



DECISION

Fair Work Act

2009
s.394—Unfair dismissal

Mahdiah Rezaeifard

v

Green Leaves ELC Pty Ltd T/A Green Leaves
(U2020/13325)

COMMISSIONER HUNT

BRISBANE, 13 SEPTEMBER 2021

Application for an unfair dismissal remedy.

[1] On 7 October 2020, Mrs Mahdiah Rezaeifard filed an application for unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act) alleging that her employer, Green Leaves ELC Pty Ltd T/A Green Leaves (Green Leaves/the Respondent), unfairly dismissed her.

[2] Mrs Rezaeifard commenced employment with Green Leaves on 28 August 2019 and was dismissed on 18 September 2020.

[3] The matter was heard before me via telephone on 26 February 2021. Mrs Rezaeifard represented herself with her husband Mr Aria present. The Respondent was represented by Ms Louise Auer-Hernandez, Senior Human Resources Manager. After obtaining the views of the parties, I decided to hold the matter as a determinative conference.

Relevant Legislation

[4] Section 394 of the Act sets out:

“394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.”

[5] Further, ss.385 and 387 provide:

“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.”

“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 Rezaeifard'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.”

[6] There are no jurisdictional issues preventing the Commission determining if the dismissal was unfair. The application had been made in time. Mrs Rezaeifard has been dismissed and has met the minimum employment period. Green Leaves is not a small business. The dismissal was not that of a genuine redundancy. Accordingly, it is necessary to determine if the dismissal was unfair having regard to the considerations in s.387 of the Act.

Evidence of Mrs Rezaeifard

[7] Green Leaves is an Early Learning Centre with various centres nationally. Mrs Rezaeifard was employed as an Assistant Educator on a part-time basis working between 15 and 37.5 hours a week.

[8] In May 2020, Green Leaves requested Mrs Rezaeifard complete a JobKeeper application form. She advised that she could not complete the form as she was claiming JobKeeper through her family business where she provides assistance as an employee to her husband. The evidence before the Commission is that Green Leaves was not aware of this other employment. The other employment was not an issue, *per se*, however it resulted in Mrs Rezaeifard not being offered as many hours of work per week, as the wages paid to her were not subsidised through the JobKeeper programme.

[9] On 9 July 2020, Mrs Rezaeifard met with Ms Natasha Wheeler, Centre Director. Ms Wheeler's email to Mrs Rezaeifard on this date informs Mrs Rezaeifard that her request to work less than five days per week could not be accommodated due to growing numbers and a shortage of staff.

[10] On 10 July 2020, Mrs Rezaeifard replied as follows:

"Hi Natasha,

Thanks for your email.

Referring to my contract of employment, I am offered and employed as a permanent part-time employee.

As you know I have been flexible with my attendance with attending from two days to five days a week as per centre operational need. This includes short time notice and dropping from 4-5 days to two days a week.

While I understand the lack of resources in particular in recent weeks, I am not able to commit to attending in centre five days a week equivalent of 37.5 hours a week on a permanent basis. However to accommodate the centre need I can make myself available for five days for WE 17/07 & 24/07.

Also referring to the conversation and session we had yesterday, I appreciate honesty and trust in particular when it comes to bilateral relations. However, I am not feeling comfortable with sharing personal circumstances and decisions of other employee(s) in particular when it is concerned with their employment.

I believe they are responsible about their employment and should have direct and clear communication with the management rather these matters to be discussed by others in particular when those matters were not and still is not clear to me. I preferred to communicate and clarify the above in the morning, but was frustrated to be called "liar" when respecting other's privacy!

I trust the above clarifies my thoughts, commitments and what I can offer to accommodate operational needs.

Kind regards,

Mahsa Rezaei"

[11] Mrs Rezaeifard's evidence is that she was challenged during this meeting as to why she had not disclosed another employee's notification of resignation. Mrs Rezaeifard's position is that if an employee wishes to resign, they should do so to management and she did not wish to engage in gossip.

[12] On 14 July 2020, Ms Wheeler sent the following email to Mrs Rezaeifard:

"Hi Mahsa

I feel your email to me dated Friday 10th July 2020 warrants a response given the circumstances of the situation and the allegations you make towards me in relation to your allegations of being called a liar – a word I never used to describe you.

To summarise the events which led to this I note the following;

- On Thursday morning at approximately 8am I overheard you speaking to another team member about Naya resigning. This conversation took place in the playground surrounded by children
- I asked who you were talking about and you responded “no one”
- I then proceeded to ask you not to talk about what I had heard given that you were meant to be supervising children Later on that morning in the kitchen area
- I asked you again who you were talking within the playground area to which you responded “Susan and her job”
- That afternoon, when the ratio allowed, I asked you to come into the planning room for a chat with Sam. I addressed what happened with you that morning. I relayed my disappointment with being lied to and provided clarification as to why I was disappointed that you lied to me. As part of this conversation I discussed the importance of trust, communication and a time and place for those types of confidential conversations. As part of this conversation you confirmed that you understood and recognised what you had done
- At no point in that conversation did I call you a liar, I did however relay my disappointment with being lied to which evidentiality was the case
- This conversation was inappropriate and could certainly be defined as gossiping
- Whilst employed with Green Leaves you are required to abide by our Code of Conduct which states that all staff must “act with honesty, integrity and professionalism” – the behaviour displayed above would certainly being [sic] this into question

In terms of clarification around your hours, I note that you are employed as a part-time employee, defined under the Award as: As detailed below in my earlier email (dated Thursday, 9 July 2020) I note that at this time, I am unable to accommodate your request, due to the needs of the Centre, and given that our occupancy is growing very quickly and also given that two employees are finishing up within the next two weeks.”

[13] On 16 July 2020, Mrs Rezaeifard responded to Ms Wheeler:

“Hi,

Thanks for your email. There are several items in the last email that are inaccurate or incorrect. This includes but not limited to:

1- It should be noted at the time of the referred conversation, I was not in my room as I was dropping my son. Also, I had not started my shift and was not supervising any children at the time.

2- In line with the item above, there was no conversation about the need to “supervise children”. If this conversation was necessary it should have been made with people in the room supervising children at the time.

3- I do not simply differentiate between “being lied to”, “you lied to me” and “liar”. They are in essence the same thing.

4- Totally agreed about the comments about “time” and “Place” about the confidential conversation. Same principles applies to everyone and one should note I was not the individual that started the conversation.

5- As per my previous email, I consider employees’ personal matter private and not sharing those details with anyone including management. In contrary to what suggested I stopped any gossip by not sharing those details with anyone including you at the time. This should be respected!

While I strongly believe I am insulted and blamed by the attitude, words and phrases that are used to describe the situation (i.e. dishonesty, trust, integrity, lie, gossip, etc.) for such a trivial incident, it is equally clear that with the approach taken to date, a simple matter is quickly getting out of hand and deteriorating the working relation that grew since last year. As an example, I can see people are asked to prepare statements by the management. As this “confidential matters” gets to the bigger circle of the centre staff and possibly even beyond due to the actions taken by the management, I reserve the right to defend my integrity when being asked about the circumstances around the incident.

Moving forward I am not interested in the style and discussion of “I said”, “you said”, “she said” and prefer not to drag a simple incident (even being uncomfortable) into a major headache for everyone.

The bottom line is that if circumstance around resigning an employee result in losing another employee, I am speechless to describe the actions and approach taken.

Finally, in regards to working hours, I have not made any “request” to change my working hours or shifts and have been simply responding to the management request of working five days a week. As you know I have been requested by the centre to work two days a week in early April due to the business need which I totally understand and accepted. This was later increased to more number of days and I have made myself available when possible to support the business operation.”

[14] On 17 July 2020, Mrs Rezaeifard was issued with a Show Cause letter, after complaints were received from other staff members regarding her conduct. The letter reads.

“Dear Mahsa,

Show Cause Letter

Further to concerns the Company have surrounding your conduct, and allegations which have been made with regard to inappropriate comments made by you, the Company is carrying out an investigation into this matter.

Specifically, it has been alleged that you have made comments to other staff as follows:

- “They don’t pay you so just go home”
- “You shouldn’t trust anyone you need to be careful”
- “Naya should be doing this because she is the group leader” (in response to a situation in which Naya had a stomach bug and had to go home and so couldn’t do it)
- “Melita is not a nice person”
- “Sammy, Sam, and Jazz are lazy”
- “I don’t like children I do this because I have to”
- “Farhat doesn’t do anything because of Fox”
- “You need to be more firm with children you are too kind that’s why Toddlers don’t listen”
- “Don’t do the extra job you are not free”
- “How many nappy changing you did? Don’t do this time just don’t help Jazz that’s not your turn”
- “Sam and Jazz run away from Nappy changing that’s why they do running because they are Australian”
- “Cece loves blond girls not like us Asians”
- “Be careful don't trust anyone”
- “Jazz is lazy”
- “Sam is too young to be the assistant manager and doesn't know how to do her job”
- Allegations that you have told another educator that “being an educator in childcare is degrading”

In addition to the above, you have been observed regularly on your phone on the couch in the pre-kindy during sleep time which is a breach to policy.

These allegations, if substantiated, constitute misconduct and are in breach of your obligations as an employee, your position description and the Green Leaves policies and procedures, specifically;

- Code of Conduct
- Complaints, Counselling and Disciplinary Policy
- Staff Handbook
- The Green Leaves Commitments

As a result of these allegations, I require you to respond to me in writing, [redacted], by 5pm on Monday 20th July 2020 to show cause as to why Green Leaves should not take formal disciplinary action against you up to and including termination of employment, resulting from these allegations.

Please be aware that no conclusions have been reached regarding the outcome of this investigation at this stage. You should also be aware that you have a responsibility to be truthful in our investigations, should Green Leaves find that evidence obtained during our investigation leads us to believe you have not been truthful in your

response, this behaviour will be considered in deciding an outcome, which may lead to termination of employment.

You are also advised that this investigation is confidential and you are directed not to discuss it with anyone in the workplace, except if they are acting as your support person through this investigation process. We wish to remind you that should you discuss this matter with any other employee in the workplace, the employee may feel uncomfortable with this communication, and this will also be considered in determining an outcome.

We appreciate your full participation in this process, however if you do not provide a response, or should you fail to take part in this process, the Company will have no option but to proceed in relation to this matter on the information before it.

Yours sincerely

Karen Macken
People and Performance Specialist”

[15] Mrs Rezaeifard’s response dated 20 July 2020 is as follows:

“Hi Karen,

In response to the show cause letter sent on Friday 17-07-20 I have provided my response below. Please note while your letter refers to statements, I am not sure if you have been provided with enough information about the events in the last ten days leading to the allegations.

As a result, I have provided you a brief in the following as I strongly believe I will be deprived of my rights when responding to some extracted phrases difficult to understand the context, situation and timing and references made .

1. First and foremost all of the following allegations are elevated only when I raised my concerns about management behaviour and conduct (i.e. being called “liar” by Natasha in the meeting on Thursday 09-07- 20). The following allegations are made as widespread and continuous misconduct spanning over an extended period of time. I consider the statement incorrect, misrepresented, inconsistency and inaccurate and would like to point out that there has been absolutely no issue, discussion or meetings about any of this alleged misconducts to date. One should reasonably expect that since commencing my position on Sep 19, at least in some limited cases there should have been some concerns raised by the management with a request to address such misconducts. This obviously has not been the case which bring me to the conversation that I had with Melita in the meeting that she specifically said she will get statement from other employees that turns out to be about irrelevant matter with people not related to the matter remotely.

2. It should be noted the event that has resulted in raising the following items, are related to an incident around 8:20am on Thursday 09-07-20. In summary, while I was dropping my son to kindy room in upstairs and prior to starting my shift, Stephenie

called me while she was in lower playground. I told her that I have not started my shift yet if she needs me to assist her. She said she wants to discuss something and not asking me to do any work. As she is my son educator I was under the impression that she needs to discuss something about my son. She asked me “Do you know Naya is decided to resign?” (Naya is my group leader and both were working together at closing shift the day before), I replied “I am not aware of anything in particular and not sure if she has made any decision”. Within the first minute of this conversation Natasha overheard us and asked us what we are talking about. Considering

- I was not even aware of the situation with Naya’s future, right at the start of the day in the morning and;
- Not aware if there has been any discussion or decision that I am not aware of and;
- Respecting Naya privacy and in order to not share Naya’s personal situation,

I did not replied to her request and did not followed the discussion further with anyone about this matter.

3. Following above Natasha shut the door angrily and later in the day in the meeting stated that she does not trust me and called me a liar. To clarify I explained to her first of all I have not been aware of Naya’s situation specifically and even if I was, I respect Naya’s privacy and it is Naya’s decision to have a direct discussion with the centre manager. I also explained verbally and also in writing on the following day, that regardless of my knowledge at the time, I have actually followed codes of conduct by not sharing other employees matter (by the way I did not know at the time anyway) and this should be respected rather than being penalized.

4. I would like to note that:

- All of the above details such as timing, locations, people presence at the time can be verified by checking CCTV camera and sign in data.
- At the time of the above discussion around 8:20am, I was not in my room, did not start my shift and were not supervising any children. The allegation that I have ignored my duty to supervise children at the time is simply not true.
- Other staff members in Nursury [sic] room (Nicole, Nasim and Stephanie) can validate above matters.

5. I have explained the above in a meeting on Thursday 09-07 to Natasha and expected a simple apology for a misunderstanding of the situation. I was considering this enough and was ready to move on. Rather I have been insulated with several labels such as “dishonest”, “trust issues” and “gossiping” all because I have not responded to her request to share some potentially private matters. Again one should note that at the time even I was not aware if Naya’s resignation is true or not.

6. It seems rather than addressing the above issue, management including Natasha and Melita started to deviate from the matter and send me correspondence about needing me to work five days a week (rather four days). I was surprised to see

there is no reference to any of my concerns and the matter is switched to a completely irrelevant matter.

7. I replied to the email (see attached) and respectfully explained my concerns again briefly.

8. Following this and again irrelevant to the original matter, I have seen an attempt to raise some other issue including several new allegations against me which referring to item 1 there was no discussion before.

9. While I have been told this is all confidential (and I respect that), I know many staff were talking about these recent events. So it is simply not acceptable that everyone including managers is allowed this issue to get out of control and openly and widely discussing this matter about me and requesting statement to be gathered in a petition style and at the same time keep telling me do not speak to anyone about this matter. As an example, I have been approached by Akari stating her regret and apologizing about what she is done. She said she could not sleep very well and wanted to hug me. I refused to have a conversation but was wondering what she is referring to and why she is apologizing.

10. I have provided my response to each statement in the following. Please note I have not been given the full statement and the following is based on limited information and extract that I have been given. Equally, I am not aware of whom or when some of the following statement are referred to and as a result, this limits my response.

11. Last but not least, I know in at least one occasion the statement is written by another person. Specifically I refer to the Akari's statement prepared by Jazz.

Statement	Comments
<p>a "They don't pay you so just go home"</p> <p>&</p> <p>"Don't do the extra job you are not free"</p>	<p>In several occasions Akari has been complaining (not to me only a but to a wider group) about lack of payment when she has to stay & for a longer period of time. Apparently as claimed by her she has been asked to stay longer due to ratio issues (lack of educators) and later found out she has not got paid for those extra time. Naya actually stated that we are not free and at the end of the shift you need to go home.</p> <p>While the above is NOT my statement, I fully agree as there have been several occasions where I was not get paid for the period of up to 30 min extra time as I was asked not to leave. So we had to wait until enough children to be picked up by the parents and ratio to be compliance. As this has been a reoccurring issue, it is unacceptable for regularly having educators underpaid. I was getting paid only after followed this up with Natasha even while the sign out</p>

	information has been available.
b “You shouldn’t trust anyone you need to be careful”	This is not my phrase. I believe this is what Natasha told Naya. You might ask Naya to clarify further.
c “Naya should be doing this because she is the group leader” (in response to a situation in which Naya had a stomach bug and had to go home and so couldn’t do it)	I am not clear on this statement, timing or the details. As far as I remember Naya was sick in the last week of June and went home sick. So not sure what is the issue if she has ended up going home
d “Melita is not a nice person”	Not clear on this statement and its timing. Is this refers to the last two weeks or before that? Is it alleged that I have said that in the response of any particular event or in the meeting?
e “Sammy, Sam, and Jazz are lazy”	Sammy works with Krsity in junior kindy and actually I heard this statement from Kristy. This is NOT my statement.
f “Farhat doesn’t do anything because of Fox”	This is not my statement. Please kindly ask Farhat who actually said this to her. I was present at the time and it was made by someone else in reference to a non-compliance matter back in May. If required I will elaborate on this issue further.
g “You need to be more firm with children you are too kind that’s why Toddlers don’t listen”	There are several statements that it seems are misrepresented as my statement and inconsistency with my role in the centre. For the record I work in prekindy and not even working with Toddlers to comment about what is wrong with their room and/or what needs to change.
h “How many nappy changing you did? Don’t do this time just don’t help Jazz that’s not your turn”	Since working with Rizka and Naya, we have been working to come up with a clear and proper work allocation. It has been group leaders decision to have the first person starting in the day to do nappies and this will be followed by others as they start later in the day (i.e. 2nd person does 2nd run and goes on). When a new person started in our room it has been explained to everyone including myself to ensure clarity and to ensure everyone gets a fair amount of work even those that are not working regularly in our room. This has been a great initiative with no issue to date. This arrangement was developed by room

	leaders Nevertheless I consider this statement completely irrelevant because I am not working with Jazz. We are in two separate rooms.
i “Sam and Jazz run away from Nappy changing that’s why they do running because they are Australian”	Another inconsistent statement. Sam and Jazz are not even in my room. So similar to item “h” how I can comment on their performance without even working with them or being in the same room?
j “Cece loves blond girls not like us Asians”	This statement clearly shows the relevance, quality and consistency of the statements and how someone else point of view are fabricated as my comments. For you information I am not even from Asian ethnicity!
k “Be careful don't trust anyone”	This is another statement that I do know what context it refers too. I am not sure if it refers to an employment situation, personal life or something else.
l “Jazz is lazy”	Again difficult to comment due to the lack of details, but this might refers to the incident that I was asked to evaluate her performance requested by Natasha in late April. Natasha asked me for a frank and clear assessment as others expressing their concerns with her performance. I do recall telling Natasha that she needs more supervision and if providing enough direction, she is doing the job well. I specifically told Natasha that I do not want her to lost her job. So one should note that on one hand Natasha has had enough respect to request me to evaluate her, on the other hand if the statement is true why she has not lost her job? As recent as two weeks ago, I was asked to evaluate Tegan too. So again if I was not reliable or trustworthy isn’t it unreasonable to be asked by the management to evaluate two people in the period of two month.
m “Sam is too young to be the assistant manager and doesn't know how to do her job”	Actually I really respect Sam and her capabilities in her role. Sam is one of the last person in the whole centre that comes to my mind as an incapable person. This is not my statement.
n Allegations that you have told another educator that “being an educator in	I am proud of what I am doing and have been a hard worker since being an educator since 2018. I am

<p>childcare is degrading” & “I don’t like children I do this because I have to”</p>	<p>interested in applying my knowledge and learning in this role and really enjoy when I can make a difference. It is a quite pleasure to contribute to the children development and I have enjoyed numerous occasions when I have been thanked personally by the parents for my performance. As an example of this in writing, please refer to the review left on Google referring to my name specifically in April 2020 by “Nicole Ng” thanking me for what my team and I have achieved.</p>
<p>o In addition to the above, you have been observed regularly on your phone on the couch in the pre-kindy during sleep time which is a breach to policy.</p>	<p>It is suggested that I have been observed using my phone on “regular’ basis. First I am wondering if this is the case why this issue is not raised before. Secondly it is a widespread issue with educators using phones to take photos to be inserted in the stories later. We have specifically requested clarification from the centre manager about using the phone and writing the stories on Educa (as we did not have ipad) and were told that it is ok to use phone to write the stories during sleeping time as Apple shops are closed (which does not mean it is not possible to purchase the device). Using phone to write the stories is not limited to me or my room only and is something quite well known in the centre. If this is incorrect and needs change, it should be applied for everyone equally.</p>

Thanks for your time to review above and I am interested in not making this incident a major issue. This was not a major issue at the beginnings at all and could be resolved by having a clear and honest discussion. On the contrary, it seems the issue has got more personal with the insult lists growing with several incorrect statements that can be easily verified by checking CCTV and signing sheet (i.e. the claim that I was supervising children at the time) trying to fabricate this as misconduct on my side. Remarkably apology was offered to the person who started the conversation and was actually “supposed” to supervise children at the time.

Excuse was provided and my English understanding was questioned when I was upset about being called a liar. Instead, the explanation that I was provided (see attached emails) was that phrases such as ” ... being lied to and provided clarification as to why I was disappointed that you lied to me” does not mean I am a liar! This is supposedly in lieu of a simple apology and acknowledging my correct conduct of not to share any sensitive matters with others including management.

Obviously the same conduct applies to all employees including management and even for argument sake, if the information about Naya’s resignation was coming from me, rather than shutting the door loudly at the presence of children and trying to get into

‘gossiping’, we could be asked to stop the conversation (rather asking for details). Then later we could discuss the issue in a meeting involving three of us. Obviously this should have been focused on inappropriateness of such conversation rather than being only interested in the content of the conversation and getting upset when this is not shared.

With several personal insults, disrespectful comments, incorrect statements and questioning my integrity and conduct, I am getting more determined to fully defend my rights and integrity as needed. Moving forward while I am more than happy to assist with any investigation and not interested to make the matter worse than what it has become to date by the approach taken by the management, I am not interested in further meetings with Melita after number of meetings to date as her attitude, tone and behavior to date has been quite disrespectful and stressful.

I would like to mention I have been provided with very limited time frame to respond to the show cause letter with effectively no time from Friday mid day to Monday 5pm. Considering the expectation that I need to attend in the centre from 8:45am to 5:15pm today (Monday 20-07) I preferred at least three business days as a minimum to seek, book and arrange time off work. However with the interest of assisting the investigation process I have decided to respond in good faith.

I am fully committed to my job and never allowing these matters to impact on my performance. As mentioned earlier I consider all statements incorrect, misleading and inconsistency and in at least one case prepared by others. As a result I do NOT believe taking any formal disciplinary action against me due to the above allegation is fair.

Kind regards
M. Rezaei”

[16] On 30 July, Ms Karen Macken, People and Performance Specialist, replied to the Applicant’s response to the Show Cause letter noting that:

“Hello Mahsa

I can confirm that I have reviewed your response to the show cause letter dated 17th July 2020 and can confirm that the Company will take no further action regarding this matter.

I am satisfied with the responses you provided regarding this matter.

I would ask that you continue to maintain confidentiality around this matter.

If you have any questions or concerns, please do not hesitate to let me know.

Regards,

Karen Macken”

[17] Mrs Rezaeifard stated that soon after, she was informed the centre required a person to work five days per week in the pre-kindy room. She had been working an average of four days per week. Ms Melita Janevik, Operational Leader, and Ms Wheeler informed her they had nominated another employee to work in her room, and Mrs Rezaeifard would then be required as a float across the various rooms. She continued in the float role for five weeks when Ms Janevik raised an issue about Mrs Rezaeifard's back pain.

[18] As I understand it, Mrs Rezaeifard wished to stay in the older children's room, looking after 3-5 year old children. This is so because they required less carrying. Children in the younger rooms required more lifting and comforting. She had a discussion with Ms Wheeler and then had a telephone consultation with Dr Azarian, a General Practitioner. Her medical certificate dated 9 September 2020 is reproduced below:

“Mrs Mahdiah Rezaeifard has chronic lower back pain which has got worse in the past year and would benefit from working with children at the age group of 3-5 year old to prevent frequent exacerbations.”

[19] During the determinative conference there was a great deal of discussion as to why Mrs Rezaeifard attended upon Dr Azarian, and whether she did have chronic lower back pain:

Commissioner: Ms Rezaeifard, this is for you only - not for your Mr Aria, thank you. Ms Rezaeifard, you've got a medical certificate here of 9 September 2020 that says that you have chronic lower back pain which has got worse in the past year and you'd benefit from working with children at the age group of three to five year old's to prevent frequent exacerbations. Is that what you said to Dr Azarian, is it?

Ms Rezaeifard: Yes, because I just on the phone and Tash asked me what I told to my GP, because just I stay in my room.

Commissioner: And you told the doctor that you've got chronic back pain?

Ms Rezaeifard: Yes, because Tash told me just ask your doctor to write this letter, then you can stay in your room.

Commissioner: Why did you report to the doctor that you had lower back pain?

Ms Rezaeifard: Because I talk to my doctor, if he say you right, I've got the back pain, I cannot lift the children. I can stay in my room; I can stay in the three to five years old. Then she writes the letter I ask.

....

- Commissioner: So, you told your doctor - let me be clear Ms Rezaeifard. You told your doctor that you didn't have back pain, but you needed a certificate to say that you did?
- Ms Rezaeifard: I told to my doctor that if you write I have got back pain, I can stay in my room and my director asked me if I have got this letter, I can stay in my room.
- Commissioner: So, you didn't think that that's fraudulent?
- Ms Rezaeifard: No, I don't have any pain.
- Commissioner: But obtaining a medical certificate - - -
- Ms Rezaeifard: (Indistinct)
- Commissioner: Do you understand what fraudulent means?
- Ms Rezaeifard: No, I don't know.
- Commissioner: You don't know what being fraudulent means? Producing a medical certificate that says that you've got back pain when you know it's not to be true?
- Ms Rezaeifard: Yes. Just because Tash told me if you give me this letter - it's not my fault, I told you, I listen to my director. I should not listen to my director. Because I didn't (indistinct).
- Commissioner: You conspired, did you; you conspired did you Ms Rezaeifard? You didn't have any pain and you went - you had a telephone consultation with a doctor and what did you tell the doctor, that you didn't have pain, or that you did have pain?
- Ms Rezaeifard: I told her that I don't have a pain, but I want to have a letter, if I lifting the children, they are like a baby or tiny child, they are big, it's hard for me to lift them. Then my director asked me if you can write a letter for me, I cannot saying that three to five years old. Just if you send it to me as an email, because I cannot come see you because I finish - I don't remember that day, 4:00 or 4:30, I don't remember. But that time when I finish, my doctor wasn't available. And then - - -
- Commissioner: So, you asked a doctor to provide you a false medical certificate, did you?

- Ms Rezaeifard: Doctor ask anything Tash ask me.
- Commissioner: No, no, I'm asking that you and your acts right here?
- Ms Rezaeifard: Yes.
- Commissioner: Did you ask this doctor to provide you with a medical certificate that you knew was not factually correct?
- Ms Rezaeifard: Yes.
- Commissioner: Well, that might constitute a crime, Ms Rezaeifard, and I need to warn you, that you don't have to answer any questions here where you may self-incriminate yourself?
- Ms Rezaeifard: To be honest, it's fine for me what happened, all of this (indistinct); it's really fine for me. To be honest, it's really fine, because I still had the problem that I was okay, I was (indistinct) I told you just when I was pregnant, I had a pain and now one day without any (indistinct) they send me just for the - going to (indistinct).
- Commissioner: I'm warning you that if you don't wish to answer a question on the basis that it may incriminate you, then you are welcome to do that and I will not make any adverse findings against your failure to answer any question?
- Ms Rezaeifard: Yes. Because then I listening a lot, so I get the bad thing.
- Commissioner: I understand. I'm just terribly concerned with this course of action and I'm only hearing it today. It's a very serious issue?
- Ms Rezaeifard: Yes. So, what is your solution?
- Commissioner: I don't have to come up with the solutions, Ms Rezaeifard, but you've just exposed yourself to having asked the doctor to make a false declaration on your behalf. I wouldn't have known that, but for your evidence today. It's a very serious issue?
- Ms Rezaeifard: Because all of the story of me, show me before I got the back pain in the story of 2010 and then I was pregnant.

- Commissioner: You produced this to your employer where you say it's not true?
- Ms Rezaeifard: No, no, because he was thinking from 2010, then I have got the thing, that's the reason I ask her for this letter.
- Commissioner: Well, either you can or can't work in the babies' room?
- Ms Rezaeifard: I can work in the babies' room because the babies' room is under 10 kilos. Just tiny tots, they are more than 10 kilo. Tiny tots a from the one and half year.
- Commissioner: Yes, but the effect of this medical certificate is that it's requesting your employer to have you work in the three to five year old room?
- Ms Rezaeifard: Yes, because Tash told me that if you want to stay to your room, your doctor should write this one, three to five.
- Commissioner: So, you could use a statement - - -
- Ms Rezaeifard: If you're assisting on (indistinct), if you are (indistinct) one, the (indistinct) one says I can work under 10 kilo, and 10 kilo means I can stay in the baby room. But they didn't ask me you can stay in the baby room.
- Commissioner: 10 kilo doesn't mean that you can stay in the baby room, we've established this?
- Ms Rezaeifard: But baby room, they are under 10 kilos.
- Commissioner: No, they're not. Not all children are under 10 kilos. There'll be some children who reach that at six months, seven months, eight months, nine months, 10 months. We know that that's true. The effect of this medical certificate is that you're trying to tell your employer that you'd have a chronic lower back pain where you state that you did not have chronic lower back pain. What a mess, Ms Rezaeifard?
- Ms Rezaeifard: Because some of the rules not telling - to be honest, I cannot get the meaning. That's really annoying me. That's the reason I ask my husband to be in a meeting. So, yes, that's the reason I'm really misunderstanding some of the rules you are telling, I'm not hearing the meaning.

Commissioner: Well, you're telling me that Tash asked you to get a medical certificate. What I understand, yes what I understand is that you told the doctor that you did not have back pain, but you would appreciate having a medical certificate that says that you do have back pain, so you can stay in the older kids' room?

[20] After an adjournment, the following evidence was given as I was trying to understand what exactly Mrs Rezaeifard said to Dr Azarian:¹

Commissioner:Ms Rezaeifard, let's to this evidence so that your husband hears it. You felt that you were pressured by Natasha to get a medical certificate, so you said to your doctor I don't have back pain, but I need a certificate that says that I have back pain. Is that correct?

Ms Rezaeifard: Just I explain to you before what has happened, what she asked me and that day when Tash asked me I didn't have any back pain. I think I explain everything to you.

Commissioner: No, I want to hear again for the record, what you said to the doctor.

Ms Rezaeifard: Just when Tash asked me to just call your doctor and ask him write you have got the back pain and you (indistinct) to (indistinct) children's room, if you want to stay in your room. That day I told to Tash my doctor is not available now. She told me okay, I can stay here and you go and call her and then I called my doctor and I asked could you please write a letter for me I got the back pain and I should stay in the room for three to five years. And that day when I called my doctor, I didn't have any pain. Just because Tash asked me I write that letter - I asked my doctor to write that letter, and I took the CT scans - - -

Commissioner: So, you asked you doctor to write the letter. Let's just talk about this medical certificate only. I'm not interested in the CT scan. You said to your doctor I need a medical certificate that says that I have back pain. Is that what you said to your doctor?

Ms Rezaeifard: Because before I was with this doctor, sometimes I get the back pain, so the doctor knows. But that day when I called her, I didn't have any back pain and I can show you in evidence that day I was at work and it was in the afternoon, Tash asked me just I call my doctor.

[21] Mrs Rezaeifard stated she was asked to stop work immediately and requested to attend a medical assessment. She said that it was a sudden assessment, and she did not have any major medical concerns, issues, nor was there an incident. Mrs Rezaeifard said that the majority of employees in roles involving physical activity might complain of occasional arm, back pain or pain in their legs, particular toward the end of a long day.

[22] It is Mrs Rezaeifard's evidence that the medical assessment she undertook was conducted by an unqualified assessor; not a GP nor a specialist. She said it was a short session, and no x-ray was taken.

[23] It is her contention that in the infants and toddler rooms, she would be required to lift children aged under two years who weigh "considerably less than 10kg". She considered it was appropriate to stay in the room she had been working in with the older children who require less lifting.

[24] The Functional Capacity Assessment was completed on 11 September 2020 by Mr Dominic Mansell, Rehabilitation Consultant. The Assessment is produced below in part:

"...

OPINION

In my opinion Ms Rezaeifard demonstrated reduced functional capacity and cannot complete her full job demands currently. In my opinion Ms Rezaeifard has the capacity to perform suitable duties in line with the physical restrictions outlined below. In my opinion Ms Rezaeifard would benefit from participating in a physical conditioning program to assist with upgrading her current functional capacity.

Ms Rezaeifard successfully demonstrated the following:

- Full truck flexion;
- Full truck extension;
- Prolonged standing;
- Prolonged walking with a normal gait;
- Prolonged sitting;
- 3 minutes of stair climbing;
- 3 minutes kneeling;
- 3 minutes overhead reaching;
- 3 minutes forward reaching.

Ms Rezaeifard has the following physical restrictions:

- Reduced capacity for squatting demonstrating 1 minute, 15 seconds;
- Reduced capacity for downward reaching demonstrating 2 minutes, 40 seconds;
- Reduced lifting floor to waist 10kg;
- Reduced lifting waist to shoulder 10kg;
- Reduced bilateral carry 10kg x 20m;
- Reduced left unilateral carry 10kg x 20m;
- Reduced right unilateral carry 10kg x 20m;
- Left hand grip strength below age and gender norms;
- Right hand grip strength below age and gender norms.

Physical restrictions

Ms Rezaeifard demonstrated a reduced capacity for lifting and carrying tasks. Ms Rezaeifard was unable to lift or carry above 10kg during the assessment. Ms Rezaeifard reported she did not experience any pain during the assessment however did not wish to lift a heavier weight due to fear of aggravating her lumbar spine. Ms Rezaeifard demonstrated reduced capacity for both squatting and downward reaching. Ms Rezaeifard reported the onset of pain and symptoms when required to work below waist height for an extended period.

Due to the nature of the role these restrictions significantly impact Ms Rezaeifard's ability to perform her pre injury role. Ms Rezaeifard was restricted in all aspects of her role due to the manual handling requirement as well as the extensive time spent working below waist height. Following a review of the job description combined with Ms Rezaeifard's demonstrated function during the assessment it is my opinion that she is unable to complete her full job demands due to the increased risk of future aggravation of her pre-existing condition.

Effort

In my opinion Ms Rezaeifard provided a submaximal effort with lifting and carrying being limited by pain and self-limiting behaviours. Ms Rezaeifard demonstrated clinically insignificant Waddells.

Subjective information

- Ms Rezaeifard scored high for her Patient Specific Functional Scale and in my opinion, this is consistent;
- Ms Rezaeifard scored no pain severe for her VAS Now and no pain for her VAS Now Post and, in my opinion, this is consistent;
- Ms Rezaeifard scored moderate for her Oswestry Disability Index and in my opinion, this is consistent;

Presentation

Ms Rezaeifard was cooperative throughout the assessment.

Vocational goals and thoughts on returning to work

Ms Rezaeifard reported she was motivated to continue with her pre-injury role.

RECOMMENDATIONS

- Given Ms Rezaeifard's demonstrated function, in my opinion she did not meet the required job demands however would be suitable in returning to employment with the following restrictions / recommendations:
 - No lifting or carrying above 10kg;
 - No continuous squatting for longer than 1 minute;
 - No downward reaching for longer than 2 minutes.

- Ms Rezaeifard would benefit from physical conditioning program to increase current functional tolerances, endurance and strength;
- Ms Rezaeifard to be provided with education of hurt vs. harm, anatomy and physiology of injury pain control, use of correct techniques and body mechanics and pro-active self-management strategies through a physical conditioning program or through physiotherapy;
- Ms Rezaeifard to continue to consult with her treating Doctor if any issues arise.

HISTORY

When and how the injury occurred

Ms Rezaeifard reported in 2010 she began to experience an aching pain in her lower back VAS 6/10. Ms Rezaeifard reported following the onset of the pain, she consulted her GP (Name Unknown) who diagnosed her with a lumbar lordosis which she had had since birth. Ms Rezaeifard reported following the diagnosis she was advised to keep active and avoid lifting heavy weights. Ms Rezaeifard reported she was able to selfmanage her symptoms through a home exercise program. Ms Rezaeifard reported in June 2018 she commenced work in the childcare industry. Ms Rezaeifard reported initially she was only working with children aged between 3 and 5 years old. Ms Rezaeifard reported due to the age of the children she was working with there was minimal manual handling of children involved in the role and she was able to complete her tasks with no pain or symptoms.

Ms Rezaeifard reported in September 2019 she transitioned to a new facility and continued to work with children in the older age group. Ms Rezaeifard reported she continued with these duties until November 2019 where she was asked to assist with the younger children aged from 1 – 2 years of age. Ms Rezaeifard reported due to the change of age group she was working with the tasks were more physically demanding with an increase in manual handling of the children. Ms Rezaeifard reported she completed duties with the younger age group for 3 days before she experienced an aggravation of her lumbar lordosis due to the manual handling requirements of working in the new area. Ms Rezaeifard reported following the aggravation she experienced the onset of aching pain in her lower back VAS 5/10. Ms Rezaeifard reported following the aggravation she had two days off work until the pain resolved. Ms Rezaeifard reported following two days off she returned to work with the 2-3-year-old age group and has experienced no pain since returning to her regular role.

Treatment

Ms Rezaeifard reported:

- Chiropractor 2013 – ongoing;
- Hydrotherapy 2018 – ongoing.

Current symptoms

- Ms Rezaeifard did not report any current symptoms.

Ms Rezaeifard reported pain to be intermittent. Ms Rezaeifard reported she is predominantly pain free and only experiences the onset of pain and symptoms when performing lifting above 10kg.

Aggravating factors

- Lifting above 10kg;
- Bending;
- Twisting;
- Standing for longer than 1.5 hours;
- Driving longer than 1 hour. Relieving factors
- Resting;
- Heat pack;
- Weight belt;
- Medication;
- Hydrotherapy;
- Chiropractor.

Upcoming appointment/s?

Ms Rezaeifard reported no upcoming reviews. Return to work Ms Rezaeifard reported she infrequently requires a day off if her symptoms flare.

PREVIOUS INJURIES

Ms Rezaeifard reported no previous injuries.

SOCIAL HISTORY

Living arrangement Ms Rezaeifard reported living with [redacted] in a two-storey home.

Activities of daily living (do they require assistance)?

Ms Rezaeifard reported she is able to perform most activities of daily living. Ms Rezaeifard reported she is unable to vacuum due to the onset of pain and symptoms when bending and pushing the vacuum. Ms Rezaeifard reported she has hired a cleaner to assist with cleaning her home. Ms Rezaeifard reported she is able to drive an automatic vehicle.

Hobbies and recreational activities?

Ms Rezaeifard reported she enjoys hiking, walking and is able to perform these with no concerns. Ms Rezaeifard reported she previously enjoyed cycling however is unable to perform this due to aggravation of her lower back when bending forwards to hold the handlebars.

.....

Lifting floor to waist (max test 20kg)

Ms Rezaeifard reported being able to lift up to 7kg from floor to waist height before experiencing the onset of pain and symptoms in her lumbar spine.

Able with restrictions 10kg x 4 reps Ms Rezaeifard demonstrated being able to lift up to 10kg from floor to waist height. Ms Rezaeifard was observed to attempt 15kg

however reported this weight was too heavy. Ms Rezaeifard reported she experienced no pain during all lifting and carrying tasks however did not wish to increase the weight due to fear of aggravation of her lumbar spine. It is recommended Ms Rezaeifard have a floor to waist lifting restriction of 10kg.

Lifting waist to shoulder (max test 20kg)

Ms Rezaeifard reported being able to lift up to 7kg from waist to shoulder height before experiencing the onset of pain and symptoms in her lumbar spine.

Able with restrictions 10kg x 4 reps Ms Rezaeifard demonstrated being able to lift up to 10kg from waist to shoulder height. Ms Rezaeifard reported she experienced no pain during all lifting and carrying tasks however did not wish to increase the weight due to fear of aggravation of her lumbar spine. It is recommended Ms Rezaeifard have a waist to shoulder lifting restriction of 10kg.

.....

Putting children into bed/cot

No photograph available

Able with restrictions Ms Rezaeifard was observed to experience the onset of pain and symptoms when requiring to bend forwards to perform the downward reaching task. Ms Rezaeifard demonstrated she was able to lift up to 10kg with no concerns. It is recommended Ms Rezaeifard avoid putting children that require lifting into a cot/bed to prevent the onset of pain and symptoms in her lumbar spine. It is recommended that if a child can access a bed themselves Ms Rezaeifard will be able to perform this task.

.....”

[25] During the determinative conference it became apparent that Mrs Rezaeifard disputed she had informed Mr Mansell that she had been diagnosed with a lumbar lordosis since *her* birth. It appears to me she informed Mr Mansell she had been diagnosed with a lumbar lordosis since being pregnant with her older children – their birth. There must have been a misunderstanding, however Mrs Rezaeifard never sought to correct this at any time until the determinative conference.

[26] Ms Auer-Hernandez gave evidence that when she read the functional assessment she believed Mrs Rezaeifard had the condition since her own birth. Ms Auer-Hernandez did an internet search to understand the ailment.² She also reviewed Mrs Rezaeifard’s medical self-assessment completed when she commenced employment and observed she had not mentioned anything about this ailment.

[27] Prior to the dismissal, Ms Auer-Hernandez did not discuss with Mrs Rezaeifard her assumption that Mrs Rezaeifard had withheld this information from Green Leaves when she commenced employment.

[28] On 13 September 2020, Mrs Rezaeifard was invited to a telephone meeting with Ms Auer-Hernandez and Ms Wheeler on 14 September 2020 to discuss the functional assessment. Following the telephone meeting, Ms Auer-Hernandez sent the following email to Mrs Rezaeifard:

“Hi Mahsa,

Thank you for your time over the phone earlier today to discuss your fitness for duty assessment.

As discussed, the doctor has outlined that you are not currently fit to complete full job demands with restrictions. The following physical restrictions were outlined in the assessment report:

- Reduced capacity for squatting
- Reduced capacity for downward reaching
- Reduced lifting floor to waist
- Reduced lifting waist to shoulder
- Reduced bilateral carry
- Reduced left unilateral carry
- Reduced right unilateral carry

The doctor has outlined the following role restrictions:

- No lifting or carrying above 10kg
- No continuous squatting for longer than 1 minute
- No downward reaching for longer than 2 minutes.

Due to this assessment result, Green Leaves will need to review the ability to provide a job role and duties that meet your restrictions.

We are happy for you to review the above and provide any suggestions you may have in terms of work duties, providing this in writing as agreed before 9am Tuesday 15 September, ahead of our review discussion at 12:30pm tomorrow.

I have copied in Natasha and Reshma - if you can please direct your response by reply all. I look forward to talking with in follow up.”

[29] On 15 September 2020, Ms Wheeler sent the following email to Ms Auer-Hernandez:

“Hi Louise,

Mahsa has shown she can and does complete tasks daily, that are required from her job description and the expectations of the centre.

According to the limitations the only tasks that can be done within the room is sit with the children on the floor or on chair.

In all room educators are required to lift, twist, carry and squat.

Thank you”

[30] On 15 September 2020, Ms Auer-Hernandez sent the following email to Mrs Rezaeifard, Ms Wheeler and other relevant centre staff, discussing which of the tasks Mrs Rezaeifard was certified fit to perform and inviting her views:

“Hi all,

As discussed earlier today, Mahsa has provided some tasks that she identifies as potentially able to complete that meet her restrictions, these include:

- Serving food (require bending and squatting)
- Cleaning – mopping, sweeping, emptying the rubbish (require bending, twisting, lifting)
- Washing dishes
- Packing away outside resources into shed (requires lifting, bending) – most items less than 10kg
- Outdoor activities – for e.g. playing with large blocks
- Indoor activities – for e.g. painting (if it doesn’t require bending or squatting)
Changing nappies (age appropriate – those able to walk upstairs) (requires bending, lifting)
- Laundry – washing and drying sheets (requires bending, lifting, squatting)
- Observing children during activities (if it doesn’t require bending or squatting)
Assisting children at sleep time (requires some bending & lifting)
- Completed observations/stories on Educa.

Mahsa, if there is anything further you would like to add to this list, please come back to me before COB today.

Tash- if we are able to look at this list tomorrow to determine whether each of the duties meets the restrictions, and whether a role can be provided on a permanent ongoing basis around these duties.”

[31] It would appear there was a discussion on 16 September 2020.

[32] On 18 September 2020, Ms Auer-Hernandez sent the following email to Mrs Rezaeifard, dismissing her from her employment on the basis that it appeared she could safely only perform four tasks, those being washing dishes, outdoor activities, observing children during activities and completed observations/stories on Educa:

“Hi Mahsa,

As discussed on Wednesday 16 September, there are four tasks outlined below which met the restrictions provided for in the independent medical assessment (Functional Capacity Assessment).

Today we have discussed the inability for our Centre/s to provide you with an ongoing permanent role that meets the restrictions as outlined by Dominic Mansell as a result of the Functional Capacity Assessment completed on 11 September.

Please see letter attached here which outlines medical termination due to the inability to meet the inherent requirements of the role.

If you do have any further questions please do let me know.

Notwithstanding this, I do wish you all the very best in your next endeavours.

Cheers, Louise.”

[33] The termination letter dated 18 September 2020 is produced below:

“Dear Mahdiah,

RE: Outcome of Fitness for Duties Assessment

Further to your attendance at a Fitness for Duties assessment with Dominic Mansell – Rehabilitation Consultant at Kinnect on 11 September 2020, Mr Mansell has outlined in report dated 11 September 2020, that you have reduced functional capacity and can not complete the full job demands due to the risk of future aggravation of your preexisting condition.

Furthermore, Mr Mansell outlined the following restrictions:

- Reduced capacity for squatting (demonstrating 1 minute 15 seconds)
- Reduced capacity for downward reaching (demonstrating 2 minutes, 40 seconds)
- Reduced lifting floor to waist (10kg) • Reduced lifting waist to shoulder (10kg)
- Reduced bilateral carry (10kg x 20m) • Reduced left unilateral carry (10kg x 20m)
- Reduced right unilateral carry (10kg x 20m)
- Left hand grip strength below age and gender norms
- Right hand grip strength below age and gender norms.

Due to the results of this assessment, we have conducted a review of the restrictions outlined by Mr Mansell against your capacity to perform the role you were employed to do as Educator at Green Leaves Early Learning Chapel Hill.

As discussed, unfortunately we are unable to provide modified duties or a temporary/ongoing alternative position within the Centre or Green Leaves Early Learning that meets the physical restrictions.

The inability to perform the inherent requirements of the educator position has resulted in Green Leaves reviewing your employment with the group.

As per your employment obligations within your employment contract dated 9 August 2019, Green Leaves requires you to present to work in a state appropriate to performing your assigned tasks competently, and in a manner which does not compromise the safety and health of yourself or others.

As a result of being unable to ensure you safely complete your duties without further injury or aggravation of your injury, Green Leaves has decided to terminate your employment with Green Leaves Early Learning Chapel Hill.

This will be effective from the date of this letter and you will be paid two weeks in lieu of notice, along with your accrued annual leave entitlements up until the date of this letter. This payment will be made by way of electronic transfer into the ordinary bank account you have provided to us.

This will occur during our next scheduled pay transfer.

We take this opportunity to remind you of your continuing obligations under your contract, the common law and statute with respect to post-employment and confidentially obligations.

Notwithstanding that our relationship has come to an end, we wish you well in the future.

If you have any questions, please do not hesitate to speak with me.

Yours sincerely,

Louise Auer-Hernandez
Senior Human Resources Manager
Green Leaves Early Learning Centres”

[34] Since being dismissed, Mrs Rezaeifard commenced looking for work immediately, including in other childcare centres and as a draftsman. She attended medical appointments and undertook a CT scan on 25 September 2020. The findings are produced below:

“Findings. There are 5 lumbar type vertebral bodies. Generally they are in excellent alignment. There is no spondylolisthesis. The pars appear intact throughout.

The disc space height is still reasonably well preserved throughout. There is a subtle increase in disc density at L5-S1 which could reflect early disc dehydration/desiccation not unexpected at this age.

The exit foramina remain quite capacious throughout. Minimal narrowing of the exit foramina for the L5 nerve roots more so on the right. I understand there is no history of radiculopathy.

The facet joints are quite well preserved throughout. They show no signs of significant degenerative change. No evidence of Bastrup’s disease.

No other focal abnormality seen. No paraspinal abnormality seen.

Further examination of the discs would require MRI. Annular tears in the discs could present with significant gain and may not be visible at all on CT...”

[35] On 29 September 2020, Mrs Rezaeifard attended upon Dr Visha Mehta. Dr Mehta wrote the following report:

“Mrs Mahdiah Rezaeifard tried to get appointment with specialist for an assessment but she is not getting the appointment for next few weeks and she does not have enough time to produce the evidence.

She had a recent CT scan of her back done that showed no major issues. (report attached), and she reports that her pain is under control. Please consider rehabilitation and return to work based on her stable clinical condition.”

[36] Mrs Rezaeifard sought reinstatement based on the medical advice she had received. On 29 October 2020, Ms Auer-Hernandez wrote to Ms Rezaeifard as follows:

“Hi Mahsa,

I have met with our National Operations Manager – Kirsten Berry and the Chief Executive Officer, Mark McDonald-Smith to discuss your request for Green Leaves to consider reinstatement of employment with Green Leaves, at an alternate centre upon your anticipated medical clearance post your specialist appointment in January.

We have discussed this request in detail, and collectively agree that the decision that was determined on the 18/9/20, in regard to the medical termination, be sustained.

Notwithstanding this, Green Leaves does wish you all the best in your next endeavours.

Best wishes

Louise”

[37] On 12 February 2021, Mrs Rezaeifard was examined by Dr John Albietz, Spinal Surgeon. Dr Albietz provided a report to Dr Azarian as follows:

“Many thanks for referring Mahdiah, a 36 year old child educator who attends for an opinion with regards her lumbar spine. Mahdiah was dismissed from work apparently due to her lumbar pathology. Mahdiah informs me that in 2010 whilst pregnant she experienced central lower back pain that resolved. She has had no significant back pain since that time. Currently Mahdiah has no back pain, no leg symptoms, and does not take analgesic medication. She attends a gym regularly and enjoys hiking without back pain.

On examination Mahdieh displays a normal gait. She has a full range of lumbar flexion, extension and lateral flexion motion without discomfort. Lower limb neurologic examination is normal. Thoracic rotation is full and painless.

Recent lumbar CT scan is normal.

Based on Mahedieh's history, examination and recent imaging she has no spinal pathology that prevent her from safely performing any form of manual or non manual employment.

Kind regards

Dr John Albietz
Spinal Surgeon”

[38] Mrs Rezaeifard stated that to the best of her knowledge, other employees have experienced some level of back pain, which she does not regard as unusual, considering the long hours of work. She cited the names of two employees she knows to have a back complaint or medical condition. She said that no examination of their capacity has been undertaken.

[39] Mrs Rezaeifard submitted that the incidents leading up to the dismissal in the two months prior to her dismissal clearly shows that Green Leaves was prepared to find any reason to terminate her employment. She noted that the show cause letter was issued, with her reply accepted. Only then was a medical reason found to dismiss her.

Evidence given during the determinative conference

[40] In the determinative conference I made it clear to Mrs Rezaeifard that I wasn't terribly impressed by the February 2021 specialist's report as it just simply gave an opinion based on what the doctor observed on the day, yet there was no functional assessment performed on her. I explained to her that without a functional assessment, there is no evidence that Mrs Rezaeifard could safely work, picking up children who weigh more than 10kg. Mrs Rezaeifard stated that she didn't know what to ask for officially, and she thought that because he was a doctor, he knew how he should assess her. My commentary is not a criticism of Dr Albietz, rather, on the evidence before the Commission, Mrs Rezaeifard remained unable to perform the tasks described within the September 2020 functional assessment.

[41] In the determinative conference, it became clear that there was some conflicting evidence regarding where the back issues originated. The Report indicated that Mrs Rezaeifard was born with lumbar lordosis, however, the evidence from the parties highlighted that the issues actually stemmed from Mrs Rezaeifard's pregnancy in 2010. I asked Mrs Rezaeifard whether she tried to have the report corrected, and she replied noting that she didn't read the report when she was there.

Son's day care terminated

[42] The evidence before the Commission is that Mrs Rezaeifard's son was attending the centre and was due to commence school in January 2021. Shortly following Mrs Rezaeifard's dismissal, in early October 2020, the centre informed Mrs Rezaeifard and Mr Aria that they were cancelling her son's enrolment and he was not welcome at the centre.

[43] Mrs Rezaeifard's son required only a further six weeks of care, and as one might expect, would 'graduate' from childcare with his peers. I was shocked to hear during the determinative conference of the action taken by Green Leaves to terminate the care arrangements for Mrs Rezaeifard's son.

[44] Ms Auer-Hernandez stated that she believed that the strained relationship between Mrs Rezaeifard and Ms Wheeler was making it very hard for that relationship to continue from a parent to the centre director. Ms Auer-Hernandez stated that it was a decision that was made by the Operations Manager to not continue that care. Ms Auer-Hernandez said that there were some inappropriate interactions, however she was not able to give any evidence as to what was alleged.

[45] Mrs Rezaeifard stated that Mr Aria had offered to do the drop off and pick up if there were any concerns, however her son's enrolment was still terminated. Mr Aria stated that it was made very clear to Green Leaves that their son would be going to school and required only six more weeks of care.

[46] I have not had any regard to this issue in my decision in determining if Mrs Rezaeifard's dismissal was unfair. I do wish to record, however, my disgust at the Respondent's callous conduct towards the child of Mrs Rezaeifard and Mr Aria. I find that he was known to the Respondent to be leaving the centre to attend school in 2021, and it is expected he should have been able to enjoy his last few weeks at the centre with all of the excitement that a graduating child should experience. There is no evidence the Respondent has provided to the Commission to demonstrate that Mrs Rezaeifard acted inappropriately when dropping her son off for care or picking him up. Further, Mr Aria offered to drop off and pick up, yet the child's enrolment was terminated. I encourage the Respondent to reflect on its spiteful conduct, particularly when a young child was impacted on the decision of a large corporation.

Mitigation

[47] Mrs Rezaeifard stated that she commenced a part-time job on 27 January 2021 doing production managing.³ Ms Auer-Hernandez stated that Mrs Rezaeifard's average earnings over the last 12 months of her employment were \$730 per week.

Witness Statement of Rizka Giovedi

[48] Ms Rizka Giovedi worked at Green Leaves Chapel Hill Centre from September 2019 to April 2020 in the capacity of a full time Lead Educator. During her employment at this centre she worked closely with Mrs Rezaeifard in the toddler room.

[49] Ms Giovedi stated that Mrs Rezaeifard worked closely with children aged 2-3 years old on a regular basis, and had been working 4-5 days a week with weekly working hours of around 37 hours per week.

[50] During the above employment, Ms Giovedi said she observed that Mrs Rezaeifard had been able to complete daily tasks as required by the centre's job descriptions, including but not limited to lifting children, changing nappies, setting up furniture and playing equipment indoor-out door area. and supervising children; which requiring her to do a lot of lifting, twisting, standing and squatting as needed.

[51] Ms Giovedi said she found Mrs Rezaeifard to be reasonably healthy, active and hard-working individual. During her period working with Mrs Rezaeifard, she stated that she did not observe any medical condition preventing her from undertaking her duties in this role.

Witness Statement of Nasim Safaeian

[52] Ms Nasim Safaeian had worked at Green Leaves in Chapel Hill from January 2020 to September 2020 as an Assistant Educator. Ms Safaeian stated that she had been working closely with Mrs Rezaeifard in the Nursery Room and other Rooms in a float role.

[53] Ms Safaeian stated that she observed that Mrs Rezaeifard was able to complete all daily tasks as required by the centres job description and that this include but wasn't limited to:

- Serving food;
- Cleaning, mopping and sweeping;
- Indoor and outdoor activities;
- Lifting children and changing nappies;
- Laundry;
- Setting up furniture/playing equipment indoor and outdoor area; and
- Assisting and supervising children.

[54] Ms Safaeian stated that she found Mrs Rezaeifard to be reasonably healthy, active and hardworking and did not observe any medical conditional preventing her from undertaking her duties in the role.

Witness Statement of Sui-Hui (Naya) Liu

[55] Ms Sui- Hui (Naya) Liu stated that she was employed by Green Leaves Early Learning from September 2019 to July 2020 as the main educator in the toddler and pre-kindy room (2-3 Yrs old).

[56] During her employment, she said she worked closely with Mrs Rezaeifard. Ms Liu stated that Mrs Rezaeifard was a hard worker and performed her duties well, packing away toys, changing nappies and supervising children.

[57] Ms Liu stated that Mrs Rezaeifard arrived to work on time and she also went to work early a few times once Green leaves Early Learning Chapel Hill needed staff members to work early.

The Respondent's evidence and submissions

[58] The Respondent did not file any witness statements as directed to do so; it simply filed written submissions. I inquired of Ms Auer-Hernandez why this was so, and she responded as follows:⁴

“I didn't believe it relevant for us to have any witness statements. I wanted to focus on the medical termination. My focus around the medical termination is that this is why there's a claim for unfair dismissal, and I didn't believe that the other components to the claim were actually relevant to the actual unfair dismissal. This was handled completely separately and I felt as though that was proven through who was actually handling those components. I handled this functional capacity assessment and the outcome of this myself, so, I felt that I was best placed to obviously give any evidence or answer any questions in regards to the medical termination.”

[59] I put to Ms Auer-Hernandez that perhaps the Respondent had attempted to dismiss Mrs Rezaeifard on account of accusations made by persons not named to Mrs Rezaeifard, and when that was abandoned by Ms Macken's decision, it moved to plan B; to dismiss Mrs Rezaeifard on account of medical grounds. Ms Auer-Hernandez submitted that was not correct. The following was discussed:

Commissioner:

.....because what has happened is Ms Rezaeifard has been given a letter with accusations. With unnamed accusations. She doesn't know who these have said, there's about, I don't know, 15 bullet points or so. But the letter is titled "Show cause letter" and it tells her that if the allegations are - well, the company is considering dismissing her. So, where's the first step of putting allegations to an employee, perhaps with some specificity. This is the investigation part. Because you don't get to a show-cause letter, in my experience, until you've made findings. So, you've done it all in one big bundle, or Karen has, a big bundle of unnamed allegations and if we find them then you may lose your job. So, where's the first step of allegations, we're looking for your response, we are investigating. If we make findings, that's when you issue a show cause letter. This is substantiated, this is not substantiated, on the basis of what you substantiated we want you to show cause why you shouldn't be dismissed. Why is it already bundled together?

Ms Auer-Hernandez:

Yes, I don't disagree with you. Usually it would be a notice of meeting letter and I believe that that's templated with that potential outcome, obviously to prepare the person, or to know that, you know, if a serious claim or if a serious allegation is found to be

substantiated, then that's the potential outcome of that process. As I said, a notice of meeting would be the usual process.

Commissioner: Ms Rezaeifard does her best to figure out where these allegations might have come from. She provides an answer and then Karen says, fine, abandons the whole thing. It's extraordinary. So, are these people lying, who have made these, I don't know, 15 bullet points?

Ms Auer-Hernandez: Potentially, Commissioner.

Commissioner: What's the business done about that?

Ms Auer-Hernandez: I guess, in our environment it's probably more common to have gossip and he said/she said scenarios. If I can say that fairly and diplomatically. Obviously we try and manage that as best we can, but getting the truth from all parties isn't always possible. Or getting to, I guess, a decision or a basis where we believe every single individual can be quite difficult. I think Karen did her best in the circumstances of that particular case and I genuinely do not believe it was a case of abandoning that because it couldn't be substantiated and then moved on to plan B. I think that - I'm a bit offended as a practitioner that that would be how my actions would be taken. Certainly I think that, you know, I was presented with a medical certificate, I think it would be highly negligent of me to allow that person to continue on with their employment without further investigating why this person has a back injury, or a chronic back injury, that they haven't outline in their self medical assessment, or to us as their employer, and not be thinking about the health and safety of that individual, and the children and other people working around them. So, I don't connect the cases as four individual things that occurred when we originally went over this case. I see them as four very individual things that have occurred through Ms Rezaeifard's employment. I can see how she probably thinks that they are connected, so I certainly think me as a practitioner - and I would hope that I'm held in the highest regard - but that's not something that I would have the lack of integrity to go through and be part of a process like that.

Commissioner: How would I know? I have no evidence, other than what you're going to tell me orally. And it is what Ms Rezaeifard puts and it is what is open to the Commission to find, that there was an abandonment of

A so abruptly because there was another tact that the respondent was then taking. So, tell me what you did. You had this functional assessment undertaken and you decided then that Ms Rezaeifard had to lose her job.

Ms Auer-Hernandez: Ms Rezaeifard's assessment was actually quite detailed. We have an 11 page report which outlines - - -

Commissioner: I've read it.

Ms Auer-Hernandez: Yes.

Commissioner: And you decided that she needed to lose her job.

Ms Auer-Hernandez: No, we went through a process of finding alternative duties that met with the actual restrictions. So, over the course of that period we looked at, you know, what she could actually do. She was a part of that conversation. So, off the back of that assessment we talked about, all right, well - - -

[60] During the determinative conference, I had Ms Auer-Hernandez walk me through the Respondent's thought process once it had determined Mrs Rezaeifard was not fit to perform her role:

Commissioner: Start again. We get the functional assessment on which date?

Ms Auer-Hernandez: 11 September.

Commissioner: 11 September. Then what's the next steps? What happens then?

Ms Auer-Hernandez: On that afternoon, Natasha said to Ms Rezaeifard, we'd like to meet you on Monday, or have a phone call with you on Monday, because it was a Friday, to discuss the outcome and obviously just discuss any potential path that we have. I did come up with a list of tasks that I thought could potentially meet her restrictions. I can forward that on to you now, Commissioner, if that's not an inconvenience.

Commissioner: So, Natasha.

Ms Auer-Hernandez: I came up with my own list of items to meet the restrictions. When I put those to Natasha and Martha, Martha didn't come up with any additions, but Natasha

came back to say that obviously she couldn't complete any of those within the restrictions because of what those restrictions entailed and that she could only see that she would be on the floor. Being on the floor with the children, that's one component of such a large role, and we can't justify somebody only sitting on the floor with children. It needs to obviously have that ability to perform all of the inherent requirements of the role. So, we did go through a process of trying to find something that she would be able to do that would meet those restrictions.

Commissioner: Within the centre?

Ms Auer-Hernandez: Within the centre. We only have centres. So, we have a very small support, when I say small support office team, we have around 30 people across marketing and HR functions, operational functions, but Martha didn't have the ability, obviously, to fulfil any of those technical functions. So, it was really based on what role we could provide within the centre itself.

Commissioner: That centre?

Ms Auer-Hernandez: Any centre would have the same roles.

Commissioner: Tell me, did you look at all centres owned by the respondent?

Ms Auer-Hernandez: They have the same role-types, Commissioner. So, there would be no difference between that Chapel Hill centre versus the Ashgrove centre, for example, which is probably the closest.

Commissioner: Well, you provide food for the children, don't you?

Ms Auer-Hernandez: We do.

Commissioner: And what qualifications are required?

Ms Auer-Hernandez: Commercial cookery, because we do market that as a qualified chef. So, we have a qualified chef who has a commercial degree qualification. That will usually be a certificate IV.

Commissioner: In every centre?

Ms Auer-Hernandez: Yes, in every centre.

- Commissioner: So, every one of your chefs have a certificate IV, do they?
- Ms Auer-Hernandez: Yes, they do.
- Commissioner: Are there any helpers in the kitchen, or it's chef only?
- Ms Auer-Hernandez: In our centres, usually only a chef only. In some of our larger centres, which would be almost 200 places, we might have a kitchen-hand, but we only have a small handful of those centres. That not being this centre or one of the ones close by to it.
- Commissioner: What enquiries did you make about that?
- Ms Auer-Hernandez: We didn't have - as I said, we really don't have a lot of those kitchen-hand roles and in the sense of those kitchen-hand roles, there needs to be a certain level of occupancy with the children before we would engage somebody into that kitchen-hand role. Usually it would be a fairly large centre where it gets to the capacity where that qualified chef can't keep up with obviously what's required and needs more help with the preparation.
- Commissioner: Sure. In Brisbane, how many of those centres do you have?
- Ms Auer-Hernandez: Of the larger centres?
- Commissioner: Yes, where there is an assistant?
- Ms Auer-Hernandez: Where we have a kitchen-hand? I'd have to go through a list, but I would probably say maybe less than four. The other thing, I guess if you're particularly focusing on the kitchen-hand role, it does require carrying grocery boxes, storage, obviously, you know, the bending, the twisting, the lifting, those components apply to that role. It wasn't necessarily something that I had thought was appropriate, because all of those things that were required, so I was focusing on the educator side. I didn't explore, you know, a kitchen-hand role because 1) we didn't have one in that centre and 2) I didn't think it was appropriate to the restriction.
- Commissioner: Well, I need to know, did you turn your mind to it at all?

- Ms Auer-Hernandez: I didn't, because I didn't think it was appropriate to the restrictions. There is a letter - - -
- Commissioner: I'm asking you, did you turn your mind to whether or not Ms Rezaeifard - - -
- Ms Auer-Hernandez: Not a formal process, no, Commissioner. Not a formal process of going through the kitchen-hand job description and saying, "Can these tasks be completed?"
- Commissioner: So, on 11 September, the functional assessment is received. You have some discussion with Natasha, do you? And then Natasha has some discussion.
- Ms Auer-Hernandez: I just told her the results of that. I really didn't have a discussion with her, I just let her know that we have to discuss that with Ms Rezaeifard and obviously talk through what type of duties we could provide that might meet the restrictions. Obviously the restrictions are quite broad, so it was very difficult to be able to provide, you know, a role when you think about where those restrictions or modifications would be required to sitting, standing, squatting, reaching downwards, lifting floor to waist, lifting waist to - I mean, it goes on, I can through.
- Commissioner: People get hurt, don't they? They get hurt or injured and sometimes they can't come to work and do their job. That's right, isn't it?
- Ms Auer-Hernandez: I understand what you're saying.
- Commissioner: If I stepped out on a gutter, twisted my knee, I might not be able to come into work. I might not be able to lift the children. How long would you allow me to get better?
- Ms Auer-Hernandez: I think the issue with that, and what I wrote in my summary, was that the legislation around that is temporary. So, that's a temporary condition. This was a pre-existing long-term chronic injury, it wasn't a temporary condition.
- Commissioner: Are you a doctor, are you?
- Ms Auer-Hernandez: I'm not a doctor, no.
- Commissioner: So, where did you address this temporary nature, in your submissions?

Ms Auer-Hernandez: I didn't write the word temporary in my submission, no.

Commissioner: Right. So, if I am a childcare worker and I twist my knee, and I need some time off, what are you as an employer going to do about that?

Ms Auer-Hernandez: You mean twist my knee outside of work?

Commissioner: Sure, yes, let's call it - I've had a bit of a bad back, and it's just flared up, and I can't work for the next two-weeks, and I've run out of sick leave. I can't meet the requirements of the job, can I?

Ms Auer-Hernandez: No and we would usually ask for full clearance before they can return back to work.

Commissioner: Right. So, you wouldn't sack someone?

Ms Auer-Hernandez: No, we would not.

Commissioner: Why not?

Ms Auer-Hernandez: Because they would usually only have a short period of time where they don't have that clearance. Once they provide us with that full clearance that they can return back to work and work safely, then they would be back on the roster and back into the workplace. That is absolutely our usual process.

Commissioner: So, if I am aging, and say my doctor thinks I need six weeks' off. What do you do?

Ms Auer-Hernandez: They would usually provide a medical certificate for us, for that period.

Commissioner: Sure, yes, and I'm providing you a medical certificate that says I need six weeks' off, I've got a back issue. Do I lose my job?

Ms Auer-Hernandez: No, you need to provide clearance before you can come back to work.

Commissioner: But I'm not sacked?

Ms Auer-Hernandez; No.

Commissioner: Why not?

- Ms Auer-Hernandez: Because they would usually provide clearance that they can return back to work.
- Commissioner: But I can't meet the requirements of the job.
- Ms Auer-Hernandez: I understand what you're saying.
- Commissioner: Answer my question.
- Ms Auer-Hernandez: It falls within that three month period.
- Commissioner: So, there is a three month period?
- Ms Auer-Hernandez: Legislatively, yes, there's a three month period.
- Commissioner: Yes.

[61] The Respondent submitted that on 21 April 2020, Ms Rezaeifard advised Ms Janevik that she could not complete the JobKeeper form as she was involved in a family business (her husband's business) and had completed the form relevant to that particular employment.

[62] Ms Rezaeifard was employed as a permanent part-time employee, engaged for a minimum of 15 hours, maximum of 37.5 hours per week. During COVID-19, the impact to employers was been significant, and the Respondent stated that the reduction in hours was in direct response to the impact of COVID-19 on the business. The Respondent further submitted that the reduction in hours was lawful and in line with Fair Work, the *Children's Services Award 2010* and the individual contract arrangement.

[63] The Respondent submitted on or around 9 July 2020, and in email on 10 July 2020, Mrs Rezaeifard advised that she was not able to 'commit' to working five days per week (or 37.5 hours per week) on a permanent basis, including saying that she could no longer work a Monday or Friday shift. Due to strict Department of Education and ACECQA regulations, Educator to Children ratios must be met in the centre and consistency of care in any one room is required to best support the children and families within the Respondent's care. To support the request to reduce days, Mrs Rezaeifard was advised that a float role was available to her, which also supported the operational needs of the centre.

[64] On 17 July 2020, Ms Rezaeifard was issued with a 'Show Cause Letter' after complaints were received from other staff in the centre in relation to her conduct. During the course of this investigation into what had occurred, the Respondent said that a number of team members provided statements around Ms Rezaeifard's conduct.

[65] Although Ms Wheeler did not give evidence in these proceedings, it was submitted that at no time did she say to Mrs Rezaeifard that she was a liar. The Respondent submitted that during the course of any grievance resolution or performance management process, it is usual process for a manager to request a team member keep all details of any matters confidential. The Respondent stated that the allegations were not found to be substantiated, and no further action was taken with respect to Ms Rezaeifard's performance.

[66] The Respondent rejected Mrs Rezaeifard's submissions that because it had been unsuccessful in dismissing her on account of the allegations made against her and not substantiated, the Respondent found another route to dismiss her. It was submitted that because Mrs Rezaeifard requested to reduce her days, this resulted in her moving into a floater role. Mrs Rezaeifard then went on to provide a medical certificate to advise due to "*chronic lower back pain... would benefit from working with children between the ages of 2-5 years old to prevent frequent exacerbations*".

[67] The Respondent submitted that the working days and injury were communicated to Ms Auer-Hernandez, and it was her advice that this be explored further in order to ensure Mrs Rezaeifard was not at risk of further injury.

[68] The Respondent submitted that Ms Janevik denied saying, "*People working as a float are doing mainly cleaning jobs, while others in the room have a good brain*". The Respondent stated that this was not language consistent with Ms Janevik witnessed by Ms Auer-Hernandez or other leadership and centre team members. The Respondent failed to call Ms Janevik as a witness to make such denial to the Commission and be available for cross-examination, accordingly there is no basis to find that Mrs Rezaeifard's evidence on this issue should not be accepted.

[69] The Respondent stated that all age groups require bending/lifting/squatting as inherent requirements of the Educator job role.

[70] The Respondent stated that Mrs Rezaeifard made an inaccurate statement in saying the physical assessment "*was not requested due to any major concerns, issues or incident*". Ms Auer-Hernandez said she made the decision to meet the Respondent's duty of care to Mrs Rezaeifard, other employees and the children in the Respondent's care because of what was contained in the medical certificate dated 9 September 2020.

[71] It was noted that the Respondent requires all employees to complete a Medical Self-Assessment form which outlines any pre-existing injuries or conditions that the Respondent should be aware of during the course of employment. Mrs Rezaeifard did not include her back condition or pre-existing injury on her Medical Self-Assessment form dated 13 August 2019.

[72] During the determinative conference, it became apparent that there may have been a miscommunication between Mrs Rezaeifard and Mr Mansell relevant to when she had been diagnosed with lumbar lordosis. Ms Auer-Hernandez believed, when reading the functional assessment that this condition had been diagnosed since Mrs Rezaeifard's birth. She said she was not to know that the details within the functional assessment were incorrect where it was reported that it was since Mrs Rezaeifard's birth, when in fact it was since Mrs Rezaeifard's first pregnancy.

[73] Ms Auer-Hernandez said the following during the determinative conference:⁵

Ms Auer-Hernandez:

It's his job to find out, you know, what is the physical status of this person and he would never take somebody's life into his own, you know, and livelihood into his own hands. This is his, you know, professional, you know, his professional demeanour, his integrity. So his report is his report.

You know, I can't take anything away from that report because that's obviously what's been said. The self-medical assessment has nothing in it, absolutely nothing in it, no, no, no. It doesn't say anything.

The inductions occurred, great, which means she knows what the company's expectations are. She's got an employment contract here that talks about the work, health and safety and the importance of performing your duties safely and ensuring that you don't engage in any activities that put your health and safety, or any person, at risk.

You know, and I can obviously keep going with any policies but then I've got a letter, you know, this medical certificate from the doctor saying that, you know, there is an issue so of course I'm going to think, "Well, why wasn't that in the self-medical assessment", if she was honest and upfront and had nothing to hide it should have been in the medical assessment.

But then now I get the functional-capacity assessment that says that she's had this condition and I'm thinking, "Okay, well, this person hasn't been honest with us and they haven't told the truth". But you know, there's a process that we still need to go through.

So you know, I'm frustrated because you're saying that you've been hard-done by but you haven't been truthful with me as an employer.

Mr Aria:

I think I don't agree that there had been anything hidden here. I think if there was anything hidden, if you know, for your - - -

Ms Auer-Hernandez:

Well, I completely disagree with you. I think it was completely hidden.

[74] The Respondent rejected Mrs Rezaeifard's assertions that the majority of employees complain of occasional arm, back pain or leg pain.

[75] The Respondent submitted that the Functional Capacity Assessment completed on 11 September 2020 was completed by a qualified Rehabilitation Consultant with a Bachelors degree in Exercise Sport Science and a Masters in Clinical Exercise Physiology.

[76] Regarding Mrs Rezaeifard's assertions that children in the under two's room don't weigh more than 10kg, the Respondent provided World Health Organisation growth charts for babies aged birth to two years of age. The growth charts note the average male baby will weigh approximately 9.5kg at age one, and approximately 12kg at age two.

[77] It became necessary during the determinative conference to discuss this issue at length with Mrs Rezaeifard, as she was asserting that she could lift young children and they didn't typically weigh more than 10kg. I exclaimed to Mrs Rezaeifard that was not my experience, and at least one of my children weighed more than 10kg between six and 12 months of age. The following was discussed:

Commissioner:

All right. The report says further:

Ms Rezaeifard reported, following the aggravation, she experienced the onset of aching pain in her lower back with a five out of 10.

You reported:

Following the aggravation she had two days off work until the pain resolved.

Ms Rezaeifard:

Yes.

Commissioner:

And:

Ms Rezaeifard reported, following two days off, she returned to work with the two to three-year-old age group and has experienced no pain since returning to her regular role.

So this is what you told the person who did the functional assessment.

Ms Rezaeifard:

Because when the child was older, they was easy to nappy change, they are coming from the step up, nappy change and everything so it was much, much easier for me.

So because in eight hours if you're just lift the children to put in their mat for the nappy change and everything it was harder for me. But if it was in the three to

five years old, they can come up from their stair, it was easier for me, yes.

I get the (indistinct) when I'm going through the smaller children to pick up and put it down and just everything.

Commissioner: Yes, and this is what you told the person who was conducting the functional assessment?

Ms Rezaeifard: Yes.

Commissioner: All right.

So you told them that you were experiencing pain when you were working in the younger room?

Ms Rezaeifard: Yes.

Commissioner: And it gives you pain, a five out of 10?

Ms Rezaeifard: I didn't remember what score I give to him but when I for eight hours I'm just in the small children and some of them is never stop crying and (indistinct) to hold them, yes, I get the pain.

And it doesn't mean I get all of the pain and I'm not working.

Commissioner: All right.

Well, he didn't make this up, did he? He's reporting what you told him?

Mr Aria: No, I think there was never a suggestion that that report was made up but I think there are some (indistinct) in the report that again, I haven't been there so I cannot comment on that so my - - -

Commissioner: No. So Mr Aria, be quiet, please.

Ms Rezaeifard, this is what you said to the person doing the functional assessment, isn't it?

Ms Rezaeifard: Yes.

Commissioner: That you have pain, you needed some time off because you had spent time in the babies room.

- Ms Rezaeifard: I didn't told I needed time off. I didn't told I needed time off. But I told when I pick up a lot, more than 10 kilo or something like that, I get the pain. (Indistinct)
- - -
- Commissioner: Did you put it at five out of 10?
- Because he's written five out of 10. He didn't make that up, did he?
- Ms Rezaeifard: To be honest, I did not remember what I told he. I did not remember.
- Commissioner: All right.
- So you wouldn't think that he's made that up, would you? You'd think that is something that you've reported to him, that you get five out of 10.
- Ms Rezaeifard: Yes.
- Commissioner: All right. So that's what you told him?
- Ms Rezaeifard: Yes, I told you I did not remember what I told him, yes.
- Commissioner: Yes.
- And then you had some time. You had some time off work until the pain resolved. That means that work - - -
- Ms Rezaeifard: Yes. If you see all of my history I was always in the (indistinct) and sometimes Tash was in there in the week, just two days working, and It seems she called me, "Come and work with us, we need (indistinct) are short of staff". All the work is there. It means I wasn't say, "Okay, today I'm not working because I have back pain, although I was in the centre.
- And (indistinct) with me in the (indistinct) and they told me, "Okay, you change your (indistinct) today but it seem I was there most of the time, four to five days.
- Commissioner: All right.
- Ms Rezaeifard: Because office had called me, or send a message to me, "Martha, today we are short of staff, come and help us". Because my body (indistinct) pain or if I had got the

medical issue it means I cannot work five days in a week.

Commissioner: So where this report says - - -

Ms Rezaeifard: And sometimes all their staff - and all of their staff (indistinct) sometimes (indistinct) because their centre was close to my home I went there bicycle, so it means I was okay. If I wasn't okay, I cannot do the cycling.

And it was another (indistinct) and I got taxi and I got the (indistinct) and they were sometimes (indistinct) and I think not a medical issue. It means sometimes, for example, you are lifting something badly, you get the pain. If you are a healthy person happen so it not means you have got the medical issue (indistinct) you are there.

That's (indistinct) - - -

Commissioner: Where the report - let me speak, thank you, Ms Rezaeifard.

You've had your time. Where the report says:

Ms Rezaeifard reported pain to be intermittent. Ms Rezaeifard reported she is predominantly pain free and only experiences the onset of pain and symptoms when performing lifting above 10 kilograms.

Do you recall saying that?

Ms Rezaeifard: As I told you, when I - we got a lot of children for example, (indistinct) and she couldn't lift up the children for nappy change or something and I did try to help her and (indistinct) follow the children to nappy change, there, after eight hours I get the back pain.

The back pain it doesn't mean I've got a medical issue.

Commissioner: All right.

Ms Rezaeifard, listen to my question. I just read out to you what the functional assessor wrote in his report. I'll read it again. You tell me whether you said this to that person:

Ms Rezaeifard reported pain to be intermittent. Ms Rezaeifard reported she is predominantly pain free

and only experiences the onset of pain and symptoms when performing lifting above 10 kilograms.

Do you recall saying that to the person conducting the assessment on you?

Ms Rezaeifard: Yes, I told this man what I told, what I told, too often if I do the lifting I get the back pain.

Mr Aria: You not told?

Ms Rezaeifard: Yes, I told, it's too often I do it, yes.

Commissioner: All right. So your employer - - -

Ms Rezaeifard: Also at the end I think it's not a medical issue.

Commissioner: Well, you're not a doctor.

[78] It was submitted that post-termination, Mrs Rezaeifard had aggravated the situation by engaging in conversation with other staff, straining the relationship. The Respondent discredited the witness statements provided by Mrs Rezaeifard.

[79] Regarding the roles Mrs Rezaeifard had applied for post-termination, it was submitted that some of the roles were too junior for her and another was outside of the early learning industry.

[80] The Respondent noted that the CT scan dated 29 September 2020 occurred post-termination, and that the Radiology scan dated 24 September 2020 declared, "*this is not an accurate assessment of the integrity of the discs themselves*".

[81] The Respondent submitted that Mrs Rezaeifard's employment was terminated on 18 September 2020 by way of medical termination, as it was found that she was not able to perform the inherent requirements of the Educator role.

[82] The Respondent stated that there was a valid reason for the dismissal related to Mrs Rezaeifard's capacity to perform the inherent requirements of the role. The pre-existing injury was assessed to have reduced Mrs Rezaeifard's capacity to perform her duties in full without risk of further injury to herself, as well as the safety of the children in her care and potentially her team members working directly with her.

[83] The Respondent submitted that Mrs Rezaeifard was notified of this reason on 14 September 2020 and that she was given an opportunity to review the restrictions from the assessment, provide input into potential duties that could be reviewed to potentially form an ongoing permanent role for her. Mrs Rezaeifard was then consulted on this, with a discussion held around what was feasible and what was not.

[84] The Respondent submitted that there was no refusal to allow Mrs Rezaeifard a support person present to assist with any discussions relating to the dismissal.

Consideration

[85] A dismissal may be unfair, when examining if it is ‘harsh, unjust or unreasonable’ by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:⁶

“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[86] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.⁷ I will address each of the criteria set out in s.387 of the Act separately.

[87] I consider it was extremely naïve of the Respondent to appear before the Commission armed only with submissions and the potential for Ms Auer-Hernandez to give oral evidence in the proceedings. For the size of the Respondent, it should have available to it far more sophisticated resources.

s.387(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)

[88] When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

“In its context in s.170DE(1), the adjective “valid” should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must “be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly.”

[89] However, 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.⁸

[90] It appears to me that the Respondent's actions in issuing to Mrs Rezaeifard a show cause letter on 17 July 2020 was in retaliation for the dispute that had arisen between Mrs Rezaeifard and Ms Wheeler the week prior. It is entirely inappropriate to issue a show cause letter to an employee in the way the Respondent has done so in this matter. The steps typically taken are these:

- (a) Collate allegations;
- (b) Put allegations to the employee, typically with enough information for the employee to understand the specificity of the allegation (time, date, who etc.);
- (c) Allow the employee an opportunity to respond to the allegations;
- (d) The employer to consider the response and then make appropriate findings or determine if further investigations are required to enable the employer to make appropriate findings;
- (e) The findings should be made clear to the employee – which allegations are substantiated or not substantiated.

[91] In deciding to issue a show cause letter to an employee after some or all allegations are substantiated, an employer should also invite the employee to put forward any mitigation regarding the employer's findings. The letter from Ms Macken on 17 July 2020 clearly jumped the gun and should never have been identified as a show cause letter; it should have simply contained the allegations and required Mrs Rezaeifard to provide a response.

[92] Mrs Rezaeifard provided very detailed rebuttals of the allegations put to her, and without further ado, curiously, all of the allegations were abandoned by 30 July 2020. I asked Ms Auer-Hernandez during the determinative conference if this meant that because Mrs Rezaeifard's response was accepted, some of the accusers might be lying, to which she responded, "*Potentially.*"

[93] It is an extraordinary thing to have occurred; for the Respondent to have completely abandoned the inquiry, noting that there were 16 allegations made against Mrs Rezaeifard.

[94] Given the way the matter was dealt with, and so soon following the dispute between Mrs Rezaeifard and Ms Wheeler, I consider the issuing of the letter to Mrs Rezaeifard was spiteful and vindictive.

[95] Turning to the events of September 2020, I accept that Mrs Rezaeifard complained to Ms Wheeler that she was experiencing pain when spending time in the tiny tots' room, which she said has babies aged from 1.5 years in it. She clearly was not working pain-free, as her evidence demonstrates that she had difficulty lifting children who weigh more than 10kg, including to comfort them or to change their nappy. Her preference was to work in the older children's room where she would experience less time having to carry them, and it is her evidence the children would be carried less when having their nappy changed as they might be able to approach the change table from a set of stairs.

[96] I consider Mrs Rezaeifard was extremely naïve when she thought she could obtain a medical certificate from her GP to declare that it would be best if she worked in the older rooms within the centre. Such a certificate necessarily declared that she was not fit to work in

the younger children's room. This instantly flagged a concern to the Respondent where it had not otherwise had a concern.

[97] I was extremely dissatisfied with Mrs Rezaeifard's evidence relevant to the information she provided to her GP over the telephone during her consultation on 9 September 2020. I will, however, afford to Mrs Rezaeifard the benefit of the doubt regarding her language skills as to whether she told untruths to Dr Azarian in order to obtain the medical certificate. In any event, the issue backfired for Mrs Rezaeifard because having produced to the Respondent a medical certificate citing chronic lower back pain which has become worse in the past year, it became necessary for the Respondent to require Mrs Rezaeifard to be independently medically examined. It could not simply ignore the information it had before it and allow Mrs Rezaeifard to only work in the 3-5 year room. It would be unsafe to do so.

[98] Having reviewed the functional assessment completed by Mr Mansell, it is clear that Mrs Rezaeifard's injury prevents her from safely working with young children as she is severely limited in her ability to lift and carry the children. During the assessment she was not able to lift a weight in excess of 10kg, and Mr Mansell reported a suboptimal effort made by her.

[99] Children can weigh as much as 10kg from less than one year of age. Clearly, there will also be occasions when children aged 3-5 will require some assistance, and perhaps to be carried by the adult responsible for them. The children, their parents, the Respondent and other employees of the Respondent are entitled to expect that the educator will be able to deal with all of the circumstances that arise in the caring of the child, including, being lifted, where necessary.

[100] I accept implicitly that the functional assessment conducted on Mrs Rezaeifard demonstrated that Mrs Rezaeifard was unable to safely perform the inherent requirements of the role. She discussed the pain that she experienced when lifting children. I am satisfied that it was necessary and appropriate, on the information available to the Respondent at the time, to refrain Mrs Rezaeifard from caring for the children at the centre as it would be far too great a risk to the health and safety of the children in her care, and would likely create a risk of injury to Mrs Rezaeifard.

[101] Where Mrs Rezaeifard places great reliance on the CT scan performed on her on 25 September 2020, following the dismissal, clearly it is simply a scan. Mrs Rezaeifard was not asked to complete a functional assessment, and if she was unable to lift in excess of 10kg on 9 September 2020, she would have been unable to lift that weight on 25 September 2020.

[102] I am comfortable that the Respondent's next steps included an appropriate consultation with Mrs Rezaeifard, relevant to any other roles she could perform. Regrettably, Mrs Rezaeifard has not properly understood Ms Wheeler's email dated 15 September 2020 where Ms Wheeler essentially said that with the limitations now known to the Respondent, the only task she could safely perform is sitting on the floor or on a chair with the children. Ms Wheeler was informing Ms Auer-Hernandez that all room educators are required to lift, twist, carry and squat; things Mrs Rezaeifard was declared not fit to do.

[103] The email from Ms Auer-Hernandez dated 15 September 2020 made it clear that there were severe restrictions on Mrs Rezaeifard, and invited Mrs Rezaeifard to respond by close of business that day. It is not clear what was discussed on 16 September 2020.

[104] It would appear that Mrs Rezaeifard had exhausted paid personal leave shortly after receiving the medical certificate dated 9 September 2020. I understand she did not have available to her a substantial amount of annual leave. Accordingly, if the Respondent had proper regard for the requirements of the Act, Mrs Rezaeifard would have been required to go on unpaid personal leave. Instead, she was dismissed. She was informed the reason was because she could not perform the inherent requirements of the role.

[105] Sections 352 and 772 of the Act prohibit an employer from dismissing an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations. Section 352 is the relevant section governing Mrs Rezaeifard's termination as she was employed by a constitutional corporation. Regulation 3.01 is the relevant regulation and is reproduced below:

“3.01 Temporary absence—illness or injury

- (1) For section 352 of the Act, this regulation prescribes kinds of illness or injury.

Note: Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

- (2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:

- (a) 24 hours after the commencement of the absence; or
- (b) such longer period as is reasonable in the circumstances.

Note: The Act defines medical certificate in section 12.

- (3) A prescribed kind of illness or injury exists if the employee:

- (a) is required by the terms of a workplace instrument:
 - (i) to notify the employer of an absence from work; and
 - (ii) to substantiate the reason for the absence; and
- (b) complies with those terms.

- (4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3)(a) of the Act, for taking

paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

- (5) An illness or injury is not a prescribed kind of illness or injury if:
- (a) either:
 - (i) the employee's absence extends for more than 3 months; or
 - (ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
 - (b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.
- (6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation."

[106] Mrs Rezaeifard was, as of 18 September 2020, temporarily absent from work because of an injury of a kind prescribed by Regulation 3.01. Parliament has determined that employees must not be dismissed within three months of being on unpaid leave because an employee has a temporary illness or injury. This is entirely fair, as employees will, at various stages of their working life have to take time off work to deal with various illnesses or injuries.

[107] Employees should not lose their job if they have to take six weeks off work to mend a broken bone. Not all employees will have a balance of six weeks of paid personal leave to cover such a scenario. Nor should employees lose their job if they are having surgery such as a hysterectomy, or retina attachment, or are recovering from hepatitis. A three month protection is in place for very good reason.

[108] Disappointingly and disturbingly, the Respondent was not aware of the obligations within the Act not to dismiss an employee on unpaid leave within this important timeframe. It blindly determined that she could not, in mid-September 2020, perform the inherent requirements of the role, or any available role, and therefore must be dismissed.

[109] Whilst it is a matter for a court of competent jurisdiction to determine if there is a breach of s.352 of the Act in the event an employee brings an application under s.365 of the Act, which Mrs Rezaeifard did not do, I do not consider it is available for the Commission to ignore the protections afforded to employees s.352 in determining an unfair dismissal claim.

It is not appropriate for the Commission to determine if there has been a breach of s.352, as that is the responsibility of the court.

[110] If the Commission could not have regard to the protection afforded to employees in s.352 unless an applicant made a s.365 application, similarly it could not have regard to the protections afforded to employees in s.351, which deals with ensuring employees are protected from adverse action because of the person's race, colour, sex and other attributes. Clearly, the Commission does take into consideration in the matters before it if employees have been dismissed on the basis of their race, colour, sex and other attributes.

[111] I am satisfied the Commission may have appropriate regard to the protections afforded to employees in those sections of the Act in determining if there was a valid reason for the dismissal. In my view, having regard for the protections afforded to employees, and determining if there is a breach of the provisions of the Act are two separate matters.

[112] Noting Mrs Rezaeifard's injury, the Respondent had an obligation to look for alternative roles she could safely perform within its organisation. On the evidence available to the Commission, the Respondent did not undertake a wide evaluation. Only after questions were posed by me to the Respondent during the determinative conference did it satisfy itself that there were no roles Mrs Rezaeifard could safely perform.

[113] Having heard that only a small number of Brisbane centres require a kitchen assistant, and the kitchen assistant is required to lift groceries and the like, I do not consider it would have been safe, in mid-September 2020 for Mrs Rezaeifard to perform a kitchen assistant role. There was no evidence before the Commission as to whether a role was available in any of the larger centres run by the Respondent.

[114] The Respondent was required by law not to dismiss Mrs Rezaeifard due to her injury, within three months of her unpaid leave commencing. Mrs Rezaeifard was a protected employee, and it was incumbent on the Respondent to permit Mrs Rezaeifard time to see if she could recover from her injury. The appropriate process is to inform her that the Respondent has taken the view she cannot safely perform the work and there are no other roles available for her to safely perform, and she is on unpaid personal leave. A prudent employer would regularly be in touch with such an employee, and as the period of three months of unpaid leave drew near, invite the employee in for a discussion to advise that the Respondent was considering dismissing her once the period of unpaid leave had gone beyond three months.

[115] In many conferences I have with parties, I liken the protection at s.352 of the Act to a red light, prohibiting dismissal due to the injury or illness within three months of the period of unpaid leave commencing. It is not then an automatic green light to dismiss once the three months have passed; however, it is no longer a red light. Discussions should occur at around that time so that once the period of three months has passed, and if the employer is determined to dismiss on account of not being able to hold the position for the injured or ill employee, the employee may then have some input into the decision.

[116] Some employers will hold open an injured or ill employee's role for them well beyond three months of unpaid leave. For example, if an employee is battling cancer, many employers will not count down the period to three months and then terminate the employment once the protected period has been reached. Employees may be in a position to inform their employer that their treatment or prognosis is good, and they may just need a further, short period of time to recover and return to pre-injury or pre-illness duties. Again, reaching the period of three months is not an automatic right to dismiss; it is simply no longer a prohibition.

[117] On 29 October 2020, the Respondent emailed Mrs Rezaeifard at [36], after she had sought reinstatement, to inform her that it was comfortable with its decision to dismiss her. Consultation had been sought with Ms Berry and Mr McDonald-Smith. This is the very reason why Mrs Rezaeifard's employment should have been live at that time. Mr McDonald-Smith should have been informed of the protection afforded to injured or ill employees; they are not to be shown the door the very minute they become unavailable to safely perform work. The Act prohibits it. Some employees will recover from their illness or injury and decisions must only be made once the three month protection period has expired.

[118] Having determined that the Respondent failed to have any regard to s.352 of the Act and the protection afforded to Mrs Rezaeifard, I am not satisfied there was a valid reason for the dismissal as of 18 September 2020.

s.387(b) - Notification of the valid reason

[119] I am satisfied Mrs Rezaeifard was informed that the Respondent considered she could not perform the inherent requirements of the role due to her incapacity.

s.387(c) - Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person

[120] Mrs Rezaeifard was not informed in the email of 15 September 2020 she was at risk of having her employment terminated. Whilst she was informed the Respondent considered she could not safely perform her role and she was then not permitted to attend for work and was on unpaid personal leave, it was not made clear to her that the Respondent was considering dismissing her on account of her incapacity.

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

[121] Without evidence of the discussion held on 16 September 2020, it is unclear if Mrs Rezaeifard requested a support person and was prevent from having a support person present. Mrs Rezaeifard did not suggest so when she gave evidence.

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[122] Mrs Rezaeifard was not dismissed for unsatisfactory work performance; she was dismissed on account of her incapacity to perform the inherent requirements of the role. Accordingly, this criterion is not a relevant consideration.

[123] I have, however, had things to say in my earlier consideration relevant to the way Mrs Rezaeifard was treated with a long list of allegations based on her alleged conduct which was then all essentially withdrawn.

s.387(f) - Whether the employer's size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[124] The Respondent is a large organisation with a dedicated human resource management specialist. The consideration within the Act is whether there was an absence of a dedicated human resource specialist, and it is implied that a smaller organisation might not be in a position to properly inform itself of the necessary procedures to follow than a larger organisation. The consideration is not whether the dedicated human resource management specialist handled the matter poorly or gave incorrect advice.

[125] Whilst it is not a consideration in this criterion, I will say that the Respondent's failure to properly inform itself of its obligations is disappointing and disturbing given the size of the Respondent and the resources it has available to it.

s.387(h) - Other matters

[126] At the determinative conference it became clear that Ms Auer-Hernandez harboured some ill-feeling towards Mrs Rezaeifard on account of Mrs Rezaeifard's failure to declare to the Respondent her diagnosis of lumbar lordosis which she was aware of since 2010. On commencing employment, Mrs Rezaeifard declared that she had no conditions at all. It appears, however, that this resentment Ms Auer-Hernandez experienced towards Mrs Rezaeifard did not form part of the reason for the dismissal.

[127] During the determinative conference it became clear that there had been some miscommunication between Mrs Rezaeifard and Mr Mansell during the functional assessment. The functional assessment informed the Respondent, and namely Ms Auer-Hernandez that Mrs Rezaeifard had experienced this condition since birth. In fact, she had experienced the condition since 2010, from her first pregnancy. Still, Mrs Rezaeifard did not declare this condition on her self-assessment medical when she completed it in August 2019. I appreciate the Respondent might then have made further inquiries as to whether she was fit to carry children and do the other strenuous activities required of an early childhood educator.

[128] If discussions had continued at the initiative of the Respondent in September 2020, these are matters that could have been discussed. They were not, on account of the brisk act to terminate Mrs Rezaeifard's employment.

[129] Mrs Rezaeifard also places great reliance on a medical report provided in February 2021. With all respect to Dr Albiez, Spinal Surgeon, the report declares Mrs Rezaeifard's statements, and a functional assessment was not conducted at this time, determining all of the duties Mrs Rezaeifard could safely perform at that time. Dr Albiez was not provided with all of the information required to declare if Mrs Rezaeifard could safely perform the work of a childcare educator.

[130] I do not consider the report of February 2021 is helpful to counter the functional assessment performed in September 2020. I do, however, consider it would have been important, if Mrs Rezaeifard informed the Respondent her condition had improved over October, November and December 2020, for a further functional assessment to have been undertaken and her condition as at late December 2020 or early January 2021 determined, prior to any decision to terminate her employment.

[131] Mrs Rezaeifard had just over one year's service with the Respondent. It is not a long period of time.

Conclusion

[132] I have determined that there was not a valid reason for the dismissal.

[133] I consider that Mrs Rezaeifard was informed of the reason for the dismissal.

[134] I am not satisfied Mrs Rezaeifard was given an opportunity to respond to any reason related to her capacity with any knowledge that termination of her employment was being considered.

[135] There was no unreasonable refusal by the Respondent to allow Mrs Rezaeifard a support person because no meeting occurred.

[136] The reason for the dismissal was capacity, not performance.

[137] The Respondent is not small and there is no absence of a dedicated human resource management specialist which impacted on the procedures followed.

[138] I have had regard to the other matters I consider are appropriate to take into consideration. While I have weighed-up Mrs Rezaeifard's failure to inform the Respondent of her pre-existing injury when she commenced employment, I do not consider the Respondent would have been prejudiced by this fact if, upon learning of the injury, it did what it was required to do when it became aware of her injury – place her on unpaid personal leave.

[139] I determine that Mrs Rezaeifard's dismissal was harsh, unjust and unreasonable.

Remedy

[140] Section 390 of the Act reads as follows:

“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.”

[141] Mrs Rezaeifard is a person protected from unfair dismissal for the Act’s purposes and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether she can be reinstated.

[142] Having regard to the requirements of the role and Mrs Rezaeifard’s ongoing medical condition, which is not cured by the provision of the CT scan in September 2020, nor the specialist’s medical examination in February 2021 (which did not involve a functional assessment), I am satisfied it is inappropriate to order reinstatement as Mrs Rezaeifard presents as an ongoing risk in the type of employment she would be required to perform. There is no current medical evidence to support Mrs Rezaeifard being able to safely lift in excess of 10kg. The wellbeing of young children is paramount, and I am satisfied with the information I have before me, Mrs Rezaeifard could not safely care for the children within the Respondent’s centre.

[143] I now turn to consideration of compensation.

Compensation

[144] Section 392 of the Act provides:

“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.”

Authorities

[145] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul’s Licensed Festival Supermarket*.⁹ That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram* and *District Retirement Villages inc T/A Ottrey*;¹⁰ *Jetstar Airways Pty Ltd v Neeteson-Lemkes*¹¹ and *McCulloch v Calvary Health Care* (McCulloch).¹²

[146] I have had regard to the above authorities, and I have considered the submission of each party.

The effect of the order on the viability of the respondent

[147] The Respondent is a large organisation and I am satisfied there would be no effect of the order on the viability of the Respondent.

The length of Mrs Rezaeifard’s service

[148] Mrs Rezaeifard had just over one year’s service with the Respondent. This is not an extensive period of time.

The remuneration that Mrs Rezaeifard would have received, or would have been likely to receive, if she had not been dismissed

[149] I have determined that Mrs Rezaeifard would have remained employed for at least a period of 13 weeks until the protection afforded to her by the Act was extinguished, and appropriate discussions could have occurred to consider termination. Up-to-date medical evidence would have been available at that time, from mid-December 2020.

[150] It is noted that during this period, Mrs Rezaeifard would have not been receiving any remuneration from the Respondent on account of being on unpaid personal leave. No other entitlements would accrue during this time.

[151] This is a matter I raised repeatedly with Mrs Rezaeifard during the determinative conference, yet Mrs Rezaeifard failed to have any discernible regard to the consideration the Commission must have at s.392(2)(c).

The efforts of Mrs Rezaeifard (if any) to mitigate the loss suffered because of the dismissal

[152] I am satisfied Mrs Rezaeifard made appropriate attempts to mitigate her loss and look for suitable employment. The Respondent's criticism of her efforts is, in my view, ill-informed.

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

[153] Mrs Rezaeifard commenced employment in another role in late January 2021. Further, Mrs Rezaeifard was in receipt of JobKeeper payments of \$750 per week up until 27 September 2020 pursuant to her other employment she had through her husband's business. This payment is appropriate to regard as remuneration, however I do not consider it appropriate to discount any compensation payable by the Respondent as Mrs Rezaeifard was in receipt of JobKeeper payments from late March 2020 until 27 September 2020, and I do not consider s.392(2)(e) contemplates a deduction from other efforts she had due to existing employment. To do so would mean that an employee unfairly dismissed would never be able to recover a complete week's wages from the role from which they were dismissed on account of earnings in a secondary job.

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

[154] This factor is not relevant in the circumstances of this matter.

Other relevant matters

[155] While it is the case that Mrs Rezaeifard would not have earned remuneration through the Respondent for the expected thirteen-week period she would have continued to have been employed, I consider it is appropriate to ensure that the Respondent, and any other employer who might consider it suitable to dismiss an employee upon them being unable to perform work on account of illness or injury, does not leap to dismissal. The Respondent had no regard for the protections afforded to Mrs Rezaeifard. Although I have had regard to the fact that Mrs Rezaeifard would have been on unpaid personal leave, I do not consider it appropriate to reward the Respondent's dismissal of her by not making any award of compensation.

[156] In my view, not making any award of compensation would potentially invite the Respondent to, in future, have similar disregard for the protections afforded to employees in the Act. Employees suffering a short-term illness or injury are often at their most vulnerable; they may be on unpaid leave and unable to obtain welfare payments on account of the illness or injury not being a long-enough period to entitle them to benefits.

Misconduct reduces amount

[157] Section 392(3) of the Act requires that if the Commission is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person then the Commission must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[158] The section requires that consideration be given by the Commission, amongst other things, as to whether a person's misconduct contributed to the decision to dismiss an employee even if the Commission has found that there was no valid reason for the person's dismissal. However, if there was no valid reason for the dismissal that may be relevant to the Commission's decision as to the appropriate amount by which the amount of compensation should be reduced.¹³

[159] I am not satisfied that Mrs Rezaeifard engaged in any misconduct which contributed to the Respondent's decision to dismiss her. It is noted that Ms Auer-Hernandez was displeased with her observations that Mrs Rezaeifard had not accurately recorded her medical history at the commencement of her employment, however it was not stated by the Respondent as a reason for the dismissal. Accordingly, I cannot be satisfied a reduction can be made.

Shock, distress etc. disregarded

[160] I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Mrs Rezaeifard by the manner of the dismissal.

Compensation Cap

[161] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the applicant, or to which the applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[162] The high income threshold immediately prior to the dismissal was \$153,600, and the amount for 26 weeks was \$76,800. The amount of compensation the Commission will order does not exceed the compensation cap.

Payment by instalments

[163] This is not an appropriate consideration given the size of the Respondent.

Order of compensation

[164] I have determined that the Respondent is to pay to Mrs Rezaeifard ten weeks' compensation at the rate of \$730.00 per week. I make a deduction of two weeks on account of the notice paid to her on termination. The amount to be paid to Mrs Rezaeifard is eight weeks x \$730.00 which is equal to \$5,840 gross less tax as required by law.

[165] In addition, the Respondent is to pay superannuation at the rate of 9.5% (as the Superannuation Guarantee Rate was at the time of the dismissal), being an amount of \$554.80 into Mrs Rezaeifard's superannuation fund.

[166] The above amounts are to be paid within 14 days of the date of this decision.

[167] An Order of compensation [PR733769] will be issued concurrently with this decision.



COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR733768>

¹ PN578-PN583.

² PN623.

³ PN188.

⁴ PN21.

⁵ PN698 – PN705.

⁶ (1995) 185 CLR 410, [465].

⁷ *Sayer v Melsteel* [2011] FWAFB 7498 at [20].

⁸ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

⁹ (1998) 88 IR 21.

¹⁰ [2013] FWCFB 431.

¹¹ [2014] FWCFB 8683.

¹² [2015] FWCFB 2267.

¹³ *Crawford v BHP Coal Pty Ltd* [2017] FWC 154, [345] – [346]; *Read v Gordon Square Child Care Centre Inc.* [2013] FWCFB 762, [83].