nguyen.

[121] Accordingly, the Applicant submits her evidence should be accepted where there is a conflict. The Commission should also have regard for the fact that while Mr Kevin Chen and Mr Michael Chen were not directors, they were employees and had management responsibility in relation to the Applicant. In those circumstances, the Commission is entitled to take into account their family and business interests in defending the Respondent's actions as going to their reliability[180] and the Commission should have regard for the fact that they had a motive, even if only unconsciously, to portray the Respondent's actions as not attributable to the proscribed reasons.

[122] In relation to the failure of the Respondent to call Janice and Wallace Chang, it was submitted that the Commission should draw an inference consistent with the rule in *Jones v Dunkel*[181] consistent with the manner in which that case was applied as articulated by the Full Court of the Federal Court in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd*[182] as follows:

> "It is accepted that where a party fails, without explanation, to call a witness who that party might have been expected to call and whose evidence might have elucidated the matter in dispute, then the inference *may* be drawn that the evidence of the absent witness would not have assisted the party that failed to call that witness: *Jones v Dunkel* at 308, 312 and 320-321. By itself that inference is frequently somewhat barren, for knowing that the evidence of a witness would not have assisted tells one nothing about what the witness's evidence affirmatively would have been. Often more directly useful is the allied principle that in such a case the trier of fact may more confidently draw any inference unfavourable to the party that failed to call that witness if that witness appears to be in a position to cast light on whether the inference should be drawn: *Jones v Dunkel* at 308 per Kitto J, 312 per Menzies J, and 320-321 per Windeyer J. Neither inference is mandatory and, generally speaking, these inferences only become material where the balance of the evidentiary record is equivocal".

[123] While the Applicant does not place excessive reliance on the rule in *Jones v Dunkel*, the Applicant submits the Respondent did not call its directors Mr Wallace Chen and Mrs Janice Chang, who, from other evidence, could have given relevant evidence on live issues. As the only two directors, they must have been able to give evidence about the dismissal decision-making process generally. Specifically, the Applicant further submits Ms Clarissa Chiang and Mr Michael Chen's evidence indicates that Mr Wallace Chen could have given evidence about the financial position of the company. The Applicant gave evidence of Ms Janice Chang's comments about the effect of her pregnancy on her fitness for work and in relation to Ms Janice Chang's comments at the meeting where her employment was terminated. It was submitted that Ms Janice Chang could plainly have given evidence about how those thoughts bore on the subsequent decision to terminate.

[124] However, with or without any *Jones v Dunkel* inference, the Applicant submits that on the whole of the evidence, her pregnancy, gestational diabetes (s 351(1)) and exercise of her

workplace rights (s 340(1)) were substantial and operative reasons for her dismissal. The Respondent's adverse action against the Applicant therefore contravened sections 351(1) and 340(1) of the Act.

The Respondent's submissions

[125] The Respondent submits that it is a small family run business which has been in business for around 30 years and engages in the sale of business equipment – mainly desktop and notebook computers – to registered businesses. Over the past financial year to now, the Respondent asserts that its business has and is still, facing very tough challenges. These challenges have arisen due to many circumstances including competition from international online businesses, the declining economy and the transition away from traditional computers. All these factors have contributed to very difficult business environment which have seen the closure of the businesses of suppliers and customers.

[126] Due to these challenges, the Respondent had to make tough decisions in order to keep the business running. Towards the end of 2018, it was evident that the Respondent needed to cut costs in order to maintain a positive cash flow. As a result, it made the difficult decision to let go of two employees in October and November 2018 and to reduce the working hours of the Applicant on 30 November 2018. According to the Respondent these are all decisions made because of the insufficient amount of work available and were not made for discriminatory reasons. The Respondent contends that its evidence including Business Activity Statements from the Australian Taxation Office, detailed sales and GP records, a witness statement from its accountant and declining card receipt statements from its bank establishes its financial position. Financial documents available after the hearing are also said to support the Respondent's decision with respect to the Applicant's employment. All of these documents are said to establish that there are significantly less business activities and hence less work available.

[127] In relation to the Applicant's assertion that she was dismissed for exercising workplace rights in relation to remuneration and leave entitlements or maternity leave, the Respondent submits that there has been no discussion with the Applicant regarding Award or her remuneration entitlements for the last two years of her employment. It was submitted that the only supporting evidence the Applicant provided was back in 2016 – over two years before her employment ended and has no relevance to the present case. It also submits that, as explained in the Respondent's evidence during the hearing, in 2016 when it was migrating data to a new payroll system, the leave entitlements were calculated and emailed to employees for checking. Upon the Applicant taking issue with the amount of her accrued leave entitlements, the leave details were entered as agreed by the Applicant into the Respondent's system and no further question has been raised since that time.

[128] In regard to the Applicant's sick leave request for 11 May 2018 which was not granted, the reason for rejecting that request was because it was submitted in advance and it was not believed to be reasonable that the Applicant could foresee her own incapacity to work before the actual date. The Respondent also submits that the Applicant was not pregnant at the time she made the request and that it has no relevance to the case being heard.

[129] The maternity leave request was said to have been accepted by Mr Kevin Chen on 30 November 2018, after 5:30pm when it was first presented. The Respondent contends that there is no reason why the Applicant's request to take maternity leave would be rejected when the

Respondent's objective is to reduce its staffing cost. It is also contends that: "*Had we known in advance her intention to take maternity until 2020, we may have considered our position differently*".

[130] The Respondent rejects the Applicant's assertion that she was dismissed because of her pregnancy or physical disability (gestational diabetes) and states that these factors do not affect her ability to perform her duties at work. In this regard, the Applicant's duties are 100% clerical in nature and her pregnancy or gestational diabetes has no impact on her ability to carry out such tasks. Accordingly, the Respondent submits that there is no sound reason as to why it would discriminate against the applicant based on her pregnancy or physical disability as there is none affecting the work required.

[131] The Respondent contends that sales and gross profit had both declined drastically leading to 30 November 2018 as confirmed by its evidence to the Commission this was the reason for its reduction in employee numbers. The Respondent submits the survival of its business was "100% the reason and was their only concern right now." The Respondent is in the business of selling and this activity is 100% of its source of revenue/income. The Respondent submits that it had no choice but to reduce its employee numbers or the working hours of its employees. In this regard, the Respondent points to the fact that the Applicant was not the only person adversely affected and that two other staff were made redundant one month prior to 30 November 2018.

[132] The Respondent also contends that on 30 November 2018, it intended to change the Applicant's position from full-time to either part-time or casual and it had not intended to dismiss her "completely". The Respondent submits that the evidence establishes that the Applicant was asked by Mr Kevin Chen to come to his office around 2 – 3.00 pm on 30 November 2018 as he wanted to discuss the changes to her employment status for the next year. The Applicant had not applied for maternity leave at this stage. In relation to the Applicant's assertion that she applied for maternity leave during the first meeting with Mr Kevin Chen, the Respondent contends that there are "*questionable actions*" on the Applicant's part which suggest otherwise.

[133] Firstly, the Respondent contends that it is unlikely that the Applicant would have initiated a meeting to request maternity leave when she did not know the date upon which she wished to commence the leave. Secondly, the Respondent points to the fact that when the Applicant states that she first told Mr Kevin Chen that she wished to take maternity leave, she did have a completed application form for such leave with her. The Respondent submits that the maternity leave form which was later submitted by the Applicant was an afterthought after the Applicant spent time calling and seeking advice after the first meeting. The maternity leave form was presented for the first time at the meeting with Mr Kevin Chen after 5.30 pm on 30 November 2018.

[134] The Respondent also contends that the Commission should find that Ms Janice Chang was not present during the "*first meeting*" and did not enter the room as claimed by the Applicant. The Respondent submits this is supported by the evidence of Mr Nguyen who stated that he did not recall seeing or hearing Ms Janice Chang "earlier on that day." Further, it submits that given Mr Nguyen claims that he heard a loud commotion from the Applicant it would be reasonable that he would have noticed the presence of Ms Janice Cheng.

[135] The Respondent also took issue with the Applicant's claims that the meeting on 30 November 2018 was the first time that the Applicant heard of problems with the business submitting that this was an "*impossible assertion*" given that her role was to look after Accounts Receivable, daily receipts and customer pickups. The Respondent contends that the drastic decline in payment being received and debtors for at least six months prior to 30 November 2018 and the drop off in customer pickup cannot have gone unnoticed given the work done by the Applicant. The Respondent also disputes the Applicant's assertion that she was unaware of any redundancies in circumstances where two other employees were made redundant within a month prior to the Applicant. It also submits that while the Respondent had not discussed financial issues with the Applicant it is not common for businesses to openly declare financial woes.

[136] In relation to the Applicant's claims about the absence of any rationale for her selection for redundancy, and the lack of consultation regarding her dismissal, the Respondent submits that as the Applicant was the only person "doing receivable", she was the only one who could be selected. Further, Mr Kevin Chen did try to consult with the Applicant on 30 November 2018 around 2 – 3.00 pm and the Applicant refused to have those discussions and was raising her voice.

[137] The Respondent submits that Mr Wallace Chen and Ms Janice Chang, while being directors of the Respondent, are not involved in the business and are rarely in the office. Mr Wallace Chen is over 70 years old and Ms Janice Chang is almost 70. They were not called as witnesses in the present case due to the stress of the situation and their fitness for such event. Mr Wallace Chen attended the meeting with the Respondent's accountant because she also manages his superannuation. Support for the assertion that Mr Wallace Chen and Ms Janice Chang are rarely in the office was said to be found in the evidence of Mr Nguyen who had also confirmed that Ms Janice Chang does not given directions in regard to work apart from asking all staff to help with basic tasks on rare occasions such as sweeping leaves if it gets windy. The Respondent strongly disagrees with the Applicant's statement against Mr Wallace Chen and Ms Janice Chang.

CONSIDERATION IN RELATION TO LIABILITY

[138] It is not sufficient to engage the provisions in Part 3 – 1 of the Act, that the Commission be satisfied that that adverse action as defined in s. 342 was taken against the Applicant *simpliciter*. The Commission must also be satisfied that the adverse action was taken because of a matter that is the subject of one or more of the general protections in Part 3 – 1 of the Act. The Applicant asserts that the adverse action taken against her by the Respondent was because she exercised a workplace right by raising issues associated with her leave and conditions of employment (s. 340) and/or because she was pregnant and/or because she suffered a disability – gestational diabetes (s. 351).

[139] Notwithstanding that the Full Bench in *Keep* was considering s. 340, I have applied the approach set out in that Decision in relation to the tasks I am required to undertake in order to determine the central question of whether adverse action was taken against the Applicant in contravention of s. 340 and s. 351. I turn now to consider each of the factual questions posited buy the Full Bench in *Keep*, on the basis of the facts in the present case established by the evidence.

[140] In doing so, I observe at the outset that I found the Applicant to be a credible witness. I do not accept the attempts by the Respondent to impugn the Applicant's evidence on the basis that she raised pregnancy related issues only after she had been informed that her full-time employment was to be terminated. In this regard, I observe that the Applicant had raised issues with the Respondent's observance of legislative and award requirements and had kept documentation in relation to the issues she had raised. That documentation establishes that the Respondent simply refused to engage with the Applicant on legitimate issues she had raised such as its failure to pay annual leave loading.

[141] The Respondent's failure to address the Applicant's legitimate concerns about annual leave loading explain her propensity to retain documents and to put communication about her pregnancy and related medical condition into writing and provide it to the Respondent's managers to supplement her verbal advice about those matters. The Applicant's evidence that she did not trust the Respondent's managers to "do right" in relation to her pregnancy and related illness was credible and I do not accept that she had a motive other than protecting her rights in relation to her pregnancy and related illness based on her past experience of the manner in which the Respondent's managers had responded to earlier issues she had raised. In particular I do not accept the inference in the Respondent's submissions that the Applicant deliberately contrived to advise of her intention to take maternity leave after her full-time employment had been terminated. The Applicant was pregnant at the time her full-time employment was terminated and gave birth to her first child in April 2019.

Was the Applicant exercising a workplace right within the meaning in s. 341?

[142] I am satisfied on the basis of the evidence before me, that at the time the Applicant's employment ended, she had workplace rights which she had exercised or proposed to exercise. Specifically the Applicant had a right to paid personal leave and had sought to exercise that right for the purposes of attending pre-arranged medical appointments with respect to treatment for pregnancy related gestational diabetes.

[143] The Applicant had sought to exercise the right to take paid personal leave for this purpose by completing a form which the Respondent used for leave applications including for sick leave. The information included on that form was that the Applicant had been diagnosed with gestational diabetes related to her pregnancy and had been advised to seek medical attention and that she had a medical appointment on 1 November 2019.

[144] I am satisfied and find that the form was handed to Mr Michael Chen on 30 October 2018. The evidence also establishes that Mr Michael Chen disputed the Applicant accessing her personal leave for this purpose and that the Applicant sought advice from the Office of the Fair Work Ombudsman which she provided to Mr Michael Chen on 5 November 2018, causing him to revise his views and to authorise payment for the Applicant's absence on 1 November 2018 as personal leave. In my view it is irrelevant whether the Applicant was actually entitled to access personal leave for the purposes of attending a pre-arranged medical appointment. What is relevant is that the leave is a workplace right which the Applicant sought to exercise. It is clear that Mr Michael Chen disputed the Applicant using personal leave for this purpose to the extent that he sought advice from the Office of the Fair Work Ombudsman in relation to the matter.

[145] The Applicant also took personal leave on 2 November 2018 because she was concerned about the effect of fumes from refurbishment work that the Respondent was undertaking at its

premises on the health of her unborn child. The Applicant states that she informed Mr Michael Chen of her reasons for taking personal leave and I accept her evidence. I also accept the Applicant's evidence that she expressed concerns to Ms Janice Chang about the effect of the fumes on her unborn child.

[146] It is also the case that on 30 November 2018 the Applicant sought to exercise a workplace right by making an oral and a written application for maternity leave. The fact that the Applicant may not have finalised the precise time at which she intended to commence maternity leave or that she had not formally advised the Respondent of the fact that she was pregnant, does not alter the fact that she had a right to take maternity leave and intended to exercise it. While the Applicant would have been required to provide more information closer to the time at which she wished to commence maternity leave, the steps she took on 30 November 2018 were in my view, sufficient to engage s. 341 of the Act. The Applicant was entitled to the benefit of maternity leave under the Act and to the right of return to her position or a position that was substantially the same at the conclusion of such leave. The fact that further information may have been required in relation to the time at which she sought to exercise her right, does not change the existence of the right or that she sought to exercise it. The Respondent's suggestions to the contrary in its evidence and submissions elevate form over substance.

[147] Further, I am satisfied that the Applicant had previously raised issues with her leave entitlements, including her entitlement to be paid annual leave loading which was rejected by Mr Michael Chen after consulting Mr Wallace Chen. Each of these matters was a workplace right as defined in s. 341 of the Act, being a benefit of a workplace law and/or a workplace instrument. This is so regardless of the specific modern award that applied to the Applicant's employment.

[148] In relation to the issues raised by the Applicant in 2016, I do not accept that at the time the adverse action subject of these proceedings was taken against the Applicant she was seeking to exercise workplace rights in relation to these issues or that the fact that the Applicant had previously exercised a workplace right to make inquiries about them, had any bearing upon the adverse action taken against her in 2018. Mr Michael Chen addressed some of the matters at the point the Applicant raised them and there is no evidence that she continued to agitate the matters that were not addressed. I also note that the matters raised by the Applicant in 2016 did not include a contention that either the *General Retail Industry Award 2010* or the *Clerks Private Sector Award 2010* applied to her. Rather, those issues related to her sick leave accruals, annual leave accruals and annual leave loading. The issue later raised by the Applicant related to whether she was entitled to use personal leave (sick leave) for the purposes of attending pre-arranged medical appointments in connection with the fact she was suffering from gestational diabetes.

Did the Applicant have any of the attributes in s. 351(1)?

[149] It is not in dispute that the Applicant was pregnant at the time her employment ended and was also suffering from gestational diabetes related to her pregnancy. Pregnancy is an attribute specifically referred to in s. 351(1). I am also of the view that gestational diabetes is a physical disability for the purposes of s. 351(1). Accordingly, I find that the Applicant had attributes specified in s. 351(1) so that she had a protection from adverse action because of those attributes.

Did the Respondent take adverse action against the Applicant?

[150] By virtue of s. 342(1) of the Act, adverse action is taken by an employer against an employee if the employer dismisses the employee, injures the employee in his or her employment or alters the position of the employee to the employee's prejudice. In the present case, the Applicant asserts that she was dismissed by the Respondent on 30 November 2018 or in the alternative her position was altered to her prejudice.

[151] I see no reason why the term "dismisses" in s. 342 of the Act should bear a different meaning to the meaning it bears in other parts of the Act. The term "dismissed" is defined in s. 12 of the Act by reference to s. 386. Section 386(1)(a) of the Act provides that a person has been dismissed if the person's employment with his or her employer has been terminated at the initiative of the employer. As a Full Bench of the Commission held in *Khayam v Navitas English Pty Ltd (t/as Navitas English)*[183] the analysis of whether there has been a termination at the initiative of the employer for the purposes of s. 386(1)(a) is to be conducted by reference to the employment relationship, not by reference to the termination of the contract of employment operating immediately before the cessation of the employment.[184]

[152] In the present case, I am satisfied that the Applicant was dismissed on 30 November 2018. The Applicant had been employed on a full-time basis for a period in excess of ten years. On 30 November 2018 she was informed, orally and in writing, that her employment was terminated. I do not accept the Respondent's submission that it did not intend to dismiss the Applicant "completely" and that it intended to change the status of her employment to casual or part-time.

[153] The letter emailed to the Applicant on 30 November 2018 is headed "*Termination of your employment by reason of redundancy*". The letter states that the Applicant's employment in a full-time position will "*seize*", that the position of full-time administrative clerk is no longer required and that this means her employment with the Respondent will terminate. The letter goes on to advise the Applicant of her notice period and that her termination date will be discussed with her. Even if an offer of casual employment could have maintained the employment relationship, there was no such offer made to the Applicant. The termination letter simply stated that the Respondent was seeking to offer a casual position for similar work, "*as per operational requirements*" with no information being provided about what those requirements were, what the position entailed or whether there was a position at all.

[154] Even if the Applicant was offered casual employment and refused that offer, it was the conduct of the Respondent in terminating the Applicant's full-time employment which brought the employment relationship to an end. Accordingly, the termination of the Applicant's full-time employment was a dismissal as provided in s. 342 of the Act.

[155] I am also of the view that in seeking to terminate the Applicant's full-time employment and offer her casual employment on an uncertain and unspecified basis, the Respondent altered the Applicant's position to her prejudice given that she was a full-time employee with some ten years' service. Further, even if the termination of the employment relationship was not actually effected the conduct of the Respondent threatened dismissal and prejudicial alteration of the Applicant's position.

Why was the adverse action taken?

[156] It is clear from the evidence that when the adverse action was taken against the Applicant she was pregnant and had sought personal leave to deal with her gestational diabetes. I am also satisfied that that prior to 30 November 2018 when adverse action was taken against the Applicant the Directors and Managers of the Respondent knew that she was pregnant.

[157] On 30 October 2018, the Applicant placed a written application for personal leave on Mr Michael Chen's desk which stated that the Applicant was pregnant and suffering from gestational diabetes. The Applicant also states that she verbally informed Mr Michael Chen that she was pregnant when she placed the leave application on his desk. After some obfuscation Mr Michael Chen conceded that he did receive the leave application handed to him by the Applicant on 30 October.

[158] Mr Michael Chen also conceded that he received the communication from the Office of the Fair Work Ombudsman forwarded by the Applicant on 5 November 2018 in relation to her entitlement to take personal leave to attend a medical appointment related to her gestational diabetes on 1 November 2018. Mr Michael Chen accepted that the Applicant left the workplace early on 2 November 2018 because of the smell of paint associated with a renovation that the Respondent was undertaking but maintained that he did not recall the Applicant raising the issue of her pregnancy in relation to this matter. Mr Michael Chen also accepted that he authorised payment of personal leave entitlements to the Applicant for attendance at the medical appointment on 1 November 2018 and for the period when she left the workplace on 2 November.

[159] I find it improbable that Mr Michael Chen did not receive the medical certificate the Applicant claims to have given to him on 5 November 2018 to support her personal leave claim for attendance at the medical appointment on 1 November 2018. The information from the Fair Work Ombudsman referred to the need for a medical certificate to be provided to the employer to support an absence. Given Mr Michael Chen's reluctance to treat the medical appointment absence as personal leave I think it improbable that he did not receive the medical certificate covering the absence. That medical certificate also made clear that the medical appointment was pregnancy related. Further the email from the Applicant on 5 November 2018 setting out information from the Office of the Fair Work Ombudsman in relation to personal/carer's leave specifically refers to "*pregnancy related illness*". It is also the case that in May 2018 the Applicant sought to take personal leave to consult a medical practitioner about fertility issues. Mr Michael Chen conceded that he had known that the Applicant was attempting to fall pregnant for a year or two prior to her dismissal.

[160] In relation to the Respondent's knowledge of the Applicant's pregnancy, Mr Nguyen's evidence is that both of the Respondent's salespersons knew that the Applicant was pregnant as did other staff and Mr Nguyen knew of the pregnancy from August or September 2018. There was uncontested evidence from the Applicant that Ms Janice Chang knew that the Applicant was pregnant having made comments about the fact that sweeping the floor would be good exercise for the Applicant given her pregnancy and having engaged in a debate with the Applicant about moving to the back of the office for a period when renovations were being carried out, to avoid the smell of paint and dust. The Applicant maintained that she told Ms Janice Chang of her concern that the dust and paint could affect her baby. The failure of the Respondent to call Ms Chang is a matter to which I will return.

[161] In light of the fact that by at least 30 October 2018, Mr Michael Chen, Ms Janice Chang and the Respondent's sales staff, all knew that the Applicant was pregnant, it is improbable that

Mr Kevin Chen did not also know of the Applicant's pregnancy before her dismissal was effected. In this regard I note that the Applicant sent emails to Mr Kevin Chen on 22 November and 29 November 2018, respectively attaching an application for sick leave on 29 November to attend a medical appointment in relation to gestational diabetes and a medical certificate dated 29 November stating that the Applicant had gestational diabetes and would require treatment for this during her pregnancy. The sick leave application was for a period on 29 November from 4.00 pm and the medical certificate was emailed at 10.33 pm on 29 November 2019 evidencing that the Applicant did not return to work after the medical appointment. The emails were sent from the Applicant's private Hotmail address, the same address to which Mr Kevin Chen emailed the Applicant's termination letter to the same email address. It is improbable that Mr Kevin Chen did not receive the emails and other documents.

[162] I also found Mr Kevin Chen's evidence that he did not know that the Applicant was pregnant until after he handed her the letter terminating her employment, most unconvincing. Mr Kevin Chen insisted that he handed the termination letter to the Applicant before she handed him her maternity leave application and was focused on establishing the order in which these events occurred. In my view, this is immaterial when the evidence of the Applicant's pregnancy which had been provided to the Respondent prior to 30 November is considered. I did not find Mr Kevin Chen to be a reliable witness and I am satisfied and find that Mr Kevin Chen knew that the Applicant was pregnant before he terminated her employment.

[163] I am satisfied that the Applicant has proved the existence of objective facts which provide the basis of the Respondent's conduct that she asserts and the elements of each of the general protections on which she relies. Accordingly, by virtue of s. 361, the onus shifts to the Respondent to prove that it did not take adverse action against the Applicant for the reasons that she alleges.

[164] The Respondent asserts that it took the action to terminate the Applicant's full time employment because there was a drastic drop in sales and gross profit and the Respondent needed to reduce its costs. The figures tendered through Ms Chiang evidence a total reduction in sales of 19.05% when the three quarters from July to March 2018 and 2019 are compared. The evidence of Mr Kevin Chen also indicates that gross profit had reduced by some 30%. Further, Mr Kevin Chen's evidence established matters such as a reduction in telephone sales and an increase in on-line sales which reduced the need for an accounts receivable role and that the duties previously performed by the Applicant were performed on a part-time basis by another staff member who also undertook a sales role after the Applicant's employment ceased.

[165] However, I have also had regard to the following matters. On 30 November 2018 when the Applicant's full-time role was terminated, she was about to commence a period of annual leave which had been approved in September 2018. The Applicant would not have returned to work until 7 January 2019. Whether the Applicant took the leave or received payment in lieu for the leave on termination of her employment could not have made any difference to the Respondent's financial position. In short, there was no apparent need to terminate the Applicant's employment at 5.30 pm on 30 November 2018, the day that she was due to commence a period of annual leave until 7 January 2019.

[166] Further, given that Mr Michael Chen and Mr Kevin Chen knew that the Applicant was pregnant before she was dismissed on 30 November, they must also have known that she would seek to take maternity leave at some point in the new year. Mr Kevin Chen said in his evidence that he had no problem about the Applicant taking maternity leave and that it would help the

Company cut costs if the Applicant took such leave. This statement begs the question as to why it was necessary to dismiss the Applicant on 30 November 2018. The Respondent's explanation for this apparent inconsistency in its position, is that Mr Kevin Chen did not know the Applicant was pregnant and wanted to take maternity leave when he handed her the termination letter on 30 November 2018 and that the Applicant handed him her maternity leave application after he handed her the termination letter.

[167] Even if Mr Kevin Chen's evidence is accepted, that evidence is that before he effected the Applicant's dismissal from her full-time position Mr Kevin Chen knew that she was pregnant and wanted to take maternity leave commencing in March 2019. If Mr Kevin Chen genuinely had no issue with the Applicant taking maternity leave and accepted that it would have helped the Respondent cut costs, there is no reason why Mr Kevin Chen could not have altered his position about the need to dismiss the Applicant from her full time position when he became aware that she wanted to take maternity leave. Such leave would have been at no cost to the Company and would have resulted in the Applicant being absent from the workplace without pay for a period of almost twelve months. Instead, Mr Kevin Chen confirmed the dismissal by emailing another copy of the termination letter to the Applicant.

[168] It is also the case that the timing of the Applicant's dismissal is at odds with the Respondent's evidence about two other employees who were also dismissed, purportedly for the same reasons as the Applicant. Ms Chiang's evidence is that the meeting where the financial position of the Company was discussed was held some time in October 2018. The Respondent's case is that it was this meeting which informed the view that reduction in employee numbers was required. Putting aside the conflict in the evidence about whether one or other of the two employees – Keith and Jack – left of their own volition or were dismissed, on Mr Michael Chen's evidence, one employee left on 12 October 2018 and the other on 9 November 2018. The fact that the Applicant was not dismissed until 30 November 2018 is at odds with the evidence that the Respondent was in such a dire situation following the meeting in October 2018 that it also needed to dismiss the Applicant at the time that it did

[169] Mr Kevin Chen's evidence about why he waited until 30 November 2018 to dismiss the Applicant was not convincing. Effectively, Mr Kevin Chen said that he did not dismiss the Applicant before 30 November 2018 because he was busy doing other things. This is inconsistent with the picture of the dire financial situation the Respondent sought to paint. Further, the manner in which the Applicant's dismissal was effected is at odds with the manner in which the two employees who were also purportedly dismissed due to the financial position of the Respondent were dealt with. Mr Michael Chen's evidence is that those employees were informed about the Company's position and why they were being dismissed. This is in stark contrast with the manner in which the Applicant was dealt with.

[170] The Applicant contended that she had no prior warning that the financial position of the Company was such that her job was in jeopardy and she was dismissed without warning on the day that she was proceeding on a period of annual leave and had informed the Respondent that she wished to take maternity leave in the new year. It was conceded by the Respondent that there was no discussion with the Applicant about the financial position of the Respondent prior to the meeting at which she was informed by Mr Kevin Chen that her full-time employment was terminated. While the Applicant may have been aware that the Respondent was suffering from financial difficulties, it is also the case that she had been employed by the Respondent for over ten years and had no reason to believe that matters had reached the point where her dismissal was in contemplation.

[171] The competing evidence about the meetings between Mr Kevin Chen and the Applicant on 30 November seems to have been directed at establishing whether the Applicant gave Mr Chen her maternity leave application before he gave her the termination letter or whether Mr Chen gave the Applicant the termination letter first. To put in in the vernacular, the question of whether or not Mr Kevin Chen beat the Applicant to the draw by handing her the termination letter before he received her maternity leave application, is not determinative of whether the adverse action was taken against the Applicant because of her exercise of a workplace right to take such leave or because of her pregnancy or disability.

[172] For the reasons set out above, Mr Kevin Chen knew at the time he handed the termination letter to the Applicant, that she was pregnant. Even if the Applicant gave Mr Kevin Chen her maternity leave application after he gave her the termination letter, Mr Kevin Chen proceeded to confirm the termination of the Applicant's employment by sending her a further copy of that letter by email in circumstances where the Applicant taking maternity leave would have had no adverse impact on the business and on Mr Kevin Chen's evidence, would have assisted the business.

[173] Finally, the Respondent's failure to call Ms Janice Chang to give evidence, is in my view significant. I accept that the Respondent is unrepresented and that Mr Michael Chen and Mr Kevin Chen who conducted the case on its behalf, do not have a full understanding of the implications of this failure with respect to the issue of whether an adverse inference should be drawn in light of the principle in *Jones v Dunkel*. To draw such an inference against the interests of an unrepresented party is problematic.

[174] However, the Applicant made detailed allegations about the conduct of Ms Janice Chang which were of central relevance to matters in dispute in this case. In this regard the Applicant asserted that Ms Janice Chang made comments about her pregnancy prior to her dismissal and at the meeting on 30 November 2018, questioned the Applicant about childcare arrangements and expressed concern about her returning to work after her maternity leave. The Applicant also asserted that Ms Janice Chang referred to the fact that she suffered illness as a result of her pregnancy and would not be able to work full-time. Whether Ms Janice Chang was at one or more meetings between Mr Kevin Chen and the Applicant on 30 November, her presence at the final meeting at or around 5.30 pm when Mr Kevin Chen handed the Applicant the termination letter, was not in dispute. Further, Ms Chang signed the termination letter.

[175] I do not accept the attempts by Mr Michael Chen and Mr Kevin Chen to downplay the role of the Directors – Mr Wallace Chen and Ms Janice Chang – in the decision to dismiss the Applicant. Mr Kevin Chen said in his evidence that he asked Ms Janice Chang to attend the 5.30 pm meeting with the Applicant. The presence of Ms Janice Chang at that meeting and the fact that she signed the termination letter in her capacity as Director, signifies that she played a role in the decision to dismiss the Applicant and arguably one that was more significant than the role played by Mr Kevin Chen. It is also the case that there is conflict in the evidence of Mr Kevin Chen and the Applicant about what Ms Chang said at that meeting.

[176] Ms Chang could have elucidated the matters in dispute. While Ms Chang may have simply denied the Applicant's allegations, in circumstances where she was not called and no satisfactory reason for this failure was provided, I can more confidently draw an unfavourable inference on the basis that Ms Janice Chang would have been in a position to cast light on whether the inference should be drawn.

[177] There is no evidence of incapacity on the part of Mr Wallace Chen or Ms Janice Chang that would have prevented their attendance at the hearing, other than assertion by Mr Michael Chen from the bar table. There are other indicators that Mr Wallace Chen and Ms Janice Chang played a role in the operation of the Respondent's business. They are directors and were involved in the decision to dismiss the Applicant having at very least, engaged in discussions with Mr Michael Chen and Mr Kevin Chen about this. When Mr Michael Chen was responding to the Applicant's earlier queries about leave loading, he sought guidance from Mr Wallace Chen before responding and Mr Kevin Chen acknowledged that the signature of Mrs Janice Chang on the Applicant's termination letter made it formal.

[178] On balance, the Respondent has not discharged the onus of establishing that the reasons for the termination of the Applicant's full-time employment did not include reasons which contravene the provisions in Part 3 – 1 of the Act. I have concluded that the reasons for the adverse action taken against the Applicant included the following prohibited reasons:

- the exercise by the Applicant of a workplace right to take personal leave for the purposes of attending medical appointments in relation to gestational diabetes; and
- the Applicant's pregnancy; and
- the disability suffered by the Applicant as a result of the pregnancy – namely gestational diabetes.

[179] Although I accept that the economic situation of the Respondent was also a reason for the termination of the Applicant's full-time employment, I have also concluded that the prohibited reasons were substantial or operative factors influencing the adverse action.

REMEDY

Legislative provisions

[180] Having found that the Respondent has breached the provisions in Part 3 – 1 of the Act, I turn to consider the orders that may be made. The Commission's power to make orders in arbitrating a general protections dispute is dealt with in s. 369(2) which provides as follows:

> "(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:
>
> (a) an order for reinstatement of the person;
>
> (b) an order for the payment of compensation to the person;
>
> (c) an order for payment of an amount to the person for remuneration lost;
>
> (d) an order to maintain the continuity of the person's employment;
>
> (e) an order to maintain the period of the person's continuous service with the employer."

The approach to determining compensation

[181] The approach to assessing compensation under s. 369(2) of the Act has been drawn from cases involving s. 545(2)(b) which concerns orders that particular courts may make for contraventions of civil penalty provisions under the Act, including ss. 340 and 351. Section

545(2)(b) provides that the Federal Court or Federal Circuit Court may make orders for loss that a person has suffered because of a contravention. In *Heraud v Roy Morgan Research Ltd (No 2)*[185] Judge Jones summarised cases in relation to compensation under s. 545(2)(b). Notwithstanding that Courts are dealing with damages, the principles are apposite when compensation under s. 369(2) is being determined. The principles which can be distilled from those case are:

- Compensation is for loss suffered because of the contravention and there must be an appropriate causal connection between the contravention and the loss claimed.[186]
- In assessing compensation the court will:
    - have regard to what is reasonable in the circumstances and what would have been likely to occur if had the Act not been contravened; and
    - consider the detriment to the employee occasioned by the employer's contravention and the extent to which it is reasonable to compensate the employee for such consequence.[187]
- The approach to calculation of compensation is, so far as a monetary amount can achieve, to place the employee in the position he or she would have been in had the employer not contravened the Act, having regard to:
    - the totality of the evidence;
    - how long the employee would have remained in employment and the determination of the value of the likely income stream.[188]
- The value of the likely income stream is discounted for reduced by the discount for contingencies and vicissitudes and the employee's mitigated loss.
- The Court may consider whether the employee has taken appropriate steps to mitigate his or her loss, however it is for the employer to establish the facts going to the employee's alleged failure in this regard.[189]
- Assessment for economic compensation for loss suffered because of a contravention of the Act is not limited to the loss of a particular job and may extend to circumstances where the employee has suffered a loss of opportunity for employment because of a particular contravention.[190]

[182] In relation to estimating how long an employee may have remained in employment, it was held in *Bostik Australia Pty Ltd v Gorgevski*[191] that:

> "Where an employee is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so."

[183] Similarly in *Dalfalla v Fair Work Commission*[192] Mortimer J held that it was appropriate for the purposes of determining compensation under s. 545(1) to consider that the employer would have been entitled to exercise any power it had to bring the employment contract lawfully to an end in a way most beneficial to itself. Her Honour also observed in that case that the likelihood of the employer taking that approach will be fact dependent.[193] In *Heraud v Roy Morgan Research Limited (No 2)*[194] Jones J expressed a view that *Bostik* and *Dalfalla* respectively involved misconduct and poor work performance in contrast with *Heraud (No 2)* where the Applicant was a valued employee and the Respondent was seeking to fill positions in a newly create Research Centre. Her Honour concluded that the evidence did not support a

contention by the Respondent that it would have brought the contract lawfully to an end because of ongoing redundancies and that in the circumstances of that case, the question of any ongoing redundancies was relevant to the consideration of any discount for contingencies or vicissitudes rather than to the length of time the Applicant would have remained in employment.[195]

[184] Similar issues were considered by Wilson C in in *Masson-Forbes v Gaetjens Real Estate Pty Ltd*[196] and by Simpson C in *Roos and Ors v Winnaa Pty Ltd.*[197] In *Masson-Forbes* matters relevant to how long the Applicant would have remained in employment included issues with the Applicant's performance, a change in expectations in relation to her role and that the market in which the Applicant was working was not one that the Respondent wished to remain involved in. In *Winnaa* the casual and fluctuating nature of the Applicants' work was relevant to the period they would have remained in employment. This approach was not disturbed by a Full Bench of the Commission in *Andrew Roos; Loretta Roos v Winnaa Pty Ltd.*[198]

[185] I have applied the principles in those cases in assessing whether I should award compensation to the Applicant and if so, the amount that should be awarded.

Compensation in the present case

The amount of compensation sought by the Applicant

[186] In relation to remedy, the Applicant does not seek reinstatement but rather seeks compensation for economic and non-economic loss pursuant to s. 369(2)(b) and (c) in the amount of $96,092.60 comprising:

	$	$
4 weeks in lieu of notice	3349.60	
LSL and rec leave underpayment	3089.82	6439.42
Lost earnings		6699.20
Lost Centrelink maternity leave		13,330.80
Future earnings		44,850.00
Super contributions – past	636.42	
Super contributions – future	4136.76	4773.18
Non-economic loss		20,000.00
Total		96,092.60

[187] The total amount sought by the Applicant in her compensation claim includes amounts for underpayments in relation to notice, long service leave and annual leave entitlements, based on an assertion that the Applicant was being paid rates that were less than she was entitled to under the modern award which applied to her at the time of her dismissal. It is also asserted that the Applicant was not paid all of her leave entitlements on termination. Further it is asserted that the Applicant was not paid four weeks in lieu of notice on the basis that the Respondent debited her accrued leave rather than providing four weeks in lieu of notice. I take it that the assertion in this regard is that the Respondent absorbed the notice period into the annual leave. An issue was also raised in respect of the Applicant's sick leave not being accrued correctly. The compensation sought by the Applicant was based on a weekly wage rate of $837.40 per week based on either the level 2 rate under the *Clerks – Private Sector Award 2010* or the Level 4 rate under the *General Retail Industry Award 2010* and not the weekly rate of $721.00 which the Applicant was paid.

[188] The Respondent objects to the inclusion amounts in relation to alleged underpayments in any amount of compensation on the basis that these proceedings concern a general protections application. In my view that objection is legitimate.

[189] The present case concerns a general protections dispute involving assertions by the Applicant that adverse action has been taken against her in contravention of the general protections in Part 3 -1 of the Act. It is not asserted that the Applicant raised the issue of her award coverage or that the adverse action was taken against her because she asserted that a particular award covered or applied to her. The award coverage issue is raised only in the context of the quantum of compensation that the Applicant claims. Further, the Applicant does not positively assert that a particular modern award applied to her employment. Rather, she asserts that either the *General Retail Industry Award 2010* or the *Clerks - Private Sector Award 2010* applied to her. The Respondent asserts that the *Business Equipment Industry Award 2010* was the modern award which applied to the applicant's employment.

[190] To award the compensation claimed for these alleged underpayments I would be required to determine the controversy about which modern award applied to the Applicant. There is insufficient evidence before me to determine the matter and in any event given the way it arose in the proceedings, it is arguable that the Respondent's consent to arbitration did not encompass this matter. I am also of the view that the present case is not an appropriate vehicle to address any issue of underpaid wages. If the Applicant has a claim for underpayment of wages it should be progressed through a court of competent jurisdiction. I intend to calculate the Applicant's compensation on the basis of the rate she was paid at the time her employment was terminated - $721.00 per week.

Length of time the Applicant would have remained in employment

[191] The starting point to consider whether compensation should be awarded to the Applicant and the amount of any such award, is to determine, on the totality of the evidence, how long the Applicant would have remained in employment had the adverse action not been taken.

[192] Evidence that weighs in favour of a finding that the Applicant would have remained in employment for a relatively lengthy period is that she had been employed by the Respondent for 10 years and there were no significant issues with her conduct, capacity or work performance. In this regard, I note that the Respondent attempted to suggest that there were issues with the manner in which the Applicant carried out her duties. However, there was no evidence that any of these matters had been raised with the Applicant and that her work performance was anything other than satisfactory.

[193] On the day that the Applicant's full-time employment was terminated – 30 November 2018 – she was proceeding on a period of annual leave up until 7 January 2019. That period of annual leave had been approved in September 2018. The Applicant had also planned to commence maternity leave on or around 4 March 2019 and to return to work on a full-time basis on 6 January 2020.

[194] Consistent with my findings in relation to liability, I consider it probable that had the Respondent not contravened the general protections provisions in Part 3 -1 of the Act by terminating the Applicant's full-time employment the Applicant would have remained in employment until at least 4 March 2019. The period of annual leave from 30 November to 7 January 2019 had been approved and the Applicant was entitled to payment for the leave

regardless of whether she took the leave or was paid the accrued entitlement on termination of her employment. There was no pressing financial imperative as at 30 November 2018 which necessitated the termination of the Applicant's employment. Similarly there was no pressing financial imperative on 7 January 2019 when the Applicant was scheduled to return from annual leave or before 4 March 2019 when the Applicant would have proceeded on unpaid parental leave. If she had proceeded on unpaid parental leave the Applicant would have continued to be employed but would not have accrued leave entitlements. The Applicant could have remained on parental leave as she had planned, until 7 January 2019, at no cost to the Respondent.

[195] However, determining the likelihood of the Applicant's employment continuing for a 12 month period after her period of unpaid parental leave concluded, as posited in her claim for compensation, is more difficult. On the one hand, had the Applicant proceeded on unpaid parental leave on 4 March 2019, the Respondent would have had the right to terminate the Applicant's employment, either while she was on parental leave or upon her return, provided that it did so for a valid reason and in a manner that was consistent with its statutory and award obligations.

[196] In this regard, I accept that the Respondent has suffered a downturn in its sales and gross profit and that the Respondent was entitled to restructure its business in order to reduce operating costs, on the basis that it no longer required a full-time employee in the role of Receptionist/Accounts. It is not for the Commission to second guess the Respondent and determine that its losses were not sufficient to justify a restructure involving the abolition of the full-time Reception/Accounts role held by the Applicant. The Applicant was the only employee in that role and a restructuring which allocated the duties she had previously performed to a person who could also perform a sales role could have provided a valid reason for terminating the Applicant's employment either during her period of parental leave or upon her return, subject to the Respondent meeting its obligations under the consultation term in the relevant award.

[197] On the other hand, the Applicant had the right under s. 84 of the Act to return to her pre-parental leave position following her period of parental leave, or if that position no longer existed, to an available position for which she was qualified. That right is a significant right enshrined in the National Employment Standards and accordingly, there is some level of probability that but for the Respondent's contravention, the Applicant would have exercised her right of return.

[198] It is also possible that there would have been some work for the Applicant to perform – albeit that it may not have been full-time work. This is apparent from the Respondent's own case in which it asserts that it wished to offer the Applicant similar duties to those that she had performed in her full-time role but on a part-time or casual basis. In circumstances where the Applicant was returning from parental leave, and had experienced mental health issues during her absence, there is some probability that a return to work on a part-time basis may have suited the Applicant. Even if – as the Respondent asserts – the Applicant declined such an offer on 30 November, this can be explained by the manner in which the Applicant was treated on that date.

[199] It is also the case that if the Respondent wished to alter the basis of the Applicant's employment from full-time to casual or part-time on the basis of a reduction in sales, then it had an obligation to consult the Applicant about this in accordance with the consultation term in the relevant award which applied to the Applicant's employment. Such obligations are found

in all modern awards and applied in the present case, regardless of which modern Award applied to the Applicant's employment. For the Respondent to fulfil its obligations in this regard would have taken a period of time after the Applicant's return from parental leave and had the discussions occurred in an appropriate manner the Applicant may have agreed to reduce her hours of work and work on a part-time or casual basis consistent with the arrangement Mr Michael Chen and Mr Kevin Chen stated that they wished to implement. Had this occurred however, there is a likelihood that the part-time or casual role would not have been ongoing for a lengthy period and may also have been abolished by the Respondent if it wished to further cut its operating costs.

[200] The matter is further complicated by the fact that the Applicant suffered post-natal depression. At the time this matter was heard, her treating Psychiatrist was unable to state with certainty when the Applicant would be in a position to return to employment in any capacity. Against this consideration, I have also had regard to the evidence that the issues with accessing sick leave prior to attend medical appointments related to gestational diabetes and the stress of losing her full-time employment prior to the birth of her child, had some impact on the Applicant's condition.

[201] In all of the circumstances, and having regard to the matters I have set out above, I have concluded that the Applicant's employment would have continued for a further period of no more than six months after her return from parental leave – half of the 12 month period claimed by the Applicant.

Economic loss

[202] In relation to past economic loss, the Applicant was dismissed on 30 November 2018, the day that she was proceeding on a period of annual leave. The Applicant was paid her accrued annual leave entitlements on termination of her employment. To the extent those leave entitlements covered the period of leave the Applicant would have taken but for her dismissal, to put the Applicant back in the position she would have been had she not been dismissed, an order for compensation would include payment for the period from her return to work on 7 January 2019 to 4 March 2019 when she would have commenced maternity leave and would not include any amount for wages in lieu of notice.

[203] Assuming that the Applicant would have commenced maternity leave on or around 4 March 2019, she would have been paid eight weeks' wages from 7 January 2019 at $721.00 per week, totalling $5,768.00.

[204] The Respondent contends that it offered the Applicant part-time or casual employment for the period prior to the date upon which she was scheduled to commence her maternity leave, which the Applicant refused. The Respondent also contends that by this refusal the Applicant has failed to mitigate her loss for this period and that the Commission should not award her compensation because of this failure.

[205] I do not accept these submissions. In circumstances where I have found that the Respondent took adverse action against the Applicant by terminating her full-time employment and offering her casual employment, the Applicant should not be penalised for failing to accept an offer of casual employment given that the Respondent making such an offer constituted adverse action. Further, at the point the Respondent offered the Applicant casual employment – on its own evidence 26 February 2019 – the Applicant was heavily pregnant and one week

away from the date upon which she had planned to commence maternity leave had she not been dismissed. In those circumstances it was not unreasonable for the Applicant to refuse the offer of casual employment and she should not be penalised for failure to mitigate her loss on that basis.

[206] I also accept that had adverse action not been taken against the Applicant by the Respondent terminating her full-time employment, the Applicant would have been entitled to access the Commonwealth Government paid maternity leave scheme. Under that scheme the Applicant would have received a payment of 18 weeks at the amount of $740.60 per week before tax, totalling $13,330.80. The adverse action taken by the Respondent against the Applicant, by terminating her employment on 30 November 2018, caused the Applicant to lose her entitlement to payments under the Commonwealth Government paid maternity leave scheme, so that there is a direct causal connection between the adverse action and the loss. Accordingly, the Applicant is entitled to compensation for that loss.

[207] The Respondent contends that if the Applicant had accepted its offer of casual employment made on 26 February 2019 the Applicant could have met the eligibility test for the maternity leave payment and that the Applicant should not be awarded compensation for loss of payments under the Commonwealth Government paid maternity leave scheme, on the basis of this refusal. For the reasons set out above, I do not accept this submission. Similarly, I reject the Respondent's submission to the effect that it offered to "reinstate" the Applicant and allow her to take sufficient leave to qualify for the payment to enable her to access it. By the time that offer was made, so much water had gone under the bridge by virtue of the Respondent's conduct in terminating the Applicant's employment, that the employment relationship was destroyed.

[208] The Applicant suffered adverse action by having her full-time employment of some ten years terminated, and a suggestion of alternative employment on a casual basis with uncertain and unspecified terms and conditions attaching to such offer, at a time when she was heavily pregnant and about to go on annual leave which had been applied for and approved in September 2018, was not a reasonable suggestion to mitigate the Applicant's loss as a result of earlier adverse action. Upon return from annual leave, the Applicant planned to work full-time for the next eight weeks before accessing maternity leave to which she was entitled. The Applicant was also planning to access an entitlement to the Commonwealth Government's paid maternity leave scheme. In those circumstances it would be unfair to penalise the Applicant for failing to mitigate the loss of her entitlement to the Commonwealth Government paid maternity leave scheme, by refusing an offer of casual employment in circumstances where an earlier offer of casual employment was adverse action taken for a proscribed reason.

[209] To accept the Respondent's submission would require acceptance of the proposition that because the Applicant did not re-engage with an employer who had taken adverse action against her in contravention of the general protections in Part 3 – 1 of the Act, to mitigate loss which had been caused by that adverse action, the Applicant should be penalised by having her compensation reduced. It would be unreasonable to expect that the Applicant would take this step, in circumstances where the conduct of the Respondent destroyed the employment relationship.

[210] The Respondent also contends that the Applicant received other Centrelink benefits during this period which should be taken into account. In relation to those benefits it appears that they were one-off payments associated with the birth of the Applicant's child and there is

no evidence that the Applicant would not have received those benefits in addition to the maternity leave payment had she been entitled to access it. It is also the case that the Respondent did not provide the Applicant with an employment separation certificate for a lengthy period after her employment was terminated, thereby causing delay to the Applicant receiving assistance from Centrelink. For these reasons I have decided to make no deduction from the amount of compensation which I have awarded for the loss of the Commonwealth Government maternity leave payment.

[211] In relation to future economic loss, for the reasons set out above, I have determined that the Applicant would have remained in employment for only a further period of six months. In that six-month period the Applicant would have earned an amount of $18,746 gross. I have also determined to make a deduction of 15% for contingencies to reflect the likelihood that the Applicant's health issues would have continued or that she would have reduced her working hours to part-time had she been appropriately consulted by the Respondent in relation to its need to cut costs and in light of the fact that this may have suited her personal circumstances. Applying a 15% deduction for contingencies, the amount for future economic loss is $15,934.10.

Compensation for non-economic loss

[212] The Applicant submits that the events of 30 November 2018 caused the Applicant emotional distress during the latter part of her pregnancy at a time when she was most vulnerable. That stress, including the Respondent's refusal to provide a separation certificate and having no income has contributed to the Applicant developing and being diagnosed with post-natal depression and warrants an award of compensation for hurt, distress and humiliation. The Applicant referred to the decision in *Winnaa* where the Commission awarded an amount of $5,000 as compensation for non-economic loss with no psychiatric injury. Reference was also made to *Sagona v R & C Piccoli Investments Pty Ltd*[199] a case involving adverse action because of pregnancy where an amount of $10,000 was awarded for distress and humiliation. It was also submitted that the approach in *Heraud (No 2)*[200] should be followed where Judge Jones held in relation to the applicant in that case that:

> "Although she has not produced medical evidence regarding her distress, nor corroborative evidence regarding the impact of the Respondent's conduct on her, I am of the view that the Court should not diminish her suffering, taking in to account that the general protection provisions operate in the context of beneficial legislation, designed to protect those employees who take leave because of the birth or adoption of a child. I am satisfied that prevailing community standards demand recognition of the fundamental entitlement of an employee to take parental leave to care for their child or children, safe in the knowledge that their employment will not be prejudiced because they have exercised their workplace right to take parental leave, including to request flexible working arrangements. I am satisfied that community standards now recognise the distress and suffering an employee will experience when those rights are contravened by an employer."

[213] In *Heraud (No 2)* her Honour went on to award $20,000 for non-economic loss and damage. In the present case, the Applicant was a long-serving employee who sought to exercise workplace rights in relation to her pregnancy related medical condition and to take parental leave. The Applicant suffered adverse action involving the termination of her full-time employment at the point she was proceeding on a period of annual leave. This undoubtedly caused the Applicant great distress at a point in her pregnancy where she should have been able to enjoy a holiday and then return to work prior to taking a period of parental leave to which she was entitled. There was no warning or discussion with the Applicant in relation to the financial position of the Respondent's business to put her on alert to the possibility of losing

her employment at such a vulnerable time. The prospect of the Applicant gaining alternative employment in the weeks preceding the point at which she wished to cease work to prepare for the birth of her child would have been limited given the advanced state of her pregnancy.

[214] The Applicant should have been able to exercise the rights to access her personal leave in relation to her gestational diabetic condition; to access her entitlement to parental leave; and her right to return to her pre-parental leave position, secure in the knowledge that she would not be discriminated against or treated adversely for exercising such rights. The Applicant should also have been able to access a source of income via the Commonwealth paid parental leave scheme and the fact that she was denied this opportunity also caused her distress. The Applicant should not have been placed in a position of financial and emotional stress prior to the birth of her child given her length of service and her reasonable expectations to access her rights to personal and parental leave and to return to her position.

[215] Unlike the circumstances in *Heraud (No 2)* there is evidence from the Applicant's treating psychiatrist that establishes that these matters contributed to the post-natal depression suffered by the Applicant. Although the evidence also establishes that there were other more significant factors at play, it also establishes that the Respondent's contraventions contributed to the Applicant's condition and caused her distress. In all of the circumstances I consider it appropriate to award an amount of $15,000 for non-economic loss.

CONCLUSION

[216] I am satisfied and find that the Respondent has contravened s. 340 and s. 351 of the Act by taking adverse action against the Applicant because of:

- the exercise by the Applicant of a workplace right to take personal leave for the purposes of attending medical appointments in relation to gestational diabetes; and
- the Applicant's pregnancy; and
- the disability suffered by the Applicant as a result of the pregnancy – namely gestational diabetes.

[217] I have determined to award the Applicant compensation in the following amounts:

a. **$5,768.00** as compensation for past economic loss between 7 January 2019 and 4 March 2019;

b. **$13,330.80** as compensation for loss of entitlement to the Commonwealth Government paid maternity leave scheme;

c. **$15,934.10** for future economic loss;

d. **$15,000** for non-economic loss; and

e. **$2,061.70** in superannuation contributions on amounts for past and future economic loss to be paid into the Applicant's nominated superannuation fund.

[218] The amounts in a. and c. are to be taxed according to law. An order requiring such payments to be made within 21 days of the date of this Decision will issue.

DEPUTY PRESIDENT

Appearances:

Ms F Keyes of Corney & Lind Lawyers for the Applicant

Mr K Chen and Mr M Chen for the Respondent

Hearing details:

2019

Brisbane:

28 June & 6 August.

Final written submissions:

Applicant's closing submissions, 8 September 2019.

Respondent's closing statement, 23 September 2019.

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[1] Transcript PN1423 – 1424.

[2] Exhibit R1 Letter from Ms Clarissa Cheng.

[3] Exhibit R2 Witness Statement of Thanh Nguyen.

[4] Exhibit R3 Statement of incident summary on 30 November 2018; Exhibit R4 Statement about Anna Liu's duties; Exhibit R5 Bundle of documents.

[5] Exhibit R6 First Witness Statement of Michael Chen; Exhibit R7 Second Witness Statement of Michael Chen.

[6] [2014] FWCFB 8941.

[7] *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241 per Mason J; approved in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647 at [59] and [62] per French CJ and Crennan J and at [104] per Gummow J and Hayne J

[8] Ibid at [8] to [15].

[9] [2019] FCAFC 181.

[10] Ibid at [114] to [121] per O'Callaghan and Thawley JJ.

[11] [2014] FWCFB 8941 at [12] citing *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd* (1999) 140 IR 131 at [161]-[162] per Branson J; *Rojas v Esselte Australia* (No. 2) (2008) 177 IR 306 at [49] per Moore J; *Construction, Forestry, Mining and Energy Union v BHP Coal and Steven Rae* [2010] FCA 590; *Jones v Queensland Tertiary Admissions Centre (No. 2)* (2010) 186 FCR 22 at [10]

[12] [2017] FCA 1046.

[13] (2012) 248 CLR 500.

[14] (2014) 253 CLR 243.

[15] [2017] FCA 1046 at paras 295 – 303.

[16] Exhibit A2 at 8.

[17] Exhibit A5 Annexure 2.

[18] Exhibit A5 Annexure 3.

[19] Exhibit A2 at 19.

[20] PN903 to PN919.

[21] Exhibit A5 Annexure 7.

[22] PN793 to PN799.

[23] PN1090.

[24] PN1091.

[25] PN954 – 958.

[26] PN1085 to PN1086.

[27] Exhibit A5 Annexure 7; PN928.

[28] PN1173.

[29] PN1197 to PN1202.

[30] Exhibit A2 at 26.

[31] Exhibit A2 at 27 to 29.

[32] Exhibit A2.

[33] Exhibit A2 at 37.

[34] PN822 to PN824.

[35] Exhibit A2 at 42.

[36] PN934 to PN935.

[37] PN1032 to PN1036.

[38] PN1037 to PN1040.

[39] PN1043.

[40] PN942.

[41] PN1069.

[42] PN1153.

[43] PN2746.

[44] Exhibit A6.

[45] PN2521 to PN2525.

[46] Exhibit A7.

[47] Exhibit A8.

[48] PN2569 to PN25270.

[49] PN2603.

[50] Exhibit A9.

[51] Exhibit A5 Annexure 8.

[52] PN2698; PN2728 to PN2730.

[53] PN2710.

[54] PN2734 – PN2737.

[55] PN551.
[56] PN552.
[57] PN559 to PN561.
[58] PN872 to PN880.
[59] PN563 to PN567.
[60] PN573 to PN574.
[61] PN580.
[62] PN580.
[63] PN601.
[64] PN606.
[65] PN602.
[66] PN607 to PN609.
[67] PN598 to PN599.
[68] PN183.
[69] PN184.
[70] PN200 to PN205.
[71] PN224.
[72] PN227.
[73] PN256.
[74] PN259.
[75] Exhibit R2.
[76] PN337.
[77] PN343.
[78] PN363 to PN365.
[79] PN362.
[80] PN366.
[81] PN372 to PN373.
[82] PN374 to PN376.
[83] PN391, PN395.
[84] PN403; PN411.
[85] PN458 to PN459.
[86] PN404 to PN405.
[87] PN400.
[88] PN406.
[89] PN413 to PN415.
[90] PN401; PN416.
[91] PN418, PN423.
[92] PN420.
[93] PN462 to PN463.
[94] PN431 to PN432.
[95] PN434.
[96] PN433.
[97] PN435.
[98] PN440 to PN444.
[99] PN436.
[100] PN451.
[101] PN452; PN456.
[102] PN493 to PN499.

[103] PN464 to PN465.
[104] PN465.
[105] PN1423 to PN1424.
[106] PN1460.
[107] Exhibit R3.
[108] PN1485 to PN1489.
[109] PN1504 to PN1505.
[110] Exhibit R4.
[111] PN1461.
[112] PN1462.
[113] PN1471 to PN1472.
[114] PN1516 to PN1519.
[115] PN1520.
[116] PN1522.
[117] PN1540 to PN1543.
[118] PN1567.
[119] PN1578.
[120] PN1613 to PN1614.
[121] PN1615.
[122] PN1616; PN1619.
[123] PN1743.
[124] PN1826 to PN1828.
[125] PN1655 to PN1665.
[126] PN1666 to PN1671.
[127] PN1672 to PN1676.
[128] PN1679 to PN1680.
[129] PN1681 to PN1688.
[130] PN1581 – 1582, PN1745 – 1753.
[131] PN1689 to PN1708.
[132] PN1583; PN1654.
[133] PN1784.
[134] PN1785; PN1797 to PN1798; PN1811 to PN1812.
[135] PN1586 to PN1589.
[136] PN1591 to PN1599.
[137] PN1600 to PN1612.
[138] PN1813 to PN1819.
[139] PN1862.
[140] PN1878.
[141] PN1878.
[142] Exhibit R7.
[143] Exhibit R6.
[144] PN1879 to PN1881.
[145] PN1945.
[146] PN1958.
[147] PN1993 to PN1996.
[148] PN2020 to PN2045.
[149] PN2050 to PN2052.
[150] PN2058.

[151] PN2057 to PN2059.

[152] PN2061.

[153] Exhibit R7.

[154] PN2069 to PN2076.

[155] PN2119 – 1124.

[156] PN2126 to PN2130.

[157] PN2250 to PN2253.

[158] PN2254.

[159] Ibid.

[160] PN2261.

[161] PN2262 to PN2263.

[162] PN2271 to PN2280.

[163] PN222, PN2296.

[164] PN2320 to PN2321.

[165] PN2339.

[166] PN2340 to PN2350.

[167] PN2355 to PN2359.

[168] PN2457 to PN2466.

[169] PN2351 to PN2354.

[170] PN2448.

[171] PN2449 to PN2450.

[172] [2012] FMCA 9; (2012) 218 IR 194

[173] Ibid at [57].

[174] [2018] FWC 7524 at [37]

[175] *Kennewell v MG & CG Atkins trading as Cardinia Waster & Recyclers* [2015] FCA 716, [52].

[176] (2012) 248 CLR 549

[177] Ibid at [77].

[178] Ibid at [52].

[179] Ibid at [67].

[180] *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467, [121]

[181] (1959) 101 CLR 298.

[182] [2011] FCAFC 53 at [79].

[183] [2017] FWCFB 5162.

[184] Ibid at [75].

[185] [2016] FCCA 1797.

[186] *Australian Licensed Aircraft Engineers v International Aviation Service Assistance Pty Ltd* (2011) 103 FCR 526 at [423].

[187] *Aitken v Construction, Forestry, Mining and Energy, Timberyards, Sawmills and Woodworkers Union of Australia (WA Branch)* (1995) 63 IR 1.

[188] *Haines v Bendall* (1991) 172 CLR 60.

[189] *Harding v Harding* (1928) 29 SR (NSW) 96 at 106; *Tasman Capital v Sinclair Pty Ltd* 75 NSWLR 1 at [55] – [72]; *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421 at 430.

[190] *Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120.

[191] [1992] 36 FCR 20.

[192] [2014] FCA 328.

[193] Ibid at [161].

[194] [2016] FCCA 1797.

[195] Ibid at 43 – 45.

[196] [2015] FWC 4239 citing *Heriot v Sayfa Systems Pty Limited* [2014] FCCA 1627 at [8] – [9].

[197] [2018] FWC 3568.

[198] [2018] FWCFB 7394 at [30].

[199] [2014] FCCA 875.

[200] [2016] FCCA 1797