DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Ranjanben Yagnik
v
1st Impressions Education Group Pty Ltd T/A 1st Impressions Early Learning Centre
(U2020/15185)

COMMISSIONER HAMPTON ADELAIDE, 28 MAY 2021

Application for an unfair dismissal remedy – whether valid reason for dismissal – whether applicant warned – fundamental dispute over existence of performance and conduct deficiencies and whether documentation now relied upon was drafted or modified after the event – concerns about aspects of the evidence, significant concerns about aspects of the respondent's evidence – found that alleged seriousness of conduct and performance concerns overstated for the purposes of these proceedings – valid reason not demonstrated – dismissal procedurally unfair and harsh – dismissal unfair – compensation awarded – order made.

1. What this decision is about

[1] Ms Ranjanben Yagnik has made an application under s.394 of the *Fair Work Act 2009* (FW Act) seeking a remedy for an alleged unfair dismissal. Ms Yagnik was employed as an Educator by 1st Impressions Education Group Pty Ltd T/A 1st Impressions Early Learning Centre (1st Impressions or the Respondent) at its Nailsworth Child Care Centre under a contract of employment executed on 7 August 2019. The contract nominated an expected start date of 9 September 2019, or to be advised and agreed.[1] Ms Yagnik's first day of actual work under the August 2019 contract was on 30 September 2019 and she worked as a part-time employee with some fluctuation of hours from the base of 28 hours per week nominated in the employment contract.[2]

[2] 1st Impressions terminated Ms Yagnik on 9 October 2020, with 4 weeks notice ending on 6 November 2020, which was worked by the Applicant. Although styled as being a "notice of non-renewal of contract" the Respondent now accepts that this was a dismissal. The stated reason for the dismissal at the time was:

[1] Attachment RY2 to exhibit A1.

[2] Attachment RY2 to exhibit A1.

> "Upon consideration of your performance/conduct and consultation with supervisors and colleagues, we have decided not to update your contract anymore."[3]

[3] The termination was communicated to the Applicant by email and there is no suggestion of any discussions between 1st impressions and Ms Yagnik in the immediate lead up to that action.

[4] Ms Yagnik contends that there were no performance or conduct matters raised with her or evident in the workplace and there was no reasonable basis for the dismissal. Further, she contends that the materials and events now relied upon by 1st Impressions are a post-dismissal invention. Ms Yagnik seeks compensation.

[5] 1st Impressions asserts that there was a valid reason for dismissal and has provided a series of documents that it contends were created at the time of the relevant events and support both the existence of performance and conduct problems, and the fact that these were discussed with Ms Yagnik. It also provided statements from some of the Applicant's former work colleagues about Ms Yagnik's alleged work performance and conduct.

[6] Given the obvious factual disputes here, I have conducted a Determinative Conference[4] to enable both parties to lead and challenge the competing evidence and to make submissions.

[7] For reasons that are set out below, I have found that Ms Yagnik was unfairly dismissed and that a payment of some compensation is appropriate. The basis for these conclusions is set out in this Decision.

2. The cases presented by the parties

2.1 Ms Yagnik

[8] Ms Yagnik contends that there was no valid reason or reasonable basis for her dismissal and asserts:

- To the extent the Applicant's dismissal is said to have related to unsatisfactory performance by the Applicant, pursuant to section 387(e) she had not been warned about that unsatisfactory performance prior to dismissal.
- Her performance was not unsatisfactory and contrary to the documents provided by the Respondent at no time was any notice provided to her, written or verbal, to indicate the Respondent held a view that her performance was unsatisfactory.
- The Respondent has not identified any conduct which it specifically cites as being misconduct. However, the lodged material suggests events such as verbal abuse or taking photographs (described as 'stealing'). The Applicant denies these events occurred and denies having engaged in any misconduct during her employment.

[3] Attachment RY4 to exhibit A1.

[4] The application was subject to a hearing in the form of a determinative conference following consultation with the parties as contemplated by s.399 of the FW Act.

- The Respondent suggests that the Team Leaders at the Centre refused to have the Applicant work in their rooms. This alleged refusal appears to precede the dismissal decision on the Respondent's chronology of events. To the extent that the Respondent may contend this refusal is a reason for dismissal Ms Yagnik contends that:
    - it ought not be accepted that any such refusal occurred, and
    - if the Commission concludes such refusal did occur, a circumstance where Team Leader/Supervisors don't wish to work with an employee is not a cogent, sound or defensible reason for dismissal.
- In any event whilst it is alleged this was the Team Leader's view in September 2020, it is apparent the Applicant continued working at the Centre into November 2020.

[9] In terms of the procedure adopted by 1st Impressions, Ms Yagnik contends that:

- The Respondent failed to provide notification of the reason for dismissal to the Applicant prior to the dismissal or the details of the reasons now relied upon at any time prior to the lodgement of materials leading to this hearing;
- The Applicant was not provided an opportunity to respond to the reasons for her dismissal and was advised of the outcome by email. The Commission has previously found that dismissal via email is inappropriate and that effecting dismissal other than in person should only occur in rare circumstances such as where there is a genuine fear to safety, which is not advanced here;
- Following notification of dismissal, the Applicant then attempted to obtain an explanation for the dismissal decision and was given an unsatisfactory response that other unidentified staff allegedly did not want to work with her;
- Given the Applicant is a member of the United Workers' Union (UWU), had she been given advance notice of the Respondent's reasons and offered the opportunity of a disciplinary meeting, it is reasonable to assume the Union would have become involved in advance of any dismissal and had the opportunity to raise issue with the Respondent's misapprehension. It is possible this could have prevented the dismissal decision;
- The effect therefore of the failure to provide reasons and a response are, in the instant matter, of substantial significance. This includes that insofar as the Respondent may contest unsatisfactory performance of some kind, the Applicant had never previously been warned that her performance was not satisfactory; and
- Whilst the size and lack of internal expertise may have played some role in the deficiencies in the dismissal, they should not form a basis for amelioration of the complete failure to afford any semblance of procedure or natural justice to the Applicant.

[10] Ms Yagnik also contends that the documents relied upon by the Respondent may have been created in retrospect in response to becoming aware of a need to provide documents and

statements to substantiate what have been, prior to the lodged material, entirely vague and non-specific assertions of concerns regarding her employment.

[11] Ms Yagnik provided an original witness statement,[5] a reply witness statement[6] and gave sworn evidence.

2.2 1st Impressions Education Group Pty Ltd T/A 1st Impressions Early Learning Centre

[12] There is some continuing ambiguity about the reason or reasons for dismissal relied upon by the Respondent. This includes that certain additional matters were raised for the very first time during final oral submissions without any evidentiary foundation. I gained the distinct impression that by that stage, the Respondent was prepared to throw anything further that it could to contest the application. Given the absence of evidence or any proper basis, I have not had regard to the propositions made for the first time during the oral submissions without any evidentiary basis and which were not raised during the proceedings to that point.

[13] Based upon the case as substantively presented, 1st Impressions contends that it dismissed Ms Yagnik due to the following reasons:

- Yelling and abuse of another employee;
- The Applicant was unable to work alone, complete the appropriate reports and documentation expected of an Educator, or provide safe care for children;
- None of the Team Leaders wanted Ms Yagnik to work in their rooms; and
- Theft of Intellectual Property (IP) in taking one or more photographs of the curriculum documents displayed in the centre.

[14] 1St Impressions also contends that these reasons are supported by the evidence of its witnesses and, in effect, that such represent valid reasons for termination.

[15] As to the procedure that it adopted, 1st Impressions accepts that it may not have followed the appropriate processes leading to the dismissal, but does not concede that such means that the dismissal itself was unfair. In particular, it contends that Ms Yagink was placed into 4 different positions to seek to maintain her in appropriate employment and despite the fact that all of the room Team Leaders did not want to work with the Applicant, could still have changed its view on the dismissal during the notice period.

[16] 1st Impressions led evidence from the following:

- Sally Zhou[7], Centre Director;
- Helena Cai[8], Team Leader and Nominated Supervisor;

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[5] Exhibit A1.

[6] Exhibit A2.

[7] Exhibit R1.

[8] Exhibit R2.

- Ellen Palmer[9], Educator;
- Jenny Zhu[10], Team Leader;
- Roan Bassig[11], Educational Leader; and
- Yang Liu[12], Educator.

[17] Each of these witnesses provided a statement in some form and gave sworn evidence. In some cases, an Interpreter assisted in the course of that evidence.

3. Observations on the evidence

[18] There are major factual disputes in this matter. These include whether there were any actual performance or conduct deficiencies concerning Ms Yagnik, whether there were any proper warnings or disciplinary processes leading to the dismissal, and whether the documentary materials now relied upon by 1st Impressions are all genuine.

[19] I have resolved these matters largely based upon my view of the credibility of the witnesses and of the evidence more generally.

[20] I have some reservations about most of the witness evidence before the Commission. I consider that Ms Yagnik has understated the existence of some work performance issues that arose during her employment. However, this does not lead me to discount her evidence entirely and I have had regard to the fact that, despite the Commission's best endeavours, some of the detail of the Respondent's position was not put to the Applicant[13] and the absence of that detail should not be held against Mr Yagnik's capacity or willingness to accept that certain events may have taken place.

[21] I have significant concerns about much of the Respondent's evidence. This includes that the claimed seriousness of the alleged performance and conduct issues has in my view been overstated by most of the Respondent's witnesses and that the degree of claimed formality of the performance management arrangements concerning Ms Yagnik has been created, or at the very least modified, after the event for the purposes of these proceedings. This includes documents that were stated as being contemporaneous records of training or processes which made references to subsequent events, and their "amendment" after the event was only disclosed when this contradiction became clear. Some of the Respondent's witnesses could not satisfactorily explain when or why their statements were created and some of the statements were finalised by another employee of the Respondent and revised to include elements not originally posited by the witness. As a result, I treat those statements with considerable caution.

[22] With one exception, my general observations above apply to the evidence of each of the Respondent witnesses at least to some degree. However, I found the evidence of Ms Bassig to be given openly and honestly and I accept it. This includes her notes of staffing

[9] Exhibit R3.

[10] Exhibit R4.

[11] Exhibit R5.

[12] Exhibit R7.

[13] Due to the fact that details of some of the allegations were not known until later in the proceedings and some were not clearly articulated at all.

training, which included Ms Yagnik as part of the groups being trained, and her observations about Ms Yagnik's work performance.

[23] In reaching the above views, I have made appropriate allowances for the fact that some of the Respondent's witnesses gave evidence with the assistance of an Interpreter and that Ms Zhou represented her business and was not familiar with adversarial processes. In that regard, I assisted with the conduct of the determinative conference, gave considerable latitude as to the form of the Respondent's evidence and submissions, and enabled the presentation of the cases in a strictly non-partisan manner consistent with the statutory charter of the Commission.[14]

4. The broad facts of the matter

[24] Ms Yagnik was employed at the Respondent's Nailsworth Education Centre as an Educator with her first shift occurring on 30 September 2019 under the terms of an employment contract.

[25] The Applicant's employment contract provided for a 6-month probationary period and did not have any specified period of employment. The Applicant worked as a part-time employee with some fluctuation of hours from the base of 28 hours per week nominated in the employment contract. There is some tension as to number of hours that were expected by the Applicant as a result of discussions leading to the employment; however, I do not need to resolve that for present purposes.

[26] The childcare centre commenced operation in September 2019 and is a long day care centre. The centre's utilisation and staffing has increased since that time. At the time of the Applicant's dismissal, the centre cared for approximately 50 children per day and had a total staff compliment in the order of 19 employees.

[27] The Respondent does not have a human resources function; however, it has had access to some legal advice concerning the employment of staff[15] and is the process of upgrading its various policies.

[28] For reason outlined earlier, the formal application of some of those policies and the associated records is not consistent and I have found has been overstated in this case. Whatever records of training or discussions that are made at the time, are not disclosed to the employees and the accuracy of those provided to the Commission as contemporaneous records is very much in doubt. For reasons previously stated, the exception to this being the training notes created by Ms Bassig.

[29] I will return to the detailed findings about the alleged work performance and conduct relied upon by the Respondent. I will however deal with a number of key events to set the appropriate context.

[30] I do accept that there were some performance concerns regarding Ms Yagnik held by 1st Impressions. These primarily involved the degree to which Ms Yagnik could adequately

[14] See also the discussion of some of the relevant considerations for a similar Tribunal in *Minogue v HREOC* [1999] FCA 85.

[15] The Applicant's employment contract was prepared by a lawyer.

prepare or finalise programming or observational documents. I also accept that 1st impressions provided training to Ms Yagnik (and to other staff) to improve in this area but eventually took the view that this was not something that would be expected of her.

[31] I also accept that there was some tension between Ms Yagnik and some of the other employees and that elements of her work were subject to some legitimate criticism and mentoring. This includes that Ms Yagnik was from time to time instructed as to how to undertake certain tasks differently. However, the contention that Ms Yagnik could not be trusted to work alone or had handled children roughly, have not been substantiated by the evidence before the Commission. Further, I note that despite apparently having that conviction within weeks of Ms Yagnik's commencing, her employment continued for almost 14 months and ended in the context of the mistaken belief that the contract was, in effect, expiring.

[32] Ms Yagnik performed various roles at the direction of Ms Zhou. This included a period where a morning "shift" was undertaken in the reception of the centre. Further, I find that in the final period of Ms Yagnik's employment, her work as an Educator essentially involved doing lunch covers; that is, working shifts across the centre to enable other employees to take their meal break.

[33] Although Ms Yagnik was engaged in different roles and as an Educator in different rooms, and that this was related to Ms Zhou's view of her work performance, I am not satisfied that the basis for these changes was clearly stated to the Applicant or that any form of formal warnings about her continuing employment were given to her at any time.

[34] One of the specific allegations relied upon by 1st Impressions was that Ms Yagnik initiated and was involved in an argument with another employee, Ms Liu, in front of some children. This was completely denied. Estimates as to when this is said to have occurred varied amongst the Respondent's witnesses from early to late September 2020 and in one case,[16] some months earlier. It was not until final submissions that an actual alleged date, 3 September 2020, was cited.

[35] I find on balance that there was a mutual argument between Ms Yagnik and Ms Liu at some point in September 2020 and that this was not appropriate. It is also likely that this occurred in the context of a dispute about whether another employee should be given time to take a toilet break. However, I cannot be satisfied that this was as serious,[17] or as long,[18] as now claimed. I do accept that this event could reasonably have provided a basis for some discipline of Ms Yagnik (and probably Ms Liu) and note that even on the Respondent's best case, this actually formed only a part consideration in the reasons for its decision not to continue with Ms Yagnik's employment. I also observe that my findings about this incident are consistent with the relatively low key manner in which it was apparently dealt with by the Respondent at the time.

[36] Although there were some discrepancies between the Respondent witnesses as to the details, I do accept that in the lead up to the Applicant's dismissal, Ms Zhou did consult with the room Team Leaders as to whether they wished to have Ms Yagnik work in their rooms.

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[16] Ms Cai.

[17] Ms Palmer described the exchange as being "violent behaviour".

[18] Ms Zhu contended that the shouting went on for a full 5 minutes.

On the balance of probabilities, I find that they all indicated some reservations about this. However, the decision to dismiss Ms Yagnik was made by Ms Zhou largely based upon her own views of the Applicant's performance and conduct.

[37] On 9 October 2020, Ms Yagnik received a letter via email from Ms Zhou. The letter advised the Applicant that the Respondent had decided not to "update her contract anymore" and provided 4 weeks' notice that the contract would end on 9 November 2020. The letter also advised:

> "Upon consideration of your performance/conduct and consultation with supervisors and colleagues, we have decided not to update your contract anymore."[19]

[38] Ms Yagnik subsequently worked out her notice period with the last shift occurring on 6 November 2020. Subject to the following, this notice period was unremarkable and was worked without incident.

[39] When Ms Yagnik next saw Ms Zhou in the workplace after the dismissal, the Applicant sought some further explanation as to the reasons for her dismissal. Ms Zhou informed Ms Yagnik that the "girls" (the other staff) did not want to work with her.

[40] Ms Yagnik subsequently spoke about this with three staff. Two fellow Educators claimed to be unaware of the decision or any consultation and confirmed they had no issue working with her. A Team Leader at the Centre also expressed she did not understand any reason for the dismissal decision. I observe that very little can be drawn from this given that the decision had already been made, these employees would continue to work together for a known and short period, and the other employees had no reason to buy into any actual reasons for dismissal. However, the nature and tone of these exchanges would appear to be somewhat inconsistent with the fractured relationships now advanced by some of the Respondent's witnesses in their evidence.

[41] Ms Zhou contends that during the notice period she observed Ms Yagnik using a personal phone to take pictures of the curriculum displayed on the centre's walls (alleged theft of the Intellectual Property (IP)). This is denied by Ms Yagnik who also contended that the employees were not permitted to have their mobile phones in the rooms. Ms Zhou did not raise the allegation with Ms Yagnik at the time, or at any time prior to filing materials in these proceedings, took no action at the time to directly confirm whether Ms Yagnik was indeed taking photos, and permitted Ms Yagnik to work out the balance of her notice period without any steps being taken. The absence of these actions was not satisfactorily explained and there is no documentary or electrotonic evidence that would support the allegation.

[42] The IP theft allegation is a serious one and the Commission must be positively satisfied that the conduct occurred.[20] Based upon all of the evidence before the Commission, I do not accept that the alleged theft of the IP has been demonstrated.

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[19] Attachment RY4 to exhibit A1.

[20] *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Budd v Dampier Salt Ltd* (2007) 166 IR 407 at [14] - [16].

5. Whether the dismissal was unfair (harsh, unjust or unreasonable) – s.387 of the FW Act

[43] Section 385 of the FW Act provides as follows:

"**385 What is an unfair dismissal**

(1) A person has been ***unfairly dismissed*** if the FWC is satisfied that:

(a) the person has been dismissed; and

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

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

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

[44] It is common ground that Ms Yagnik was dismissed, 1st Impressions is not a small business within the meaning of the FW Act,[21] and that the dismissal was not a redundancy. As a result, Ms Yagnik's dismissal will be unfair if it was harsh, unjust or unreasonable.

[45] Section 387 of the FW Act provides as follows:

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

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

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

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

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

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

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

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

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

[21] Section 23 of the Act – a small business must employ less than 15 relevant employees at a particular time. The evidence is that approximately 19 employees were employed at the time of the Applicant's dismissal and the Respondent did not contend that it was a small business.

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

[46] It is convenient therefore to use the various provisions of s.387, with reference to the relevant circumstances, to outline my consideration of the matter.

Section 387(a) – whether there was a valid reason for the dismissal related to Ms Yagnik's capacity or conduct (including its effect on the safety and welfare of other employees)

[47] 1st Impressions relies upon concerns about Ms Yagnik's performance, including the capacity to perform the role of Educator and Receptionist, and her alleged conduct, as constituting the valid reason for dismissal:

[48] Valid in this context is generally considered to be whether there was a sound, defensible or well-founded reason for the dismissal. Further, in considering whether a reason is valid, the requirement should be applied in the practical sphere of the relationship between an employer and an employee where each has rights, privileges, duties and obligations conferred and imposed on them. That is, the provisions must be applied in a practical, common sense way to ensure that the employer and employee are each treated fairly.[22]

[49] It is also clear from the authorities that the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts before the Commission. That is, it is not enough for an employer to rely upon its reasonable belief that the termination was for a valid reason.[23] Equally, facts justifying dismissal, which existed at the time of the termination, should be considered, even if the employer was unaware of those facts and did not rely on them at the time of dismissal.[24]

[50] My findings about the reasons relied upon by the Respondent have been set out earlier in this Decision. I do not accept that the alleged theft of the IP has been demonstrated. As a result, I am not persuaded that this alleged misconduct occurred. Further, although the allegation may otherwise have been relevant to remedy, it would not be relevant to the dismissal itself, given that it would have occurred after the dismissal had been determined and communicated.

[51] I have found that there were some legitimate performance and conduct concerns; however, the seriousness and significance of these has been overstated by the Respondent for the purposes of these proceedings. I observe that despite allegedly forming the view very early in the employment that Ms Yagnik was not competent to work alone, did not have the knowledge of a qualified Educator, and that allegedly serious misconduct occurred at various

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[22] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 as cited in *Potter v WorkCover Corporation,* (2004) 133 IR 458 per Ross VP, Williams SDP, Foggo C and endorsed by the Full Bench in *Industrial Automation Group Pty Ltd T/A Industrial Automation* [2010] FWAFB 8868, 2 December 2010 per Kaufman SDP, Richards SDP and Hampton C at par [36].

[23] See *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1; *King v Freshmore (Vic) Pty Ltd* AIRCFB Print S4213 per Ross VP, Williams SDP, Hingley C, 17 March 2000; *Edwards v Giudice* (1999) 94 FCR 561; *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* AIRCFB Print S5897 per Ross VP, Acton SDP and Cribb C, 11 May 2000 and *Rode v Burwood Mitsubishi* AIRCFB Print R4471 per Ross VP, Polites SDP, Foggo C, 11 May 1999.

[24] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 373, 377–378; *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1, 14. See also *Dundovich v P & O Ports* AIRC PR923358 8 October 2002, per Ross VP, Hamilton DP, Eames C at [79]; *Lane v Arrowcrest* (1990) 27 FCR 427, 456; cited with approval in *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410, 467 and 468.

stages, 1st impression continued to employ Ms Yagnik for approximately 14 months, including during her notice period. Further, no formal warning was ever provided to Ms Yagnik.

[52] I observe that my findings are broadly consistent with the oral evidence of Ms Bassig, to the effect that Ms Yagnik did have some performance deficiencies associated with her written work and this was below the expected standard but was capable of performing other aspects of the Educator's role. Further, my findings about the seriousness of any performance concerns are also consistent with the informal and low-key manner in which they were dealt with at the time.

[53] In terms of the views of the Team Leaders, I would accept that this is a factor that might influence the ongoing employment of Ms Yagnik. However, I am not satisfied that there was an outright refusal to work with the Applicant, and in any event, given that the concerns now relied upon by the Respondent have been overstated, I do not consider that their views in themselves provide a valid reason for dismissal, at least at that point.

[54] Having regard to my findings and all of the circumstances of this matter, I find that there was not a valid reason for the dismissal of Ms Yagnik.

Section 387(b) – whether Ms Yagnik was notified of the reasons for dismissal

[55] This consideration requires the Commission to assess whether the Applicant concerned was relevantly notified of the reasons leading to the dismissal before that decision was taken.[25]

[56] It is evident that 1st Impressions mistakenly considered that Ms Yagnik's dismissal was the termination of a fixed contract. It is also clear that the employment contract was not a fixed contract, and even if it was agreed for 12 months as initially contended (and there is no reliable evidence to support that proposition) the dismissal was after the anniversary of the contract. This misunderstanding is likely have led the Respondent to the view that it was not necessary to apply any formal disciplinary processes including as contemplated by s.387(b), (c) and (e) of the FW Act.

[57] In any event, there was no notification to Ms Yagnik of the reasons for dismissal as relied upon by the employer in any manner consistent with this consideration.

Section 387(c) – whether Ms Yagnik was given an opportunity to respond to any reason related to her capacity or conduct

[58] The process contemplated by the FW Act does not require any formality and is to be applied in a common sense way to ensure the employee has been treated fairly.[26]

[59] In the absence of proper notice of the reasons, there was no meaningful opportunity for Ms Yagnik to respond to the reasons for dismissal related to her capacity or conduct as contemplated by this consideration.

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[25] See *Trimatic Management Services Pty Ltd v Daniel Bowley* [2013] FWCFB 5160.

[26] *RMIT v Asher* (2010) 194 IR 1. See also *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [75].

Section 387(d) – any unreasonable refusal by the Respondent to allow Ms Yagnik a support person

[60] There were no meetings directly in connection with the dismissal and no circumstances where a request for a support person was made by Ms Yagnik. Accordingly, this consideration does not arise.

Section 387(e) – if the dismissal is related to unsatisfactory performance by Ms Yagnik – whether she has been warned about that unsatisfactory performance before the dismissal

[61] This consideration relates to performance of the job. Performance in this context includes the employee's capacity to do the work, and the diligence and care taken with that work.[27]

[62] I accept on balance that Ms Yagnik was advised at times that her work performance required some improvement. I also accept that some additional supervision was provided and informal training initiated. This includes mentoring by Ms Cai and the training provided by Ms Bassig. However, I do not accept that that Ms Yagnik was ever warned that her employment was in jeopardy or advised that the employer considered her non-performance as seriously as it now contends.

[63] In this regard I observe that 1st Impression relied upon what it described as being a warning letter provided to all employees by email that was also displayed at the centre. When this document was produced,[28] this revealed a note to all employees that appropriately remined the employees of some important elements of the job and the workplace and thanked them for their hard work. I commend the Respondent on this approach, but it does not represent any form of warning as contemplated by s.387(e) of the FW Act.

Section 387(f) – the degree to which the size of the respondent's enterprise would be likely to impact on the procedures followed in effecting the dismissal.

Section 387(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.

[64] I deal with these two considerations together.

[65] 1st Impressions employed something in the order of 19 employees at the time of the dismissal. Although it is not a small business within the meaning of the FW Act, it is relatively small enterprise and has a very flat management structure. It does not have any internal human resources expertise and I accept that this is likely to have impacted on the procedures adopted in this matter.

[66] I have taken this into account in assessing the overall fairness of the dismissal.

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[27] See *Anetta v Ansett Australia Ltd* (2000) 98 IR 233.

[28] Exhibit A3.

Section 387(h) - other matters considered to be relevant

[67] Amongst other considerations, the Commission should also consider the impact of the dismissal upon the Applicant given all of the circumstances. This dismissal meant that Ms Yagnik lost her employment with the normal consequences of that event.

[68] The manner of dismissal, including the complete absence of any procedural fairness or discussions in the lead up to being advised by email, is a factor in this case exacerbating the unfairness of the dismissal.

[69] I observe that the decision by Ms Zhou to permit Ms Yagnik to work out the notice period, provided the centre with the Applicant's services during that period but also gave opportunity for her to seek (and gain) new employment. I have taken this into account.

Conclusion on nature of dismissal

[70] The FW Act requires a global assessment having regard to the various relevant statutory considerations. In that context, procedural unfairness is an important consideration given the provisions of the FW Act but does not necessarily mean that the dismissal was unfair. This is reinforced by the objects relating to Part 3-2 Unfair Dismissal of the FW Act in s.381 which relevantly provides as follows:

> **"381 Object of the Part**
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> … …
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> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.
>
> Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95."

[71] Despite the existence of some work performance concerns, I have not been persuaded that a valid reason for dismissal existed. There were no proper or adequate warnings about work performance or the alleged conduct concerns.

[72] There was no proper notice of reasons for dismissal prior to that decision being made and communicated to Ms Yagnik and no opportunity to respond. Despite the nature and size of the business, this absence of any due process created actual unfairness. The dismissal was also harsh given all of the circumstances.

[73] Given the facts of the matter and the statutory considerations, I am satisfied that the dismissal of Ms Yagnik was harsh, unjust and unreasonable. It was therefore unfair within the meaning of the FW Act.

6. Remedy

[74] Ms Yagnik does not seek reinstatement to her former position, but rather, compensation. As to the amount of compensation, Ms Yagnik contends that her earnings from employment following her dismissal have been largely comparable with her earnings with the Respondent thus far, except for 3 weeks over Christmas/New Year period 2020 where she had no earnings of any kind – and would have expected work if she had not been dismissed by the Respondent. As a result, Ms Yagnik contends that compensation should be calculated on the basis that her actual financial loss to date includes the 3 weeks lost over Christmas 2020 period, or more precisely, $2,301.60 gross. Ms Yagnik also noted that the compensation calculation should also take into account a component for future loss given the casual, "unreliable" nature of her current agency employment.

[75] 1st Impressions contended that it would pay whatever statutory entitlements existed and opposed this application. It also contended that if any compensation was considered by the Commission, the fact that it had mistakenly paid Ms Yagnik outstanding personal (sick) leave entitlements ($575.95) at the time of the cessation of employment, should be taken into account. I infer that the Respondent contends that this should be deducted from any compensation otherwise determined by the Commission.

[76] Division 4 of Part 3-2 of the FW Act relevantly provides as follows:

"**Division 4—Remedies for unfair dismissal**

390 When the FWC may order remedy for unfair dismissal

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

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

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

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

(3) the FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

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

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

… …

392 Remedy—compensation

Compensation

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

Criteria for deciding amounts

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

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

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

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

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

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

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

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

Misconduct reduces amount

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

Shock, distress etc. Disregarded

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

Compensation cap

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

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

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

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

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

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

393 Monetary orders may be in instalments

To avoid doubt, an order by the FWC under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order."

[77] The prerequisites of ss.390(1) and (2) have been met in this case.

[78] Section 390 of the FW Act makes it clear that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate **and** that compensation is appropriate in all the circumstances. Ms Yagnik has gained new employment and does not seek reinstatement. I find that such would be inappropriate in all of the circumstances of this matter.

[79] As set out above, under the FW Act, it is then necessary to consider whether compensation in lieu of reinstatement is appropriate.

[80] A Full Bench in *McCulloch v Calvary Health Care Adelaide*[29] (*McCulloch*) confirmed, in general terms, that the approach to the assessment of compensation as undertaken in cases such as *Sprigg*[30] remains appropriate in that regard.

[81] Section 392(2) of the FW Act requires me to take into account all of the circumstances of the case including the factors that are listed in paras (a) to (g). Without detracting from the overall assessment required by the FW Act,[31] it is convenient to discuss the identified considerations under the various matters raised by each of the provisions.

[82] In so doing, I observe that it is not permissible under s.392 of the FW Act to simply assess the loss by reference to the weeks after the Christmas/New year 2020/21 period when the Applicant was not paid for work in her new employment as advanced on Ms Yagnik's behalf. All of the considerations of s.392(2) must be taken into account. This includes that for

[29] [2015] FWCFB 873.

[30] *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21. See also *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc T/A Ottrey Lodge* [2013] FWCFB 431.

[31] *Smith and Others v Moore Paragon Australia Ltd* (2004) 130 IR 446.

most weeks either side of that period, Ms Yagnik was earning a higher wage than prior to the dismissal; albeit that this was a casual wage. I will return to these aspects below.

The effect of the order on the viability of 1st Impressions

[83] There is no indication that an order of the kind being considered here would impact upon the viability of that business.

The length of Ms Yagnik's service with 1st Impressions

[84] Ms Yagnik worked for 1st Impressions for just over 12 months. This is a relatively short period and I have taken this into account including, where relevant, in relation to the assessment of the other considerations.

The remuneration Ms Yagnik would have received, or would have been likely to receive, if she had not been dismissed – the projected loss

[85] This involves, in part, consideration of the likely duration of Ms Yagnik's employment in the absence of what I have found to be an unfair dismissal. That is, the establishment of the anticipated period of employment.[32]

[86] I consider that the anticipated period of employment for present purposes should be in the order of some 16 weeks, beyond the final date of employment. This includes a period of notice. This is reasonable in all of the circumstances including the fact that there were some legitimate issues in the workplace but should these have been handled in a manner as contemplated by the procedural considerations in s.387 of the FW Act, would on the balance of probabilities have meant that the employment would have continued for that period. Further, should the Respondent have identified that it was proposing to conclude the Applicant's employment on the (mistaken) belief that it was a 12-month contract, it is likely that the Applicant would have involved the UWU in the process and that this would have led to some extension to the period of employment.

[87] In adopting the period of 16 weeks, I am mindful that given the level of Ms Yagnik's post-dismissal remuneration, the longer the projected period, the greater the potential deduction under s.392(2)(e) of the Act to any compensation otherwise arising. However, in the absence of a valid reason for dismissal[33] and the other considerations outlined above, I do not consider that it is fair or appropriate to adopt a shorter period for present purposes.

[88] The evidence reveals that Ms Yagnik's wages with the Respondent was an average of $767.20 per week, taken over the last 3 months of her employment. I consider that this is a proper basis for present purposes.

[89] On this basis, the projected loss of wages was $12,275.20. I will return to the notion of lost remuneration, which would generally include superannuation (and not just wages), shortly.

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[32] *McCulloch.*

[33] See *McCulloch* at [27].

The efforts of Ms Yagnik to mitigate the loss suffered by her because of the dismissal

[90] Ms Yagnik sought and obtained employment almost immediately after the dismissal. I am satisfied that she has taken active steps to mitigate her losses and no discount to any compensation is warranted as a result of this consideration.

The amount of any remuneration earned by Ms Yagnik from employment or other work during the period between the dismissal and the making of the order for compensation

The amount of any income reasonably likely to be so earned by Ms Yagnik during the period between the making of the order for compensation and the actual compensation

[91] Ms Yagnik commenced to receive remuneration from alternative employment almost immediately after the dismissal. Although that employment is through an employment agency and is casual, other than for a period of 4 weeks immediately associated with the Christmas/New year 2020/21 period, Ms Yagnik's remuneration has on average been marginally higher than that gained whilst employed by 1st Impressions. Ms Yagnik confirmed during final submissions that this employment continued up until the time of the hearing and I infer is, in practice, likely to continue.

[92] The evidence reveals that 1st Impressions shut down for a period of about a week between Christmas and New Year 2020/21 and the employees in the position of Ms Yagnik took annual leave. In Ms Yagnik's case, this annual leave was paid out upon dismissal as accrued but untaken leave and I will return to the significance of this aspect shortly.

[93] The evidence also reveals that Ms Yagnik did not receive any work or payments from her new employment between 21 December 2020 and 10 January 2021. A period of about 4 weeks, with 1 of those weeks coinciding the Christmas shutdown implemented by 1st Impressions.

[94] The wages from the new employment received by Ms Yagnik in the projected period of 16 weeks following the Applicant's last day of work with 1st Impressions, amounted to $9,801.00 (rounded).

[95] This means that the deduction arising from this consideration in terms of wages is an amount of $9,801.00.

Any other matter that the FWC considers relevant and the remaining statutory parameters

[96] The remuneration from the new employer is somewhat more uncertain going forward given the casual nature of that work. It also includes a casual loading and unlike Ms Yagnik's employment with the Respondent, her new employment does not include paid annual or personal leave in addition to the wages. A proper comparison with the pre-dismissal earnings requires that some allowance be made for this difference.

[97] On the other hand, for reasons outlined above, if the employment had continued with the Respondent over the 16 weeks projected, there would have been a period of 1 week (paid as annual leave) during the Respondent's Christmas 2020 shutdown and the Respondent could properly argue that this has already been paid as annual leave upon termination. Having

regard to these competing considerations, I consider that it is fair and reasonable not to make a further adjustment to the calculation of the compensation in respect of either of these matters. That is, not to discount the wages for the new employment because it includes the casual loading and there is no additional paid leave, or to deduct the week of annual leave. These elements broadly offset one another.

[98] Section 392(3) of the FW Act provides that if the Commission is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct. For reasons set out earlier, I am not satisfied that misconduct, at least of the kind that would fairly lead to a deduction under this provision, has been demonstrated by the Respondent.

[99] 1st Impressions sought that the Commission take into account what it described as the overpayment by mistake of the Applicant's "sick" (personal) leave upon termination. This was raised at the very conclusion of the hearing and there is no evidence to provide the context for that payment, other than the fact that an amount was paid in that regard as part of the final week's pay.[34]

[100] It is likely that this was, at least in part, the pay-out of the personal leave and that such was not required by the relevant modern award or the FW Act. However, as it was raised so late in the hearing without any supporting evidence, and I cannot be certain as to the actual status of the payment or whether the Applicant took any personal leave that was being paid as a result of the final payment, I do not consider that I should make a deduction for this amount. I do note that the Respondent may be able to make a claim to recover an overpayment through other means; however, it should take legal advice about this aspect before considering any such action.

[101] The maximum compensation limit in this case is the **lesser** of 26 weeks remuneration received or entitled to receive before the dismissal occurred[35] (approximately $20,000)[36] or the stated statutory cap of $76,800.[37] The amount of compensation otherwise arising from the statutory considerations is far less than the lower figure.

[102] Taxation as required would be payable on any amount determined. I consider that superannuation of 9.5 per cent[38] should be taken into account in relation to the compensation figure in this matter as it would have been payable in relation to the projected wage loss (and is being paid in addition to the wages due from the new employment). Section 392 of the FW Act refers to the notion of "remuneration" and the inclusion of the superannuation payment is more consistent with that concept.

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[34] Based upon the final payslip provided to the Applicant – part of Annexure RY4 attached to exhibit A1.

[35] It is the higher of the amount of remuneration received or entitled to be received for the previous 26 weeks period that is to be used under s.392(6)(a) of the FW Act.

[36] Using the approximate figures relied upon by the Applicant but allowing for the impact of regulation 3.06 of *the Fair Work Regulations 2009*, which effectively requires the Commission to ignore the fact that she was, in effect, on unpaid leave for approximately three months during the 6 month period prior to her dismissal. The Respondent's lower figure of the amount for the previous six months also significantly exceeds the amount of the compensation awarded and as a result it is not necessary for me to determine this aspect with precision.

[37] Section 392(5) of the FW Act.

[38] Based upon the *Superannuation Guarantee Charge Act 1992* (Cth) and related scheme.

Conclusions on remedy

[103] Having regard to the circumstances of this matter applied to the considerations established by s.392 of the FW Act, I consider that it is appropriate to make an award of compensation to Ms Yagnik in lieu of reinstatement.

[104] The amount of compensation arising from the considerations and findings above, is as follows:

- Projected wages loss $12,275.20
- Less relevant wages from new employment ($9801.00)
- Compensation to be paid $2,474.20

[105] In addition, a superannuation contribution of 9.5% of this amount is also appropriate.

7. Conclusions and Order

[106] I find that Ms Yagnik was dismissed and that her dismissal was unfair within the meaning of the FW Act.

[107] I have found that compensation is appropriate in lieu of reinstatement and the amount determined above is also appropriate in all of the circumstances.

[108] The compensation payment is to be made within 14 days of this decision.

[109] An Order[39] consistent with the above is being issued in conjunction with this Decision.

COMMISSIONER

Appearances:

M McCarthy of United Voice on behalf of Ms Yagnik, the Applicant.

S Zhou on behalf of 1st Impressions Education Group Pty Ltd T/A 1st Impressions Early Learning Centre, the Respondent.

[39] PR730180.

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