



# DECISION

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

**Salvanah Bennie**

v

**Sunnyhaven Disability Services Ltd**  
(U2020/11119)

DEPUTY PRESIDENT CROSS

SYDNEY, 31 MARCH 2021

*Application for an unfair dismissal remedy.*

[1] An application was filed on 17 August 2020 (the Application), by Ms Salvanah Bennie (the Applicant), pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act), following her dismissal on 28 July 2020. The Applicant seeks an unfair dismissal remedy of compensation.

[2] The Applicant commenced employment with Sunnyhaven Disability Services Ltd (the Respondent) on 29 February 2016. The Applicant was first employed in the role of a Disability Support Worker and was later promoted into the role of Team Leader.

[3] On 15 September 2020, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). The Directions were as follows:

1. **Salvanah Bennie (the Applicant)** is directed to file with the Fair Work Commission, and serve on **Sunnyhaven Disability Services Ltd (the Respondent)**, an outline of submissions, witness statements and other documentary material the Applicant intends to rely on in support of his application in this matter **by 4pm on 28 September 2020**.
2. The Respondent is directed to file with the Fair Work Commission, and serve on the Applicant, an outline of submissions, witness statements and other documentary material the Respondent intends to rely on in opposition to the application in this matter **by 4pm on 12 October 2020**.
3. The Applicant is directed to file with the Fair Work Commission, and serve on the Respondent, any reply material, that is, any witness statements and other documentary material in reply to the Respondent's witness statements and documents **by 4pm on 19 October 2020**.

[4] The Applicant did not comply with the Directions and on 19 October 2020, the Respondent made application seeking to dismiss the Application pursuant to s.399A of the Act. I heard the s.399A application on 9 November 2020, and dismissed that s.399A Application. Further directions for the filing of materials were made.

[5] On 2 November 2020, one week prior to the s.399A hearing, the Applicant filed an Outline of Submissions, a statement of the Applicant, and statements from Ms Malia Salt, Ms Sharon Farah and Ms Jessica Reid. Pursuant to the further directions for the filing of materials, the following were filed:

- (a) On 18 December 2020, the Respondent filed an Outline of Submissions, and statements from Ms Joumana Sanjakdar, the Human Resources Manager of the Respondent, Ms Leonie Wild, the Operations Manager of the Respondent, and Ms Michelle Horne, the Accommodation Manager of the Respondent; and
- (b) On 18 January 2021, the Applicant filed statements in reply from Mr Alex Avenarius and Ms Joyce McLean. Neither of those deponents had previously filed statements in the matter.

[6] The hearing of the matter occurred on 8 and 9 February 2021. The Applicant and each of the deponents of statements for the Respondent were cross-examined. The Statements of Ms Jessica Reid, Ms Sharon Farah, Ms Malia Salt were tendered in evidence without the deponents being required for cross-examination.

[7] As to the two statements filed by the Applicant in reply, I rejected the admission into evidence of the statement of Joyce McLean as it was not in any way in reply, but rather raising new matters. I rejected all but two paragraphs of the statement of Alex Avenarius for similar reasons, with the two admitted paragraphs going to the deponent's professional relationship with the Applicant.

[8] Other than the Applicant's own statement, and the statement of Mss Farah who acted as the Applicant's support person in the meeting of 23 July 2020, the evidence of the Applicant's witnesses traversed issues of workload, workplace culture, and alleged incidents other than those involved in this matter. Ms Salt left employment with the Respondent on 1 May 2019, and Ms Reid left such employment in March 2020. As I conclude below that the Applicant's conduct did not involve issues of workload and workplace culture, I consider the evidence of Ms Salt and Ms Reid to be irrelevant.

[9] The evidence of Mr Avenarius that was admitted was simply that he was the Accommodation Manager at Sunnyhaven and directly supervised the Applicant, who was a Team Leader at a different House. He found the Applicant to be hard working, and a good Team Leader who always had a calming effect on the residents that she was supporting.

## **Background**

[10] There were only a limited number of factual disputes between the parties, and the determination of those factual disputes is undertaken where those facts relate to the various issues for determination.

[11] The events the subject of this matter all occurred at an accommodation house operated by the Respondent. Five clients of the Respondent, with varying levels of disability, resided at the accommodation house. For reasons of confidentiality, in this decision I will refer to the accommodation house as "the House", and to the residents by their initials, being "Ms JC", "Ms RF", "Ms RF", "Mr CH" and "Ms PF".

[12] It was not in dispute that in the Team Leader's position, the Applicant was required to provide high quality services to the residents of the House, and conduct herself in accordance with all of the Respondent's Policies and Procedures (which included the Respondent's Duty of Care Policy, Neglect Policy and COVID Operating Procedures).

[13] The Applicant had previously, on or around 11 December 2019, received a written warning for reported missed medication. A resident was to be administered insulin once a week with their usual medication. On 10 December 2019, it was discovered that the Applicant did not provide the resident with their insulin. The non-administering of medication was identified by another staff member and subsequently reported to the Accommodation Manager. The Applicant accepted that she breached the Respondent's duty of care policy and medication management policy. The Applicant was provided with a first and final warning letter that encouraged the Applicant to respond should she so wish. No response was received from the Applicant.

[14] While the Applicant sought to traverse that first and final warning in the hearing, she eventually conceded as follows:<sup>1</sup>

*"I accepted that I took accountability for that, the mishap, because initially that's how I was made to feel. That, well, look, you are the team leader for the house, it is your responsibility to ensure that that medication - it was effectively your responsibility to have ensured that that medication was administered, even though my shift had finished at 8 pm."*

[15] In the week commencing 20 July 2020, the Applicant worked on Monday 20 July 2020, between 9:00 am and 4:30 pm, and on Tuesday 21 July 2020, between 9:00 am and 3:30 pm, the Applicant attended training. Later, on 21 July 2020, the Applicant attended a sleepover shift at the House. This involved the Applicant being at the House between the hours of 10:00pm on 21 July 2020 and 6:00am on 22 July 2020. The evidence was clear that the Applicant was able to sleep throughout this shift and was not required to wake up to attend to any of the residents during that sleepover.

[16] After the sleepover shift, the Applicant was rostered for the morning shift from 6:00 am to 2:00 pm on 22 July 2021. The Applicant set her alarm for 6:00am, got up when the alarm went off, logged in (by placing her thumb on a reader) to the Respondent's time keeping system (RosterLive).

[17] The Applicant was the only staff member rostered to work the morning shift. In the hearing of the matter evidence fell which disclosed that in a meeting around three weeks before 22 July 2020, the Applicant had raised staffing issues regarding the morning shift. As a result, the possibility of a second person working from 7.00am to 10.00am was provided for in the shift roster. If that shift was to be utilised, the staff member on the morning shift would "fill" that second position. The Applicant did not, however, fill the second position on 22 July 2020.

[18] After getting up and logging on to the 'RosterLive' system, the Applicant went to the bathroom, and then went back to sleep. She did not set another alarm. As observed above, the

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<sup>1</sup> Transcript PN 939.

Applicant was the only staff member rostered at the House during the morning of 22 July 2020.

[19] The usual morning routine of the residents in the House are set out in daily routine schedules prepared for each resident. Each of these daily routine schedules contemplated tasks being attended to for these residents between 6:00am and 7:00am. There was also a Staff Duty Checklist for the morning shift at the House setting out all tasks to be completed by the staff member attending to that shift.

[20] The daily routine schedules and staff duty checklist recorded a number of tasks required to be completed prior to the participants leaving for their day program, including:

- a. *signing into RosterLive*
- b. *reading and signing the shift change-over checklist when starting the shift;*
- c. *checking all medication;*
- d. *administering all medication;*
- e. *morning showers;*
- f. *assisting residents to dress; and*
- g. *assisting with serving and feeding breakfast.*

[21] The exact tasks required differed from resident to resident. For example, the daily routine sheet for Ms JC listed the following:

- a. *between 6:00am and 7:00am:*
  - i. *Ms JC blood sugar level needs to be checked,*
  - ii. *insulin needs to be administered; and*
  - iii. *Ms JC needs to be showered and dressed,*
- b. *staff then need to ensure Ms JC has breakfast and medication administered before breakfast.*

[22] The daily routine sheet for Mr CH records that between 6:00am and 7:00am staff must '*prompt him to go to toilet early morning otherwise Chris may make wet bed.*'

[23] At approximately 7.00am on 22 July 2020, a Painter arrived to paint a bathroom in the House. He knocked on the door and windows of the house. That did not wake the Applicant and she was subsequently woken around 7.30am by a telephone call. She then let the Painter into the House without observing COVID 19 protocols such as taking his temperature.

[24] At approximately 7.45am, the Accommodation Manager, Ms Horne, arrived at the House to pick up some documents. She observed a number of residents either in their pyjamas

and walking around, or waiting to be showered and waiting for their breakfast. Ms Horne also observed the Applicant to be in her pyjamas.

**[25]** As a consequence of the Applicant's delayed start to the morning shift, several significant issues eventuated for the residents at the House, including that:

- (a) Ms JC's blood sugar levels were checked later than they should have been;
- (b) Mr CH was wandering around the House naked after having wet himself;
- (c) the Applicant did not assist Mr CH (other than to direct him back to his room to get himself dressed);
- (d) residents were late getting out of bed, not showered, dressed and fed as part of their usual routine;
- (e) the Applicant failed to perform COVID risk assessments of the Painter.

**[26]** The Respondent became concerned that the Applicant's conduct amounted to neglect of the residents living in the House, and so, consistent with its obligations, the Respondent reported the incident to the NDIS Safeguards Commission, in line with the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, which requires all incidents involving 'abuse or neglect of a person with a disability' to be reported.

**[27]** Later on 22 July 2020, the Respondent sent a letter to the Applicant requesting her to attend a meeting the following day, 23 July 2020 at noon to discuss the events of the morning of 22 July 2020.

**[28]** The Applicant brought Ms Farrah to the meeting with her to act as such a support person. Ms Horne, Ms Wild, the Applicant and Ms Farah were all present at the meeting on 23 July 2020. In that meeting, the events of the morning of 22 July 2021 were raised with the Applicant. Her responses were

- a. that she was feeling fatigued after she got up and logged on and that's why she went back to bed;
- b. that she totally forgot to complete the COVID checklist and check the Painter's temperature; and
- c. that Mr CH had wet the bed and she had directed him to return to his room before returning to attend to another client's blood sugar level checks.

**[29]** The Respondent was concerned that the Applicant's conduct indicated that she was not suited to working as a Team Leader. On 23 July 2020, Ms Horne advised the applicant that the Respondent had a vacancy in the position of a Disability Support Worker and asked her to consider it, effectively being a demotion.

**[30]** On 24 July 2020, Ms Horne sent a letter to the Applicant asking her to show cause as to why she should not be dismissed (with notice) for her conduct on 22 July 2020 (the Show

Cause Letter). The Applicant was provided until 12:00 pm on 28 July 2020 to provide a response. On 24 July 2020 at 6:03 pm, the Applicant emailed Ms Horne, stating that she would not be giving any further explanation or justification regarding the matters as she felt they had been adequately addressed at the 23 July 2020 meeting, and she had no interest in the offer to be assigned the role of a Disability Support Worker as she had no interest in returning to such position. The Applicant stated she would leave it at the discretion of the company to terminate her employment.

[31] The Respondent terminated the Applicant's employment on 28 July 2020, with payment in lieu of notice of termination. The Respondent terminated the Applicant's employment because of her conduct on 22 July 2020 and her previous failure in December 2019 to ensure a client received their medication, the subject of a first and final warning.

## CONSIDERATION

### Preliminary findings

[32] I am satisfied that:

- (a) The Applicant was dismissed at the initiative of the employer (ss 385(a) 386(1)(a));
- (b) Her unfair dismissal application was lodged within the 21-day statutory time limitation found at s 394(2) of the Act;
- (c) The Applicant is a person protected from unfair dismissal in that:
  - i. she had completed the minimum employment period set out in ss 382 and 383 of the Act; and
  - ii. an award, the *Social, Community, Home Care & Disability Services Industry Award 2010* (the Award), applied to her employment (s 382(3)(b)(ii)); and
- (d) Her dismissal was not a case involving the Small Business Fair Dismissal Code (s 385(c)).

### Was the Dismissal Harsh, Unjust or Unreasonable?

[33] I must consider the question of whether the Applicant's dismissal was '*harsh, unjust or unreasonable*' and therefore an unfair dismissal, pursuant to the considerations outlined in s.387 of the Act, dealing with the matters to be taken into account by the Commission in determining whether the dismissal was unfair.

[34] Section 387 of the Act identifies the matters that the Commission must take into account in deciding whether a dismissal was "harsh, unjust or unreasonable":

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

- (c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) The degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) Any other matters that the FWC considers relevant.

**(a) Valid reason**

[35] The reasons relied upon by the Respondent were best summarised in the show cause letter sent to the Applicant on 24 July 2020. There the reasons were listed as:

- (a) Sleeping whilst on shift;
- (b) Not providing support when required to residents; and
- (c) Not following COVID Operating procedures.

[36] As the Full Bench found in *Sydney Trains v Hilder*:<sup>2</sup>

*“The principles applicable to the consideration required under s 387(a) are well established, but they require reiteration here:*

- (1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.*
- (2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct occurred and what it involved.*
- (3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).*

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<sup>2</sup> [2020] FWCFB 1373, at [26].

- (4) *For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).*
- (5) *Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).*
- (6) *The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.*
- (7) *The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).*
- (8) *An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.*
- (9) *Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable."*

**(i) Sleeping Whilst on Shift**

[37] There is no question as to whether the Applicant slept on her shift. The only dispute is for how long she slept, with the Applicant saying 60 minutes and the Respondent 90 minutes. I prefer the Respondent's evidence that it was 90 minutes. However, in the circumstances of the duties and responsibilities of the Applicant, neither period of time is acceptable, and either period constitutes a valid reason. That is particularly so where the Applicant logged into the 'RosterLive' time recording system before going back to sleep.

[38] The Applicant submitted that she had fallen asleep because she had fatigue, due to excessive hours worked in a 24-hour period. While it is correct to observe that the Applicant had one and a half hours less break between the end of her training shift and the start of the sleepover shift than the eight hours provided for in the Award, the Applicant conceded that she did not wake during the sleepover shift on the evening of 21 July 2020. There was no basis for the Applicant to be fatigued.

**(ii) Not Providing Support when Required to Residents**

[39] The Applicant's sleeping when she should have been working then inevitably resulted in her not providing the support required by residents. It was in relation to this issue that the Applicant gave incredible evidence, both written and oral, that affected the credibility of her



evidence as a whole. The Applicant's approach was summarised in the following exchange in cross-examination:<sup>3</sup>

*"This is your statement. It's paragraph 53 of your statement. So, this is talking about what happened on the 22nd? -Yes.*

*It says it's talking about your usual duties? -Yes.*

*It says in the second sentence, 'These tasks would have been the same, had I woke up at six, as the clients would generally wake up whenever they would wake them. The clients usually got out of bed by 6.30 and I would attend to their personal care'? -Yes.*

*Then it says, 'Sleeping an extra hour is not detrimental to any of the clients as their normal routine stayed the same'? -Yes."*

**[40]** The daily routine schedules prepared for each resident, and the Staff Duty Checklist for the morning shift at the House, were not a part of the Respondents written evidence. Those documents were put to the Applicant in cross-examination and it became readily apparent that the documents put to the Applicant were not those in existence as at July 2020. Nonetheless, the Applicant gave quite definite answers as to what would be contained in the contemporaneous daily routine schedules for each resident, and the Staff Duty Checklist. One such example was that the daily routine for Mr CW would not include a sentence "*Staff prompted him to go to the toilet early morning, otherwise C may make wet bed.*"

**[41]** After the Applicant's evidence, and pursuant to s.590 of the Act, I required, among other documents, production of daily routine schedules for each resident, and the Staff Duty Checklist, as they existed around July 2020. Those documents were produced and tendered by the Respondent without any objection by the Applicant, and were compelling in their contents. By way of example:

(a) The Client Daily Routine for Ms JC that applied in July 2020, was completed by the Applicant in her own handwriting. It listed as the Activity between 6.00am and 7.00am "*Shower, dress, check BSL and administer insulin as per diabetes management plan and protocols.*"<sup>4</sup> Breakfast was listed as occurring between 7.00am and 8.00am. The Applicant's evidence in her prior cross-examination, however, was as follows:<sup>5</sup>

*"The previous one just stated check BSL between six and eight. Then it states perform personal cares. Then it'll get down to say between eight and a certain time, it will say breakfast, then under that it will say, 'Between this hour and this hour, day programs."*

(b) The Client Daily Routine for Mr CH that applied in July 2020, and was signed by the Applicant as Team Leader as indicating it had been "*Received and analysed by*" her, listed as the Activity between 6.00am and 7.00am as "*Usually C don't want to wake up in early morning so staff need to remind him time to get up, need to remind him every 5 minutes until*

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<sup>3</sup> Transcript PN 693 to 696.

<sup>4</sup> Exhibit R13.

<sup>5</sup> Transcript PN 524.

*C gets up. Staff prompt him to go toilet early morning otherwise C may make wet bed.*"<sup>6</sup> The Applicant's evidence in her prior cross-examination, however, was as follows:<sup>7</sup>

*"Can I take you to exhibit R6. It's on your iPad, it's one of the documents I showed you. It's the daily routine for Mr CH. Can you see that it says between 6 am and 7 am, the third sentence - or the second sentence, 'Staff prompted him to go to the toilet early morning, otherwise C may make wet bed'? -Yes.*

*So, you knew that you needed to get C to go to the bathroom early in the morning? -No. C never had problems with wetting the bed.*

*THE DEPUTY PRESIDENT: Except for 22 July? -Yes. Except for this date. He's very independent in the sense that he knew how to go to the toilet. You didn't need to prompt him. If he needed to use the toilet he would use the toilet on his own.*

*MR WHITBREAD: I assume you deny this is an accurate version of the daily routine for 22 July last year? -Yes.*

*You say that that sentence didn't exist on the daily routine? -Did not exist."*

(c) The Client Daily Routine for Mr CH that applied in July 2020, was identical in text (but not format) to the Client Daily Routine originally put to the Applicant in cross-examination, even including the same spelling errors.

[42] The Applicant was clearly focussed on denying the contents of the Client Daily Routines in order to somehow explain her failures arising from her sleeping on shift. Those denials were simply unacceptable.

### **(iii) The COVID SOP Breach**

[43] The Applicant clearly breached the COVID operating procedures, and at a time when the pandemic was at its height. The Applicant knew she was required to test the Painter prior to his accessing the House. As a result of her sleeping on shift, the Applicant was attempting to focus on numerous duties she should have performed between 6.00am and 7.00am, and simply failed to test the Painter. Ms Farah's evidence regarding how the Applicant explained her failure in the meeting of 23 July 2020, was as follows:<sup>8</sup>

*The Applicant said: When the painter arrived, I just let him in as I was in the middle of doing Jenny's diabetes checks. I hadn't even thought to sign the painter in as I needed to return to resume attending to Jenny.*

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<sup>6</sup> Exhibit R14.

<sup>7</sup> Transcript PN 663 to 667.

<sup>8</sup> Exhibit A3 at [4].

### Conclusion on Valid Reason

[44] The result of the Applicant's failures was that five disabled residents who needed supervision and care were left unattended for a period of 90 minutes. By the time the Applicant has woken, the situation had compounded to an extent that:

- (a) The blood sugar level of Ms JC had not been checked when it should have;
- (b) Mr CH wet himself and his bed, was wandering around the house naked, and was not helped by the Applicant to clean and dress himself after this incident; and
- (c) Due to the failure to COVID check the Painter, all residents were exposed to the risk of COVID-19 infection.

[45] The Respondent referred to the decision of Commissioner Deegan in *Dolva v Sylvandale Foundation Limited T/A Sylvandale Foundation*,<sup>9</sup> being another case in which an applicant engaged as a Disability Support Worker applied for an unfair dismissal remedy following a misconduct related dismissal, where the Commissioner found:

*“An employee occupying a position such as that occupied by the Applicant must have the total confidence of their employer. An employer cannot take the risk of leaving an employee in charge of vulnerable clients where there is a reasonable concern that the employee may not react appropriately in all situations. An employer providing the services of carers to clients such as those the employer in this case, are so dependent on their carers, a reasonable belief, supported by evidence, that a carer has a short temper, reacts immoderately to minor provocations, or acts in a way that could be construed as an abuse of their position, is a valid reason for the termination of that person's employment.”*

[46] I consider the observations of Commissioner Deegan to be apposite to this matter. The misconduct alleged by the Respondent occurred and involved serious breaches by the Applicant that justified termination. The seriousness of the breaches were compounded by the Applicant's failure to take responsibility for her actions, and to attempt to maintain that sleeping on the job for a significant period of time was not a big issue.

[47] I agree with the Respondent's submission that while it is not necessary for the Respondent to show that the Applicant's conduct amounted to serious misconduct, as it made payment in lieu of notice of termination, the evidence demonstrates that the Applicant's conduct meets this threshold of regulation 1.07 of the *Fair Work Regulations 2009* (Cth) in that it was wilful and deliberate behaviour inconsistent with the continuation of the contract of employment, that caused serious and imminent risks to the health and safety of the Respondent's residents and to the reputation of the Respondent's business.

### (b) Notification

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<sup>9</sup> [2011] FWA 8340, at [80].

[48] The Applicant was notified of the of the reasons for termination, most particularly by the letter of 22 July 2020, the ventilation of the reasons in the meeting on 23 July 2020, and the Show Cause Letter.

**(c) Opportunity to Respond**

[49] The Applicant had an opportunity to respond in the meeting on 23 July 2020, and in response to the Show Cause Letter (Section 387(c)).

**(d) Support person**

[50] The Applicant was able to have Ms Farah as her support person.

**(e) Warnings**

[51] While it is clear that the Applicant had a previous warning, that is not a relevant consideration under s.387(e). As the Full Bench observed in *Larcombe v Bis Industries Limited*:<sup>10</sup>

*“Thirdly, s.387(e) of the Act relates to warnings for unsatisfactory performance. The Decision appears to conclude that it was not appropriate to take into account under this head, the severity of past disciplinary action (the demotion). That appears manifestly correct. Moreover, we are not persuaded that there is an arguable case of error arising from the Commissioner’s apparent decision not to take the severity of past disciplinary action into account. The Commissioner’s reasons for so doing were that the disciplinary action was not challenged at the time and it was now not appropriate for him to try to “balance the ledger” by taking a matter not previously challenged into account. No arguable appellable error from that reasoning is disclosed. The scope of the consideration under s.387(e) is well settled and does not require further clarification by this Full Bench. The Appellant’s prior disciplinary history is a matter the Commissioner was entitled to take into account under s.387(h). That the Commissioner may have taken prior warnings about conduct into account under s.387(e) instead of (h) does not enliven the public interest nor do the other matters raised by the Appellant as to s. 387(e) of the Act attract the public interest.”*

**(f/g) Size of the business/human resources**

[52] These are not relevant considerations as the Respondent is a relatively large company and is well resourced.

**(h) Other relevant matters**

[53] There were sound, defensible and well-founded reasons for the Applicant’s dismissal, relating to each reason upon which the Respondent relied. Regarding other relevant considerations, the Applicant made the following submission:

*“Section 387(h) – Other relevant factors*

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<sup>10</sup> [2017] FWCFB 4545, at [34].

1. *Providing care services to people with a disability is the core feature of Sunnyhaven's operations however they have failed to uphold these standards by not ensuring work health and safety requirements were met.*
2. *Sunnyhaven's failure in their duty of care to its participants and employees had the potential for very serious consequences and placed them at serious risk.*
3. *Sunnyhaven did not give due consideration to Salvanah's personal circumstances in reaching its decision to dismiss her."*

[54] The reference to failing to ensure work health and safety requirements above would appear to be a reference to staffing levels. Such levels were the subject of some of the evidence of the Applicant's witnesses that I considered irrelevant. I do not consider that staffing levels had any role to play in the events of the morning of 22 July 2020. That is because:

- (a) Three weeks before 22 July 2020, a new roster was put in place that would have allowed the Applicant to roster another staff member from 7.00am to 10.00am. The Applicant chose not to do so;
- (b) As I have found above, there was no reason for the Applicant to be fatigued. While the Applicant had an hour and a half less than the required eight hour break between her training shift on 21 July 2020, and the sleepover shift later that day, the evidence was clear that the Applicant was able to sleep throughout the sleepover shift and was not required to wake up to attend to any of the residents during that sleepover; and
- (c) The apparently chaotic scenes that occurred on the morning of 22 July 2020, were not caused by staffing levels, but rather by the rostered staff member sleeping for at least 60 minutes, but I find 90 minutes, and then having to perform a significant backlog of duties when she finally woke up.

[55] Finally, the Respondent did give due consideration to the Applicant's personal circumstances in reaching its decision to dismiss her. The Respondent even proposed an effective demotion to the position of a Disability Support Worker that would have at least allowed the Applicant to have continued in employment, but the Applicant rejected that proposal. In the circumstances it was entirely understandable that the Respondent considered the Applicant could not remain in the responsible position of Team Leader.

### **Conclusion on Dismissal**

[56] Taking into account the matters referred to above, I find that the dismissal of the Applicant was not harsh, unjust or unreasonable. The Respondent had valid reasons upon which it relied to dismiss the Applicant, and no procedural fairness issues arose.

[57] The termination of the Applicant was not harsh unjust or unreasonable. The Application is dismissed.



DEPUTY PRESIDENT

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