REASONS FOR DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Tiffany Causer
v
Refined Learning Pty Ltd T/A ABC Refined Learning
(U2021/1955)

DEPUTY PRESIDENT BOYCE SYDNEY, 26 JULY 2021

Application for an unfair dismissal remedy – jurisdictional objections – applicant a volunteer and not an employee – respondent a small business employer who applied the Small Business Fair Dismissal Code – both jurisdictional objections dismissed – reason for applicant's dismissal arises from her querying her underpayment of wages – no valid reason for dismissal – no procedural fairness – compensation awarded.

Introduction

[1] On 9 March 2021, Ms Tiffany Causer (**Applicant**) filed an application for an unfair dismissal remedy with the Fair Work Commission (**Commission**), against her former employer, Refined Learning Pty Ltd T/A ABC Refined Learning (**Respondent**).

[2] The Applicant was terminated by the Respondent on 22 February 2021. She commenced her employment with the Respondent in November 2019. Ms Fiona Wen, Director/Owner, purchased the Respondent's business on or around 1 August 2020. There is no suggestion that the Applicant's service with the Respondent has been other than continuous for the purposes of s.22 of the *Fair Work Act 2009* (**Act**).

[3] The Applicant claims that her dismissal by the Respondent was "unfair" within the meaning of Part 3-2 of the Act. In opposing the claim, the Respondent raises two jurisdictional objections.

[4] On 14 July 2021 a telephone hearing was conducted to resolve the jurisdictional objections, and the merits of the Application. At the hearing, Mr Garry Dircks, of Just Relations Consultants, appeared with permission for the Applicant.[i] Ms Wen appeared for the Respondent (with the aid of an interpreter).

Evidence before the Commission

[5] The Form F2 filed by the Applicant alleges that her dismissal was for no valid reason, and was effected absent procedural fairness.

[6] The Form F3 filed by the Respondent raises two jurisdictional objections. Firstly, that the Applicant was not an employee of the Respondent, but a "volunteer". Secondly, that the Respondent is a small business employer and, in dismissing the Applicant, complied with the Small Business Fair Dismissal Code.

[7] In explaining those objections in the Form F3, the Respondent states:

> "Tiffany [the Applicant] is a volunteer in our tutoring centre (sic) is not an employee."
>
> "Tiffany is a volunteer in our tutoring centre from older principal. When we started running here, she already voluntary here."
>
> "We are a small business with only two full-time employees, others are all casual and no part-time employees here. We always complied with the Small Business Fair Dismissal Code very well."

[8] Further or in the alternative, as to the merits of the Application, the Respondent says that the Applicant was given warnings about her unauthorised mobile telephone use whilst tutoring in classes, various parents complained about her work, and she regularly failed to answer the questions of students she was tutoring or teaching (being questions that she should have answered).

[9] The jurisdictional objection that the Applicant was a volunteer (and not an employee) was withdrawn by the Respondent prior to the hearing (on 17 May 2021). Despite this concession by the Respondent, it is not clear to me at all the basis upon which such an objection was ever made in the first place.

[10] As to the jurisdictional objection that the Respondent is a small business employer who has complied with the Small Business Fair Dismissal Code, the Respondent has produced no evidence whatsoever as to compliance with, or even attempted compliance with, the Small Business Fair Dismissal Code. I therefore dismiss this objection, and again point out that given the absence of any evidence to support it, it is not clear to me at all the basis upon which such an objection was ever made in the first place.

[11] I note that the Respondent also appears to vaguely assert that the Applicant was not "dismissed", either because of a miscommunication, or because the Respondent offered the Applicant her job back post her dismissal. To the extent that the Respondent asserts that it did not dismiss the Applicant, having regard to the evidence, I reject it as baseless. The dismissal of the Applicant was unambiguously communicated to her by way of text message on 22 February 2021.

[12] The Applicant tendered a witness statement in her own name dated 16 June 2021 (Exhibit A1). Her evidence is that she is a university student, and was employed as a tutor and HSC student coaching specialist by the Respondent as its learning college (selective school) in Hurstville, New South Wales. The Applicant points out that the Respondent's business is a commercial enterprise where students pay fees for coaching and tuition, and that she was employed as one of a number of teachers and tutors engaged by the Respondent.

[13] The Applicant's uncontested evidence is that in or about June or July 2020 a woman that she knows as "Fiona" (being the English name given to the current owner Ms Wen),

started to attend the workplace each week to see how it was running. At one point the former owner was no longer there, and Fiona (being Ms Wen) was the only one there in charge.[ii]

[14] The Applicant points out that in the past the former owner would come out at the end of the day with an envelope with cash for each of the tutors and teachers. The Applicant says that following the change in ownership Ms Wen would hand out envelopes of cash on the same basis that the previous owner did. The Applicant says that she was being paid $105 per Saturday until January 2021. Her work included marking homework, and helping individual tutoring groups of 10 to 20 students (these students were in Year 2, i.e. 7–8 year-old students).

[15] The Applicant says that in January 2021 she started teaching classes of 10 which involved conducting whole lessons of course material, including maths lessons. She says that her pay went up to $140 per Saturday for that work. In addition to the weekend work, the Applicant was also allocated around five days of the same work on weekdays (where she was paid at the higher rate of $20 per hour since the new owner began running the business).

[16] The Applicant's evidence is that she contacted the Fair Work Ombudsman about her pay rates. The advice she received was that she is covered by the *Miscellaneous Award 2020*, and for a casual of her age working on a Saturday she should be paid $25.35 an hour. The Applicant says that on Saturday, 20 February 2021, after she received her pay, herself and other workers, including Ms Angela Cao, raised the issue about rates of pay with Fiona (Ms Wen). The workers pointed out that their hourly rates did not even match up for the weekday hourly rate of $20 per hour.

[17] The Applicant says that Fiona (Ms Wen), responded to her and said that the old boss paid that amount and that this was all that the business can afford. The Applicant says that then:

> "Fiona answered something in the Chinese language, which some of the workers (but not me) understood. Fiona avoided direct answers to the questions."

[18] On Tuesday, 22 February 2021, the Applicant received her roster by text message for March 2021. It was ordinary to receive her monthly rosters via text. When the Applicant looked at the roster, she was not rostered on at all. When she queried her absence from the roster via text, the response via text was "because we cannot match your requirements".[iii]

[19] The Applicant then texted back, "You cannot pay the minimum wage?", to which the text response was, "Hoping you find a higher wage job, thanks".[iv] The Applicant says her interpretation of this exchange was that she was dismissed from her job merely because she asked for the correct rate of pay to be paid to her.

[20] The Applicant also tendered the witness statement of Ms Angela Cao, her former work colleague. Ms Cao's evidence is wholly consistent with the Applicant, to the effect that after her shift on 20 February 2021, the Applicant and herself approached Ms Wen to discuss a possible pay rise, noting that there were unhappy about their current pay. Of this conversation, Ms Cao states:

> "Fiona concluded our discussion notifying she would discuss with her management and let us know in due time.

> On the 22nd February 2021, Fiona's manager (Katherine), terminated both Tiffany and I over text by presenting an empty roster (attach images).
>
> After questioning the empty roster she presented us, she responded with 'Sorry we cannot match your requirements. Hope you find a high paying wage'. To confirm, I asked her if I was terminated, and she responded 'yes'."[v]

[21] I note that "Katherine", as referred to in Ms Cao's statement, has not given evidence in these proceedings, nor have the factual issues surrounding the termination of both the Applicant and Ms Cao been put in contest in these proceedings by the Respondent.

[22] Ms Wen tendered a statement of herself in these proceedings.[vi] It is a statement of some 18 paragraphs. Nowhere in her evidence does Ms Wen address the reason/s for the Applicant's dismissal. Rather, her evidence is directed to matters surrounding Ms Wen's personal circumstances, and/or the circumstances of the Respondent's business, including the business' ability (or rather, inability) to pay any amount of compensation that might be awarded. Ms Wen, in her oral submissions at the hearing, acknowledges that the wrong thing was done to the Applicant, which she expresses her contrition for.

[23] Mr Dircks, in his written submissions on behalf of the Applicant, accurately sets out the summary of the factual background in this matter (by reference to the evidence), as follows:

> "1. The Applicant was employed by the Respondent and its predecessor for 16 months, from November 2019 until 22 February 2021 (see the Applicant's witness statement at paragraph 1; attachment TC8).
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> 2. The Applicant was paid at the rate of $140 per day for a 9 hour day on Saturdays and $20 per hour when she was rostered on to weekday work (see the Applicant's witness statement at paragraph 7, 12 and 14).
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> 3. The Applicant worked as a tutor and teacher (see the Applicant's witness statement at paragraph 4).
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> 4. The Applicant was dismissed after raising problems with the prevailing pay rates (see the Applicant's witness statement at paragraphs 23 to 27).
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> 5. The explanation for the dismissal at the time is set out in the text message exchange attachment TC7. This exchange explaining why the Applicant no longer appeared on the roster is "Because we cannot match your requirements" (obviously referring to the pay). The applicant wrote, "You cannot pay the minimum wage"; the response was "Hoping you will find a high wagr (sic) job. Thanks"
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> 6. The reasons given on the Form F3 for dismissal are disingenuous and simply cannot be accepted. They are allegedly playing with the phone in class, for which it is alleged that a warning was given, and alleged complaints from two parents.
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> 7. The Applicant gives evidence that at no stage was she playing with the phone during class, that she was never given a warning, and that no complaints were put to her. She gives specific evidence in relation to the parent who sought a refund, Ritesh

Singh, to the effect that this was not related to the period when she had dealings with that parent's child, but to earlier periods (paragraphs 34 to 36 of the Applicant's statement).

8. However, if the Commission were to accept that these matters were the genuine reasons for dismissal and ignore the obvious reason as set out in attachment TC7 and the applicant's evidence of the lead up to that, then it is relevant that this is not in the nature of alleged serious misconduct. This has an implication for the claim of compliance with the Small Business Fair Dismissal Code (if that is at all relevant).

9. Whatever the reason, given the dismissal of the contending reasons, neither constitutes a valid reason for dismissal related to conduct or capacity.

10. We submit that the Applicant was unfairly dismissed within the meaning of s.385 of the Fair Work Act 2009 (Cth) ('the Act') in that:

a. The Applicant was dismissed for the purposes of s.386(1)(a) of the Act;
b. The dismissal was harsh, unjust and/or unreasonable (for reasons set out in these submissions)
c. The dismissal is not claimed to be a case of genuine redundancy."

[24] Mr Dircks also made submissions going to why the dismissal of the Applicant is unfair:

"24. It is submitted for the reasons set out above that no valid reason for dismissal existed related to the Applicant's capacity or conduct; however, it is incumbent on the party that seeks to show a valid reason for the termination to establish this validity (see *Jobson v Gerrard Strapping Systems*).

25. It is submitted that the apparent reason for dismissal expressed in attachment TC7 is not a valid reason for dismissal, in that it is not sound, well-founded and defensible (per the requirement set out in *Selvachandran v Petron Plastics Pty Ltd*).

26. In *Selvachandran v Peteron Plastics*, Northrop J held that "A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason."

27. We submit that the reason for dismissal is indeed capricious, fanciful, spiteful and prejudiced.

28. Capricious is an appropriate adjective to describe what happened in that it has the meaning of "given to sudden and unaccountable changes of mood or behaviour". The Applicant raised a grievance related to wage rates and in response was dismissed.

s.387(b) WHETHER PERSON NOTIFIED OF THAT REASON?

29. This section is not relevant unless there was a valid reason for dismissal, which we say does not exist.

30. However, notification of the particular reasons for dismissal should occur before the decision to terminate is carried out (per *Gibson v Bosmac*, also *Nicholson v*

Heaven and Earth Gallery adopted by the Full Bench in *Crozier v Palazzo Corporation*).

31. Notification must be given in explicit, plain and clear terms.

32. This did not happen in either the sense of being notified before the decision to terminate was carried out or in any clear terms.

s.387(c) WHETHER PERSON GIVEN OPPORTUNITY TO RESPOND TO ANY REASON RELATED TO CAPACITY OR CONDUCT?

33. This section is not relevant unless there was a valid reason for dismissal.

34. However, as stated by the Full Bench of the Commission in *Crozier v Palazzo Corporation*:

> [70] Section 170CG(3)(b) and (c) are clearly related to the concept of "procedural fairness". The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. This principle is a well established incident of public administrative law. It is apparent from the Explanatory Memorandum that s.170CG(3)(b) and (c) are intended to import the principle into Australian labour law […]
>
> [73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted (Underlining added).

35. The opportunity to respond implies an opportunity that might result in the employer deciding not to terminate the employment if the response is of substance.

36. It is submitted that there was no conceivable opportunity for the Applicant to influence the Respondent's decision.

s.387(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

37. There was no refusal to allow a support person. There were no discussions as such.

s.387(e) IF DISMISSAL RELATED TO UNSATISFACTORY PERFORMANCE - WHETHER EMPLOYEE WAS WARNED ABOUT THAT UNSATISFACTORY PERFORMANCE?

38. We submit that there were no warnings.

s.387(f); s.387(g) THE DEGREE TO WHICH THE SIZE OF THE EMPLOYER'S UNDERTAKING WOULD BE LIKELY TO IMPACT ON THE PROCEDURES FOLLOWED IN EFFECTING THE TERMINATION? THE DEGREE TO WHICH THE ABSENCE OF DEDICATED HUMAN RESOURCE EXPERTISE WOULD BE LIKELY TO IMPACT ON PROCEDURES?

39. Employees who are about to lose their employment are entitled to expect a fair go, regardless of the size of the employer's undertaking or the absence of specialist human resources (*Pergaminos v Thian PL t/as Glenhuntly Terrace and Rieusset v Pastry Art Design PL*).

40. It is submitted that the manner in which the dismissal was affected was harsh and the Applicant was denied a fair go, despite the size of the business and the absence of human resource expertise.

s.387(h) ANY OTHER MATTERS FWC CONSIDERS RELEVANT

41. The principle of a 'fair go all around' applies to dismissals.

42. The impact of the dismissal on the employee's personal or economic situation may be taken into account (per the Full Bench decision *Ricegrowers Co-operative Limited v Schliebs*).

43. A dismissal may be

- Unjust because the employee was not guilty of the alleged misconduct
- Unreasonable because the evidence or material before the employer did not support the conclusion
- Harsh on the employee due to economic and personal consequences resulting from being dismissed, or
- Harsh because the outcome is disproportionate to the gravity of the misconduct (the punishment does not fit the crime).

44. We submit that a dismissal based on an employee seeking a pay rise or asserting their rights under an Award is simply contrary to any notion of a fair go.

45. We submit that the Applicant has simply not been provided a fair go all round. The dismissal was harsh, unjust and unreasonable."

Statutory provisions

[25] Section 385 of the Act reads:

"**385 What is an unfair dismissal**

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.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388."

[26] For the purposes of s.385 of the Act, I make the following findings:

(a) the Applicant was "dismissed" by the Respondent on 22 February 2021 (via text message); and

(b) the Applicant's dismissal was not consistent with the Small Business Fair Dismissal Code, nor was it a case of genuine redundancy.

[27] I also find that the Applicant's salary was less than the high-income threshold, had served the minimum employment period, and that there is no basis to find that the Applicant is not a person protected by Part 3-2 of the Act.[vii]

[28] Section 387 of the Act provides what matters must be taken into account by the Commission in determining whether a dismissal was harsh, unjust or unreasonable:

"**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

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

s.387(a) — Whether there was a valid reason for the Applicant's dismissal which is related to his capacity or conduct

[29] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded", and should not be "capricious, fanciful, spiteful or prejudiced".[viii] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[ix]

[30] Where a dismissal relates to an employee's conduct, the reason for dismissal might be valid because the conduct occurred and justified termination. The reason might not be valid because the conduct did not occur, or it did occur, but did not justify termination.[x] The question of whether alleged conduct took place, and what it involved, is to be determined by the Commission on the basis of the evidence in the proceedings before it.[xi]

[31] Where a dismissal relates to an employee's capacity (i.e. where the reason is associated or connected with the ability of an employee to do their job),[xii] and there is a dispute as to whether the employee possessed the requisite capacity to perform their job, it is for the Commission to resolve that disputed issue as a matter of fact.[xiii]

[32] Mr Dircks submits that the reason/s for the Applicant's dismissal are not sound, defensible and well-founded, but are capricious and/or spiteful. In my view, the evidence identifies that the Applicant was dismissed because she made an inquiry as to her rate of pay with Ms Wen. The termination of the Applicant for this reason would be unlawful under Part 3-1 of the Act. However, for the purposes of these proceedings I only need find that such a reason was not a "valid reason" for the Applicant's dismissal, and I make that finding. I concur with Mr Dircks' submission that the reason for the Applicant's dismissal in this case was capricious and spiteful.

[33] For clarity, I wholly reject all of the Respondent's assertions as to the Applicant being dismissed because she was given warnings, complaints were made about her, and/or that she failed to answer student questions in class. None of these assertions are supported by any evidence whatsoever.

s.387(b) — Whether the Applicant was notified of the valid reason; s.387(c) — Whether the Applicant was given an opportunity to respond to any reason related to his capacity or conduct; s.387(d) — Whether there was any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist at any discussions relating to dismissal; and s.387(e) — Whether the person had been warned about that unsatisfactory performance before the dismissal

[34] Section 387(b), (c), (d) and (e) all concern questions of procedural fairness and unsatisfactory performance. Based upon the evidence, I find that the Applicant was not afforded procedural fairness, and she was not warned about any matter (let alone

unsatisfactory performance). The matters that the Respondent relies upon as to the Applicant's conduct and performance are not supported by any evidence in these proceedings. Therefore, in relation to the matters that I am required to consider under section 387(a) to (e) of the Act, I find that they all weigh in favour of a finding that the Applicant's dismissal was harsh, unjust and unreasonable.

s.387(f) and (g) — The degree to which the size of the Respondent's enterprise would be likely to impact on the procedures followed in effecting the dismissal. 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

[35] Both of these criteria go to the question of procedures followed in effecting a dismissal. There is no evidence of any procedures adopted to dismiss the Applicant. Further, given that it appears to me that the Applicant's dismissal was for an unlawful reason, I do not give any weight to the small size of the Respondent's undertaking, or its absence of dedicated human resources specialist, in terms of the impact of these matters upon the procedures that were not followed when dismissing the Applicant.

s.387(h) — Any other matters that the Commission considers relevant

[36] Section 387(h) requires me to consider any other relevant matters. Mr Dircks submits that the unfairness in the Applicant's dismissal in this matter is demonstrated by the abhorrent behaviour by the Respondent, not only in dismissing the Applicant for raising a legitimate issue about her rates of pay, but also by reference to the Respondent's blatant non-compliance with the relevant Award, statutory record keeping requirements, and taxation laws. I accept that these matters may well constitute other relevant matters to be taken into account in determining whether the Applicant's dismissal was unfair, however, it is unnecessary for me to make findings as to same (i.e. beyond the findings I have already made as to an absence of a valid reason for the Applicant's dismissal, and the absence of procedural fairness if effecting her dismissal). Further, I do not accept that the evidence before me enables me to make findings, that on any view are serious, going to non-compliance with statutory obligations outside of Part 3-2 of the Act.

Conclusion – Applicant's dismissal was unfair

[37] Having considered and taken into account all the matters that I am required to under s.387 of the Act, I am satisfied, on the basis of the evidence and findings set out in this decision, that the Applicant's dismissal by the Respondent was "harsh, unjust and unreasonable". Her dismissal was absent a valid reason, absent procedural fairness, and absent any warnings as to unsatisfactory performance. I therefore find that her dismissal squarely fits with the ordinary meaning of each of the words harsh, unjust and unreasonable.

Remedy

[38] Division 4 of Part 3-2 of the Act deals with remedies for unfair dismissal, and reads:

> "**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.

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:
(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) 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 reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

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."

[39] The Applicant does not seek reinstatement. I equally consider reinstatement to be inappropriate, especially given the reasons for, and manner of, her dismissal. Indeed, in my view, requiring the Applicant to return to work with Ms Wen as her boss, would not be conducive to a productive or harmonious working relationship.

[40] Having regard to all the circumstances of this case, I consider that an order for compensation is appropriate. It is therefore necessary for me to assess the amount of compensation that should be ordered to be paid to the Applicant. In assessing compensation, I am required by s.392(2) of the Act to take into account all the circumstances of the case (including the specific matters identified in paragraphs (a) to (g) of this subsection).

[41] I will use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket*,[xiv] and applied and elaborated upon in the context of the current Act by Full Benches of this Commission in a number of cases.[xv] The approach to calculating compensation in accordance with these authorities is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination.
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> Step 3: Discount the remaining amount for contingencies.
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> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.
>
> Step 5: Apply the legislative cap on compensation.

[42] In relation to the assessment of compensation under s.392 of the Act by reference to the steps set out in *Sprigg*, the Full Bench of this Commission in *A1 Distributions v Humphries* has stated: [xvi]

> "… the first step to be taken in assessing compensation is to consider s.392(2)(c) - that is, to determine what the applicant would have received, or would have been likely to receive, if the person had not been dismissed. In *Bowden* this was described in the following way:
>
> > '[33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of

> reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:
>
> > "... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law."
> >
> > [34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the '*anticipated period of employment*'...'
>
> The identification of this starting point amount "necessarily involves assessments as to future events that will often be problematic". Once this first step has been undertaken, various adjustments are made in accordance with s.392 and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee's misconduct and the application of the cap of six months' pay. This approach is however subject to the overarching requirement to ensure that the level of compensation is in an amount that is considered appropriate having regard to all the circumstances of the case."[xvii]

[43] Mr Dircks submits that the Applicant would have continued in her employment for a period of at least 12 months. I am satisfied on the balance of probabilities that the Applicant would have continued in her employment, but for her dismissal, for a period of at least 12 months. Indeed there is no evidence of any performance or other issues that give rise to any period of continuing employment being less than 12 months. In my view, 12 months is an appropriate time for which to make an assessment of the Applicant's continued employment.

[44] Applying the submissions of Mr Dircks, the figure of 12 months earnings comes to a gross amount of $13,961.40. This amount was not disputed by the Respondent.

Viability (s.392(2)(a)) and Length of service (s.392(2)(b))

[45] In reaching my determination as to compensation in this matter, I have had regard to the effect of any compensation amount to be awarded upon the viability of the Respondent's business. Ms Wen has given evidence and made submissions concerning the asserted detrimental impact upon her business of any compensation amount being awarded to the Applicant. However, this evidence merely identifies that the Respondent's business operational expenses are around $28,755 a month. There is no evidence as to the income (or likely income) of the Respondent's business, or why an any amount of compensation awarded to the Applicant will adversely impact upon the Respondent's business. Ms Wen also advances a general assertion as to the impact of the COVID-19 pandemic (and related lockdown measures) upon the business. Whilst I accept that the COVID-19 pandemic has a likely detrimental impact upon both employers and employees, again, in this case, there is no specific evidence as to the likely or actual costs arising from the impact of COVID-19 lockdowns upon the Respondent's business. It follows that based upon the evidence before me, I do not consider there to be any basis to reduce any amount of compensation awarded to

the Applicant because of actual or likely adverse impacts upon the viability of the Respondent's business.

[46] The Applicant's length of service, around one years and three months, in my view, does not justify any adjustment to the amount of compensation to be awarded.

Mitigation efforts (s.392(2)(d))

[47] Regarding mitigation efforts, the Applicant has given evidence as to her attempts to find further jobs. She has received JobSeeker, and has been applying for up to 15 jobs per month but has been unable to obtain further employment. In my view, it follows that there should be no deductions on the basis of the Applicant's attempts to mitigate her situation.

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

[48] The Applicant, between the date of her dismissal and the date of the hearing, has earnt $2,100.[xviii] She was not paid any notice upon dismissal. I therefore deduct from the amount of $2,100 from the sum of $13,961.40, leaving a gross amount of $11,861.40.

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

[49] No submissions were made as to this issue, and in my view, no adjustment to the amount of compensation should be made in respect of same.

Any other relevant matter (s.392(2)(g))

[50] It is necessary to consider whether to discount the amount of compensation for "contingencies". This step is a means of taking into account the possibility that the occurrence of contingencies to which the Applicant was subject might have brought about some change in earning capacity or earnings. Positive considerations which might have resulted in advancement and increased earnings are also taken into account. The discount for contingencies should only be applied in respect to an "anticipated period of employment" that is not actually known, that is a period that is prospective to the date of this decision.

[51] Because I am looking (in this case) at an anticipated period of employment which has already passed, in my view, there is no uncertainty about the Applicant's earnings, capacity or any other matters during the period post her last day of employment with the Respondent. In all the circumstances, my view is that it is not appropriate to discount or increase the compensation in this case for contingencies.

[52] Save for the matters referred to in this decision, my view is that there are no other matters which I consider relevant to the task of determining the amount of compensation in this case for the purposes of an order under s.392(1) of the Act.

[53] I have considered the impact of taxation, but my view is that I prefer to determine compensation as a gross amount and leave taxation for determination.

[54] In my view, the application of the *Sprigg* formula in this case does not yield an amount that is excessive or inadequate. Therefore, I do not consider there to be any need to reassess any of my assumptions on the amount of compensation to be awarded.

Misconduct (s.392(3))

[55] The Applicant did not commit any misconduct, so my view is that this has no relevance to the assessment of compensation.

Shock, distress or humiliation, or other analogous hurt (s.392(4))

[56] I note that in accordance with s.392(4) of the Act, the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap (s.392(5)-(6))

[57] The amount of $11,861.40 is less than the amount of the high-income threshold applying immediately before the Applicant's dismissal. However, having regard to ss 392(5) and (6) of the Act, the maximum amount I can order is 26 weeks' pay, resulting in a final gross figure of $6,980.70.

Instalments (s.393)

[58] No application has been made by the Respondent for any amount of compensation awarded to be paid in the form of instalments.

Conclusion on compensation

[59] Having regard to the matters I am required to consider under section 392(2) of the Act, my view is that a remedy compensation in the amount of $6980.70 (less applicable taxation required by law), plus an amount of 9.5 per cent superannuation on that amount, is appropriate in all the circumstances of this case.

Fair go all round

[60] I have had regard to section 381(2) of the Act, which is an overarching principle in unfair dismissal matters. It concerns a "fair go all round", and reads:

> "**381 Object of this Part**
>
> (1) The object of this Part is:
>
> (a) to establish a framework for dealing with unfair dismissal that balances:
> (i) the needs of business (including small business); and
> (ii) the needs of employees; and
>
> (b) to establish procedures for dealing with unfair dismissal that:
> (i) are quick, flexible and informal; and
> (ii) address the needs of employers and employees; and
>
> (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

> (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 *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95."

[61] In my view the outcome in this case is consistent with the objective of providing a "fair go all round" for both the Applicant and the Respondent.

Disposal of proceedings

[62] The following Order [PR731695] was issued on 14 July 2021 in disposal of this matter:[xix]

> A. The Respondent is to pay to the Applicant the gross sum of $6,980.70 (subject to applicable taxation as required by law) by way of electronic funds transfer into the Applicant's nominated bank account.
>
> B. The Respondent is to pay into the Applicant's nominated superannuation fund the sum of $663.17 (being 9.5% of the amount $6,980.70).
>
> C. Orders A and B above must be complied with within 14 days of the date of these orders.

DEPUTY PRESIDENT

Mr Garry Dircks, Just Relations - Consultants, instructed directly by the Applicant.

Ms Fiona Wen, Director, on behalf of the Respondent.

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[i] I granted permission for the Applicant to be represented by a paid agent in these proceedings. I did so taking into account the necessary considerations under s.596 of the Act, and specifically having regard to the fact that the Applicant was not in a position to represent herself, and that the Respondent was legally represented at the time Ms Wen's evidence was settled and filed (albeit such legal representation was withdrawn prior to the hearing). In my view, based upon these facts, it would be unfair to refuse to allow the Applicant to be represented in these proceedings (s.596(2)(b)). (I note the submissions as to representation by Mr Dircks, on behalf of the Applicant, dated 4 June 2021).

[ii] Applicant's Statement, at [10]-[18], and [22]-[28].

[iii] Applicant's Statement, Annexure "TC-7".

[iv] Ibid.
[v] Exhibit A2, Ms Coa's Statement.
[vi] Exhibit R1.
[vii] Sections 382(a) and 382(b)(iii) of the Act.
[viii] *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333; (2000) IR 371 at 373.
[ix] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
[x] *Edwards v Justice Giudice* (1999) 94 FCR 561; (1999) 169 ALR 89; [1999] FCA 1836 at [7].
[xi] *King v Freshmore (Vic) Pty* Ltd Print S4213 [2000] AIRC 1019 at [23] to [24].
[xii] *Crozier v AIRC* (2000) 50 AILR 4-488*;* [2001] FCA 1031 at [14].
[xiii] See more broadly: *Jetstar Airways Ltd v Neeteson-Lemkes* [2013] FWCFB 9075; *CSL Limited v Chris Papaioannou* [2018] FWCFB 1005.
[xiv] (1998) 88 IR 21.
[xv] *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762*; Bowden v Ottrey Homes Cobram* [2013] FWCFB 431.
[xvi] [2016] FWCFB 7206.
[xvii] Ibid at [16]-[17].
[xviii] Transcript, PN86-PN87.
[xix] This decision was originally made on an *ex-tempore* basis on transcript. In making my decision on transcript, I reserved the right (at the time the *ex-tempore* decision was handed down) to add to or amend the *ex-tempore* decision when publishing these reasons for decision, and I have done so accordingly.