DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mrs Nada Hinic
v
Safety Assembly Moulding Pty Ltd
(U2022/10789)

DEPUTY PRESIDENT CROSS SYDNEY, 28 APRIL 2023

Application for an unfair dismissal remedy

Introduction

[1] This decision arises from an application made by Mrs Nada Hinic (the Applicant) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (the Act) for relief in respect of the termination of her employment by Safety Assembly Moulding Pty Ltd (the Respondent). The cessation of the Applicant's employment occurred on 19 October 2022 by way of a letter that stated the Applicant had abandoned her employment, although I note that the Applicant said she did not receive that letter by post until 26 October 2022.

[2] The Applicant asserted that her dismissal was unfair and that the Respondent had no valid reason to terminate her employment. The Respondent alleged that the conduct of the Applicant evinced an intention not to return to the employment, and so abandon her employment, by repeatedly failing to obey the reasonable request of the Applicant's Workers' Compensation insurer and the Respondent to:

> (a) Attend medical and other appointments arranged whilst she was on workers' compensation and employed by the Respondent;
>
> (b) Co-operate or contact the Respondent regarding her obligation to return to work; and
>
> (c) Return to work on numerous occasions when deemed able to do so by the workers' compensation insurer.

[3] On 6 February 2023, directions were issued to program the manner in which the Application was to proceed to hearing (the Directions). The parties complied with the Directions. In particular, the parties filed the following documents:

(a) The Applicant's Written Submissions dated 20 February 2023 (the Applicant's Submission);

(b) The Respondent's Written Submissions dated 6 March 2023 (the Respondent's Submission).

[4] The matter was listed for hearing and was heard on 17 March 2023 (the Hearing).

[5] Pursuant to the Directions, the Respondent sought permission to be represented at the Hearing. The Applicant objected to such permission being granted because:

(a) While the Respondent had previously been represented by a Solicitor, the Respondent sought to be represented by a Barrister less than 24 hours before the commencement of the Hearing, and well after the time outlined in the Directions for such application;

(b) The Applicant did not have the financial means to be legally represented at the Hearing; and

(c) The Respondent was *"more knowledgeable of the Matter to represent themselves at the Hearing than newly appointed legal representative"*.

[6] I granted permission to the Respondent to be represented as I considered that it would enable the matter to be dealt with more efficiently. The correctness of that determination was emphasised by the way in which the matter proceeded at the Hearing.

[7] At the Hearing the Applicant was self-represented and communicated through an interpreter. The Respondent was represented by Mr A Guy of Counsel. It was clear from the commencement of the Hearing that the Applicant was severely distressed by the proceedings, and numerous adjournments were required to attempt to alleviate that distress. Eventually, and approximately half-way through the Hearing, the Applicant was excused from further attendance due to her distress. The Applicant was thereafter provided with the full transcript of the Hearing and provided the opportunity to make further submissions approximately three weeks later, with the Respondent given a right of reply.

[8] Mr Guy assisted the Commission, and the Applicant, by proposing a course of proceeding that did not involve any questioning of the Applicant, making appropriate concessions that allowed a refinement of the facts and issues while protecting the interests of the Respondent, and presenting balanced submissions that correctly characterised the case of the Applicant even to the extent of clarifying an application for reinstatement.[1] That conduct was an example of why for efficiency of proceedings permission to be legally represented may be granted to one party in matters notwithstanding that the other party may not be so represented.

Background Facts

[9] The various acronyms used in the correspondence in this matter are:

EML	-	Employers Mutual Limited/an appointed provider of claims management for iCare
iCare	-	The Workers' compensation insurer.
SAM	-	The Respondent/ Safety Assembly Moulding Pty Ltd.
WRK	-	The Worker.
IMP	-	Independent Medical Practitioner.
NTD	-	Nominated Treating Doctor

[10] The Applicant says she commenced employment with the Respondent in October 1999, while the Respondent says she commenced on 23 June 2012. The disparity in start dates was to an unresolved issue regarding whether various employing entities were related, however the length of the Applicant's employment was only possibly relevant regarding harshness and compensation.

[11] It was common ground there were no issues regarding the Applicant's performance at work during the course of her employment. The bulk of the relevant evidence in the matter was contained in correspondence between the parties.

[12] The Applicant was injured at work on 17 December 2021, and that was the last day she attended work.[2] Liability for the injury was accepted on 24 December 2021.

[13] On 22 June 2022, the Applicant received a Certificate of Capacity/ Certificate of Fitness (the COC) from her treating Doctor, Dr Velibor Todorovic, certifying the Applicant as fit for *"some type of work"* for 4 hours a day and 4 days a week, from 22 June 2022, with the following capacities:

Lifting/Carrying	1kg
Sitting tolerance	10 minutes
Standing tolerance	3 minutes
Pushing/pulling ability	2kg

[14] The above certified capacities appear to have persisted until the Applicant's employment ceased. The COC was provided to the Respondent.

[15] The Applicant failed to attend work capacity assessments with Workfocus, the rehabilitation provider, on 14 July, 4 August, 25 August, 29 September 2022.

[16] On 25 August the Applicant obtained a medical certificate from Liverpool Health Service that stated:

> *This is to certify that HINIC, Nada, 21/05/1962 was treated admitted to this hospital on 25/08/2022 suffering from*
>
> *She will be unable to attend work/school from 25/08/2022 to 25/08/2022*

[17] On 26 August the Applicant obtained a medical/attendance certificate from Liverpool Hospital Emergency Service that stated simply that she attended the emergency department but gave no diagnosis as to illness and did not certify any unfitness for work.

[18] Following the issuance of the COC, there were a number of efforts made to contact the Applicant. Those efforts were summarised in a letter from the Respondent to the Applicant dated 31 August 2022 (the 31 August Letter), sent by email. That letter asserted, without apparent dispute by the Applicant, that a number of attempts made by the Respondent to contact the Applicant. The 31 August Letter was in the following terms:

> *Dear Nada,*

Potential Abandonment of Employment

We refer to your failure to return to work since 22/06/2022 upon notice from your referring Doctor that you were fit for light duties. Several attempts have been made by EML and Safety Assembly Moulding management to contact you regarding your absence, however they have been unsuccessful. We note the following attempts to contact you on the following recent occasions to no success:

10/6/22: EML - call to Nada no answer 16/6/22: EML - call to Nada no answer
IME options sent to Nada from EML 20/6/22 and phone call to Nada to choose appt- no answer, text and email sent
28/6/22: EML - call to Nada no answer text sent
28/6/22: EML - call to Nada Dr to raise concerns regarding communication And IME being booked 11/7/22: EML - call to Nada no answer - email sent following requesting urgent call back
18/7/22: EML - call to Nada no answer
18/7/22: EML - email from rehab provider indicating that the Nada email works and emails from Nada saying she does not want anyone involved or attending appts
21/7/22 Call to WRK no answer
EML: Vocational Assessment booked in for 4/8/22 on the 21/7/22 IMP Sent with appt details and phone call to Nada to advise - no answer
3/8/22: EML - call to Nada no answer - advising Nada to attend Voc 4/8- no answer
4/8/22: EML - Rehab phones EML to advise Nada hasn't turned up for Vocational Assessment
5/8/22: EML - call to Nada to confirm why didn't attend and potential compliance management to commence 9/8/22: EML - rebooked Voc assessment for 24/8
10/8/22: EML - call to Nada no answer to advise of new Voc date
10/8/22: EML - Compliance warning letters sent to the Nada if nonattendance at the next Voc review, suspension to commence
10/8/22: SAM - Email sent reaching out to Nada to make contact with Safety Assembly Moulding – no response
12/8/22: SAM - call to Nada – no option to leave a voice mail so number was texted – no call back
30/8/22: SAM - Follow up email sent to Nada from email sent back on the 10/8. No response received to date.

Please note prior to the June logs there were other case managers from EML that were managing your case and had advised multiple contacts had also been made with little to no response. Also attempts from SAM management had been made after the accident with also little to no response and hence left to EML to manage.

We are concerned for your welfare. Please advise us as soon as possible if there is any reason preventing you from attending work, or alternatively, if you have decided that you will not be continuing with your employment.

You are directed to contact us by telephone on 0419 697 373 or 0414 988 763.

If we do not receive a reply from you before close of business on 07/09/2022, which satisfactorily explains your absence, we will have no option but to take further action. This may include Bruce Green accepting that you have abandoned your employment, and therefore, your employment will have terminated.

We consider this an urgent matter and ask that you contact us as soon as possible.

Yours sincerely,

[Emphasis added]

[19] The third last entry in the 31 August Letter refers to correspondence that was issued by the Respondent on 10 August 2022 at 2:56pm, as follows:

We are reaching out to see how you are going as over the last few months there has been attempts to contact you to no avail. We hope all has been ok and that your recovery is on track.

We were advised you were able to return to work back on the 22/06/2022, however have not received any communication from you to arrange that to take place. We have been working with Icare to find out updates on your rehab treatment and any further updates regarding you being able to return to work, however they too have advised us they have found it hard to reach you.

We would appreciate if you could make contact with Bruce 0419 697 373, Mark 0417 464 386 or myself 0414 988 763 to arrange your return to work at the earliest as it would be nice to have you back and we will work with you on your capabilities.

[20] The last entry in the list in the 31 August Letter refers to an email from the Respondent to the Applicant sent on 30 August 2022, which stated:

> *Hi Nada,*
>
> *Hope you are well.*
>
> *I just wanted to reach out to you again as there were attempts to contact you again to no avail and we wanted to check up on your status of return to work.*
>
> *If you could please contact Bruce or myself it will be kindly appreciated.*
>
> *Kind Regards*

[21] As noted in the 31 August Letter, Icare/EML had made numerous attempts to contact the Applicant to arrange appointments that she did not subsequently attend.

[22] On 6 September 2022, the Applicant sent her Response to 31 August Letter. The response was as follows:

> *Hello,*
>
> *I'm responding to the email sent on 31/08/2022 with attachment 'Potential Abandonment of Employment'. I, Nada Hinic, want to continue with my employment at Safety Assembly Moulding Pty. Ltd.*
>
> *My weekly payments haven't ceased they have been suspended for not attending Vocational assessment on 25/08/2022. I have a valid reason why I couldn't attend the Vocational assessment and I have notified icare.*
>
> *I didn't know that Safety Assembly Moulding has sent me an email until today because I don't know how to use computer and I don't know how to use email. I have to ask someone else to check email for me occasionally and therefore I haven't seen the email earlier and thus I haven't replied to the email.*
>
> *Safety Assembly Moulding hasn't advised me of the date on which I'll be required to return to work, which days I will be required to work and what would be the start time*

and finish time for 4 hours/day for 4 days/week that I have capacity for some type of work as written in Certificate of Capacity. I regularly provide Certificates of Capacity to icare. I receive letters via post from icare about important information regarding my claim, but I haven't received any letter from icare regarding my return to work details. Therefore, I thought that details regarding my return to work are still in the process of being made and I was waiting for written letter with return to work details from Safety Assembly Moulding or icare. Thus, I haven't failed to return to work or been absent if Safety Assembly Moulding hasn't advised me in a written letter of my return to work details including the date on which I'll be required to return to work, which days I will be required to work and when would be the start time and finish time for 4 hours/day for 4 days/week that I have capacity for some type of work.

On 19/01/2022 I called Sadie from Safety Assembly Moulding to enquire about my weekly payment and at the same time I also notified her that I don't know how to use computer and that I don't know how to use email and therefore I would have to ask someone else to check email for me occasionally. For that reason I haven't provided email address to Safety Assembly Moulding prior to 07/01/2022 when email address was first used to email Certificate of Capacity to Bruce Green on 07/01/2022 because on 21/12/2021 he instructed me to fax or email Certificate of Capacity to him instead of sending it via post. However, as I don't know how to use computer and I don't know how to use email I was concerned that I might miss important information from Safety Assembly Moulding if sent to me via email so on 19/01/2022 I asked Sadie if important information from Safety Assembly Moulding can be sent to me via post as a method of contact and she agreed to it.

In relation to statement by Safety Assembly Moulding, in an email with attachment 'Potential Abandonment of Employment' sent on 31/08/2022 that Safety Assembly Moulding management has made attempts to contact me with little to no response after I got injured at work on 17/12/2021, I haven't received a phone call from one of the numbers listed as contacts for Safety Assembly Moulding: Bruce 0419 697 373 or Sadie 0414 988 763 since 21/12/2021 when they both called to instructing me to fax or email Certificate of Capacity to them instead of sending it via post while I was still at doctors appointment.

Since I got injured at work on 17/12/2021 other contact that Safety Assembly Moulding management has made was via email on 01/04/2022 notifying me that Safety Assembly Moulding hasn't been paying me superannuation entitlements as per requirement. Since 01/04/2022 Safety Assembly Moulding management hasn't made attempt to contact me

until sending an email on 10/08/2022. In an email from Sadie sent on 10/08/2022 Sadie wrote that Safety Assembly Moulding has been advised about my return to work on 22/06/2022, but hasn't contacted me until 10/08/2022 as shown in the log provided. In the log it writes that SAM called on 12/08/2022, but I haven't received a phone call from any of the 2 phone number listed as contacts for Safety Assembly Moulding in the email sent on 31/08/2022: Bruce 0419 697 373 or Sadie 0414 988 763. So if the call was made from Safety Assembly Moulding as written in the log it would be useful to call from a number that has been listed as a contact so that I can return the call because I haven't received a call from Safety Assembly Moulding since 21/12/2021.

Please in future can Safety Assembly Moulding send me all important information via post because I don't know how to use computer and I don't know how to use email and please allow 7 working days for delivery by post as per standard so that I don't miss any important information.

Once again I want to continue with my employment with Safety Assembly Moulding Pty. Ltd.

[Emphasis added]

[23] The Respondent replied to the above email on 9 September 2022, further instructing the Applicant that EML would contact her regarding her upcoming scheduled appointments:

Dear Nada,

Response to email dated 06/09/2022

Thank you for your email response dated 06/09/2022

Unfortunately, we have been unable to arrange your return to work due to your non attendance with Work Focus whom have tried to arrange your Vocational Assessment and return to work plan. We have an obligation to ensure your return-to-work plan accommodates to your needs and as per outline in your certificate of capacity to work as outlined by your referring Doctor. We were notified that Work Focus had been put on hold since 7th March, 2022 and have on numerous occasions checked for updates to no avail. By not providing consent to Work Focus and refusing rehabilitation limits us to be able to work with Work Focus and yourself on a suitable return to work plan.

Please note you may have now received or in the process of receiving an update on from EML and Work Focus regarding scheduled appointments for a Vocational Assessment in approx. 2 weeks' time and an appointment to see an Independent Medical Examiner on the 10th October. It is important that you attend these appointments so that we can work on your return-to-work plan and have no further issues.

We have been advised that there have been requests made to ensure you have interpreters present and expenses covered for you to be taken to and from these appointments by car. It is in your best interest to ensure you adhere to the requests made by EML and Work Focus to avoid any further matters with your workers compensation claim.

Please note this letter will be also mailed to your home address and apologies as we do not recall you requesting that any communication was to be mailed out in the past, however moving forward we will use both lines of communication.

[Emphasis added]

[24] The Respondent sent a further email to the Applicant dated 13 September 2022, regarding further attempts from Work Focus to contact the Applicant about her upcoming vocational appointments, as follows:

Dear Nada,

We received further updates today that Work Focus continue to request you to sign a consent form and have tried on numerous occasions to contact you to discuss your rehabilitation and to book vocational assessments to no success. Can you kindly fill the form out and return to Work Focus to enable them to work with you and the necessary parties to have you come back to work as per your capacity to work plan.

We have also been advised that another appointment has been scheduled for your Vocational Assessment with Work Focus on the 29th September 2022 which we strongly advise that you attend. Work Focus work with EML and Safety Assembly Moulding regarding your rehabilitation and your return-to-work plan. Without this in place makes it difficult to have you return to the workplace and hence our recommendation is for you to adhere to their requests.

[Emphasis added]

[25] At 7:48pm on 13 September 2022, the Applicant sent a response by email which stated the following:

> *Hello,*
>
> *I, Nada Hinic, am writing to advise Safety Assembly Moulding Pty Limited that varicose veins have developed in both of my legs as a result of prolonged standing while working on the machine as process worker- plastic injection moulding at Safety Assembly Moulding Pty Limited. Doctor has referred for me for treatment for varicose veins.*
>
> *Thank you.*

[26] The following day on 14 September 2022, the Respondent sent an email acknowledging that the Applicant could in fact be reached via email, despite her previous correspondence requesting that all correspondence be sent through post:

> *Hi Nada,*
>
> *As it has become evident you are able to be reached via email we will continue our line of communication through this means moving forward.*
>
> *Should this be an issue can you please advise us at your earliest convenience.*

[27] The Respondent further addressed issues concerning the method of correspondence between the parties, in an email on 15 September 2022, as follows:

> *Hi Nada,*
>
> *Bruce has asked why you have agreed for Work Focus and EML to be communicated via Email and are requesting that we send you communication via Mail? It is appreciated that you do have someone that can occasionally help you access your emails and kindly ask they continue to do so as Emails being your choice of communication you would need to be checking for all comms coming from all relevant parties pertaining to your workers compensation claim.*
>
> *At this stage our decision is that we will continue our line of communication with you via Email.*

Lastly, Bruce tried contacting you on Tuesday a couple of times and still has not received a call back so can you please return his call as he would like to speak with you and touch base.

Kind Regards

[28] On 16 September 2022, the Respondent sent another email in response to the Applicants email informing the Respondent of varicose veins, as follows:

Hi Nada,

Thank you for your email.

We recommend that you provide all relevant documentation and Doctor reports at your Independent Medical Examination which has been booked for the 12th October through EML.

Kind Regards

[29] The Respondent then sent a further follow up email on 19 September 2022, asking for more information regarding the Applicants alleged development of varicose veins:

Hi Nada,

We are seeking further information from you regarding your email dated 13/09/2022. Can you please provide your intentions of your email, any medical proof you have been provided to back your below statement and the date from when you believe you developed Varicose Veins as a result of your below claim.

Please kindly send this through by the 28th September, 2022.

Your assistance is kindly appreciated.

[30] On 26 September 2022, a Case Management Specialist at EML wrote to the Respondent as follows:

Hi everyone,
Hope the weekend was wonderful for you all.

At 4:45pm on Friday I received a call from Nada, speaking very clear English I might add. There was a very lengthy conversation had. Nada is wanting treatment for varicose veins and now adjustment disorder with depressed mood and anxiety as stated on her most recent certificate.

Nada has claimed that she wants to engage a new Rehab provider as believes the RTW plan was a lie when originally done in February. I tried to explain that this wasn't the case however Nada wasn't listening. I would suggest that We stop Rehab ER services for the moment but continue with the VOE as this is essential to the compliance management.

I have attempted to call her NTD to organize a MCC To clarify the nature of how these diagnoses have to do with broken ribs. I was not able to reach Dr Todorovic, so I have emailed him also.

Sadie can you please advise if Nada has been terminated for abandonment?

Moving forward I need to have a direct conversation with the NTD and Nada to clarify the COC. I explained to Nada that she needs to attend the VOE and the IME or her benefits will cease. I asked many times if she will be attending as I have organized a car and an interpreter, but I never got a straight answer that she would attend.

Essentially, I have explained to Nada that she hasn't been compliant so nothing will be approved until she attends these appointments.

Thank you

[Emphasis added]

[31] The Applicant replied to the Respondent's email of 19 September 2022, by email on 27 September 2022, as follows:

Hello

Onset of my varicose veins was in January 2016 and since then varicose veins have gradually increased. I have already notified Bruce Green of the date of onset of my varicose veins in the letter sent by registred post to Bruce Green at Safety Assembly

Moulding Pty Ltd notifying him of varicose veins. I also called Bruce Green on 16/09/2022 to ask if he received my letter.

Please find attached a copy of the letter sent via registered post to Bruce Green at Safety Assembly Moulding Pty Ltd notifying him of varicose veins.

Thank you

[32] On 7 October 2022, the Claims Review section of iCare wrote to the Respondent as follows:

You may recall the worker's compensation claim brought by Nada Hinic, the claimant, for an injury on 17 December 2021 during her employment with your organization , Safety Assembly Moulding Pty Ltd.

The purpose of this email is for your information only.

By way of an update, the icare Dispute Resolution and Litigation team conducted a review of five decisions of the insurer surrounding the suspension of weekly payments in this claim as follows:

1. *On 10 August 2022 the claimant was notified that her weekly payments would be suspended on 2 September 2022 pursuant to section 44A (6) of the Workers Compensation Act 1987 (the 1987 Act) should she fails to participate in a work capacity assessment. It was noted that she failed to attend the work capacity assessment with Workfocus, rehabilitation provider on 14/07/2022 and 04/08/202. A new appointment with Workfocus was rescheduled to take place on 25 August 2022.*

2. *On 30 August 2022 the claimant was notified that her weekly payments would be suspended on 2 September 2022 pursuant to section 44A (6) of the Workers Compensation Act 1987 (the 1987 Act) due to her failure to attend the assessment with Workfocus on 25/08/2022.*

3. *At 1513 hours on 13 September 2022 the claimant was notified that her weekly payments would be suspended on 4 November 2022 pursuant to section 119 (3) of the Workplace Injury Management and Workers Compensation Act 1998 (the 1998*

Act) should she fails to attend an independent medical assessment at the request of the insurer (rescheduled from 30 August 2022 to take place on 12 October 2022).

4. *At 1524 hours on 13 September 2022 the claimant was notified that her weekly payments would be suspended on 25 October 2022 pursuant to section 44A (6) of the 1987 Act should she fails to participate in a work capacity assessment with Workfocus. It was noted that the claimant failed to attend her appointments with Workfocus on 14 July 2022 , 4 and 25 August 2022. The new appointment with Workfocus was rescheduled to take place on 29 September 2022.*

5. *On 30 September 2022 the worker was notified that her weekly payments were suspended on 29 September 2022 until she attends the 'independent medical assessment' pursuant to section 119(3) of the 1998 Act. In that letter it was noted that the claimant failed to attend the assessment booked with Workfocus, rehabilitation provider, on 14 and 28 July 2022, 4 and 25 August 2022 and 29 September 2022.*

This review was at the request of the claimant who provided further medical evidence and explanation for her non-attendance of the independent medical assessment and vocational assessment in this claim.

The outcome of our review is as follows:

- *We have withdrawn the decisions dated 30 August 2022 and 30 September 2022 to suspend weekly payments since these decisions were either failed to com ply with the required statutory notice requirements prior to suspending weekly payments or not valid.*
- *We have maintained the decision dated 13 September 2022 to suspend weekly payments from 4 November 2021 should the claimant fails to attend the upcoming independent medical assessment on 12 October 2022.*

[33] The Applicant was required to attend two vocational work assessments on 12 and 14 October 2022. She did not attend either assessment, however, after her employment ceased the Applicant provided the Respondent with medical certificates for those dates and 29 September 2022. Those certificates had previously been provided to EML.[3] None of those certificates was from the medical practitioner who was the Applicant's treating practitioner throughout her incapacity, Dr Velibor Todorovic.[4]

[34] The medical certificate for 29 September 2022, was in the following form:

Dr Thoa-Van Le MBBS,MD,FRACGP

Shop 5 Cabramatta Plaza, 180 Railway Pde CABRAMATTA 2166

Medical Certificate

THIS IS TO CERTIFY 11-IAT

Mrs Nada Hinic

IS RECEIVING MEDICAL TREATMENT ON

Thursday, 29 September 2022

She WILL BE UNFIT TO CONTINUE her USUAL OCCUPATION

This Certificate was completed on 29/9/2022

Dr Thoa-Van Le

[35] The medical certificate for 12 October 2022, was in the following form:

12.10.22

I hereby certify that in my opinion

Nada Hinic

Is still unfit to resume her usual work on and including 12.10.22 due to medical [illegible]

Signed: Dr. F. K. H. Teng

[36] The medical certificate for 14 October 2022, was in the following form:

Medical Certificate

THIS IS TO CERTIFY THAT

Mrs Nada Hinic

IS RECEIVING MEDICAL TREATMENT AND FOR IBE PERIOD

Friday, 14 October 2022 TO Friday, 14 October 2022 INCLUSIVE

She WILL BE UNFIT TO CONTINUE her USUAL OCCUPATION due to a medical consultation

This Certificate was completed on 14/10/2022

[37] On 19 October 2022, the Respondent sent the following letter to the Applicant:

Dear Ms Hinic

RE: ABANDONMENT OF EMPLOYMENT SAFETY ASSEMBLY MOULDING PTY LTD

I refer to previous correspondence to you advising that you were being considered as having abandoned your employment with the Company because of the following circumstances: -

1. *Your failure to return to work as approved by the Workers' Compensation insurer on **22 June 2022** or at any time thereafter;*

2. *Your failure to respond appropriately to directions and requests to you from the Company relating to your Workers' Compensation claim and return to employment on 10 **August 2022, 31 August 2022 and 9 September 2022**; and*

3. *Your failure to satisfactorily explain your continuing refusal to attend Workers' Compensation medical appointments arranged for you to progress such claim and in particular failure to attend such appointments on **29 September 2022, 12 October 2022 and 14 October 2022** and the suspension of your Workers' Compensation payments in consequence.*

You have been absent from your place of work without cause since 22 June 2022 and there has been no adequate explanation of your absence.

The Company's policy on abandonment of employment and your failure to present for work without notification or authorisation is an abandonment of your employment.

[38] On termination the Applicant was paid outstanding annual leave and long service leave. No payment was made in relation to notice.

[39] The Respondent sent the Applicant an email regarding her final pay and other entitlements on 31 October 2022.

[40] On 2 November 2022, the Applicant issued a Letter of Demand that largely dealt with her accrued entitlements the Applicant asserted that she was owed, and a further letter regarding her accrued entitlements on 5 November 2022. The Applicant subsequently pursued her Long Service Leave claim with the NSW Department of Premier and Cabinet.

[41] On 9 February 2023, Dr Todorovic provided a Certificate of Capacity that declared the Applicant had no capacity to work from 9 February to 8 March 2023, due to her injury of 17 December 2021, and *"adjustment disorder with depressed mood and anxiety"*.

CONSIDERATION

Preliminary findings

[42] I am satisfied that:

(a) The Applicant's unfair dismissal application was lodged within the 21-day statutory time limitation found at s 394(2) of the Act;

(b) The Applicant is a person protected from unfair dismissal in that:

(i) she had completed the minimum employment period set out in ss 382 and 383 of the Act; and

(ii) an award, the *Manufacturing and Associate Industries and Occupations Award 2010*, applied to her employment (s 382(3)(b)(i)); and

(c) Her dismissal was not a case involving the Small Business Fair Dismissal Code (s 385(c)). While the Respondent in their Response raised a jurisdictional objection on this ground, that objection was not pursued at the Hearing.

[43] The relevant issue to be determined in the Respondent's jurisdictional objection is whether the Applicant was dismissed at the initiative of the employer (ss 385(a) and 386(1)(a)). The Respondent submitted in their Response the following:

> 3. *Abandonment of the employment by the Applicant ceasing to attend her place of employment without proper excuse or explanation and an unwillingness and/or inability to substantially perform her obligations under the employment contract.*

[44] Issues associated with abandonment of employment were recently considered as part of the 4 yearly review of modern awards. The Full Bench of the Commission considered the meaning of the expression "*abandonment of employment*," and to its relevance in the context of an unfair dismissal application. The Full Bench stated as follows (references omitted):

> *"Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment contract, the employment relationship is ended by the employee's renunciation of the employment obligations.*
>
> *Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern Award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative*

> *of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).”*
>
> (Emphasis added)

[45] I cannot conclude that a reasonable person would have formed the view that the Applicant had abandoned her employment. Between 6 September 19 October 2022, the Applicant had been in contact with the Respondent. Any brief delays in the correspondence did not convey abandonment as the Applicant issued multiple response letters to the Respondent.

[46] On 6 September 2022, the Applicant, responding to the 31 August Letter, advised the Respondent:

> *“Once again I want to continue with my employment with Safety Assembly Moulding Pty Ltd”*

[47] The Respondent’s requests for updates thereafter were simply that, requests for updates. They did not seek any further explanation as to what the Respondent perceived to be abandonment.

[48] The termination of the employment relationship did occur at the initiative of the employer, and there was a dismissal within the meaning of s 386(1)(a).

Was the Dismissal Harsh, Unjust or Unreasonable?

[49] I must consider the question of whether the Applicant’s dismissal was ‘*harsh, unjust or unreasonable*’ and therefore an unfair dismissal, pursuant to the considerations outlined in s.387 of the Act.

[50] Section 387 of the Act states:

> ***387 Criteria for considering harshness etc***.
>
> *In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:*

> *(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
>
> *(b) whether the person was notified of that reason; and*
>
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
>
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
>
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
>
> *(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
>
> *(h) any other matters that the FWC considers relevant.*

(a) Valid Reason

[51] In *Sydney Trains v Gary Hilder*[5] ("Hilder") the Full Bench summarised the well-established principles for determining such matters[6]:

> *"The principles applicable to the consideration required under s 387(a) are well established, but they require reiteration here:*
>
> *(1) A valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced.*
>
> *(2) When the reason for termination is based on the misconduct of the employee the Commission must, if it is in issue in the proceedings, determine whether the conduct*

occurred and what it involved.

(3) A reason would be valid because the conduct occurred and it justified termination. There would not be a valid reason for termination because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour).

(4) For the purposes of s 387(a) it is not necessary to demonstrate misconduct sufficiently serious to justify summary dismissal on the part of the employee in order to demonstrate that there was a valid reason for the employee's dismissal (although established misconduct of this nature would undoubtedly be sufficient to constitute a valid reason).

(5) Whether an employee's conduct amounted to misconduct serious enough to give rise to the right to summary dismissal under the terms of the employee's contract of employment is not relevant to the determination of whether there was a valid reason for dismissal pursuant to s 387(a).

(6) The existence of a valid reason to dismiss is not assessed by reference to a legal right to terminate a contract of employment.

(7) The criterion for a valid reason is not whether serious misconduct as defined in reg 1.07 has occurred, since reg 1.07 has no application to s 387(a).

(8) An assessment of the degree of seriousness of misconduct which is found to constitute a valid reason for dismissal for the purposes of s 387(a) will be a relevant matter under s 387(h). In that context the issue is whether dismissal was a proportionate response to the conduct in question.

(9) Matters raised in mitigation of misconduct which has been found to have occurred are not to be brought into account in relation to the specific consideration of valid reason under s 387(a) but rather under s 387(h) as part of the overall consideration of whether the dismissal is harsh, unjust or unreasonable."

[52] The reasons relied upon by the Respondent were outlined in the Termination Letter dated 19 October 2022, as follows:

1. *Your failure to return to work as approved by the Workers' Compensation insurer on 22 June 2022 or at any time thereafter;*

2. *Your failure to respond appropriately to directions and requests to you from the Company relating to your Workers' Compensation claim and return to employment on 10 August 2022, 31 August 2022 and 9 September 2022; and*

3. *Your failure to satisfactorily explain your continuing refusal to attend Workers' Compensation medical appointments arranged for you to progress such claim and in particular failure to attend such appointments on 29 September 2022, 12 October 2022 and 14 October 2022 and the suspension of your Workers' Compensation payments in consequence.*

[53] It was unremarkable, in light of the significant capacity limitations outlined in the COC, that the Applicant failed to return to work after 22 June 2022. Those limitations obviously curtailed any work that could be available to the Applicant, and contrary to the content of the first reason, the Workers' Compensation insurer had not approved a return to work.

[54] The other two reasons relied upon by the Respondent, however, were of more substance. The New South Wales legislation regarding Workers Compensation focuses on more than just payment of compensation and goes the issues of certification and rehabilitation. In particular:

(a) The *Workers Compensation Act 1987* (NSW) provides at s.44A:

44A Work capacity assessment

(1) An insurer is to conduct a work capacity assessment of an injured worker when required to do so by this Act or the Workers Compensation Guidelines and may conduct a work capacity assessment at any other time.

(2) A work capacity assessment is an assessment of an injured worker's current work capacity, conducted in accordance with the Workers Compensation Guidelines.

(3) A work capacity assessment is not necessary for the making of a work capacity decision by an insurer.

(4) An insurer is not to conduct a work capacity assessment of a worker with highest needs unless the insurer thinks it appropriate to do so and the worker requests it.

(5) An insurer may in accordance with the Workers Compensation Guidelines require a worker to attend for and participate in any assessment that is reasonably necessary for the purposes of the conduct of a work capacity assessment. Such an assessment can include an examination by a medical practitioner or other health care professional.

(6) If a worker refuses to attend an assessment under this section or the assessment does not take place because of the worker's failure to properly participate in it, the worker's right to weekly payments is suspended until the assessment has taken place.

(b) The *Workplace Injury Management and Workers Compensation Act 1998* (NSW) provides, at ss.46, 48 and 119(1) to (4):

46 Employer's injury management plan obligations

(1) The employer must participate and co-operate in the establishment of an injury management plan required to be established for an injured worker.

(2) The employer must comply with obligations imposed on the employer by or under an injury management plan for an injured worker.

(3) This section does not apply when the employer is a self-insurer.

....

48 Return to work obligations of worker

(1) A worker who has current work capacity must, in co-operation with the employer or insurer, make reasonable efforts to return to work in suitable employment or pre-injury employment at the worker's place of employment or at another place of employment.

(2) For the purposes of this section, a worker is to be treated as making a reasonable effort to return to work in suitable employment or pre-injury employment during any reasonable period in which—

(a) the worker is waiting for the commencement of a workplace rehabilitation service that is required to be provided under an injury management plan for the worker, or

(b) the worker is waiting for a response to a request for suitable employment or pre-injury employment made by the worker and received by the employer, or

(c) if the employer's response is that suitable employment or pre-injury employment will be provided at some time, the worker is waiting for suitable employment or pre-injury employment to commence.

....

119 Medical examination of workers at direction of employer

(1) A worker who has given notice of an injury must, if so required by the employer, submit himself or herself for examination by a medical practitioner, provided and paid by the employer.

(2) A worker receiving weekly payments of compensation under this Act must, if so required by the employer, from time to time submit himself or herself for examination by a medical practitioner, provided and paid by the employer.

(3) If a worker refuses to submit himself or herself for any examination under this section or in any way obstructs the examination—

(a) the worker's right to recover compensation under this Act with respect to the injury, or

(b) the worker's right to the weekly payments, is suspended until the examination has taken place.

(4) A worker must not be required to submit himself or herself for examination by a medical practitioner under this section otherwise than in accordance with the Workers Compensation Guidelines or at more frequent intervals than may be prescribed by the Workers Compensation Guidelines.

....

[55] Where a worker fails to comply with return to work obligations the insurer may suspend or terminate the payment of compensation to the worker, or cease and determine the entitlement of the worker to compensation in the form of weekly payments in respect of the injury under the Act.

[56] As noted in the email from iCare on 7 October 2022, in this matter the Applicant was notified on five occasions that her payments would be suspended from various dates between 2 September and 4 November 2022, with reliance placed on either s.44A of the *Workers Compensation Act 1987*, or s.119 of the *Workplace Injury Management and Workers Compensation Act 1998*. Eventually the suspension commenced on 4 November 2022, and remains in place.[7]

[57] In summary, the Applicant failed to attend:

(a) Work capacity assessments with Workfocus, the rehabilitation provider on 14 July, 4 August, 25 August, 29 September 2022; and

(b) Two vocational work assessments on 12 and 14 October 2022.

[58] The Applicant submitted that a return-to-work plan was never completed for her and that on each occasion that a return-to-work appointment was scheduled, she was unwell, providing certificates to that effect, submitted after her dismissal. The Applicant stated in her closing submissions:

> *However, the insurer icare/EML didn't advise me of my returned to work date and Return To Work Plan wasn't developed for me by the insurer icare/EML. The employer acknowledged the requirement for Return to Work Plan in order for me to return to work with Safety Assembly Moulding Pty Ltd in a document Letter from Respondent to Applicant dated 09/09/2022 (on Court Book pages 83 and 208) and in this letter the employer also acknowledged that Return To Work Plan wasn't developed for me prior to and at the time this letter was emailed to me on 09/09/2022. Thus, I didn't cease to attend my place of work without proper excuse or explanation since 22/06/2022 as stated by the employer because Return To Work Plan wasn't developed for me by the insurer icare/EML and the insurer icare/EML didn't advised me of my returned to work date and the insurer icare/EML and the employer didn't set a date for my return to work which is proper excuse or explanation and therefore I didn't abandon my employment and I was unfairly dismissed because there was not a valid reason for my dismissal.*

[59] The Respondent submitted that the reason for a return-to-work plan not being completed was because of the Applicant's unwillingness to participate in such a process. The Respondent submitted in their closing submissions:

> *20. … that the Applicant's failure to lead any evidence that she was willing to even engage in the return to work process, even now, having been given every opportunity to put evidence demonstrating willingness, when objectively viewed demonstrates that the failure to develop a return to work plan rests solely with the Applicant.*
>
> *21. There is no evidence, or even a suggestion that the Applicant was engaging in any way, lest a meaningful way with the many appointments scheduled for her. She refused to sign consent forms provided by the return to work providers and offered no alternatives dates or times for other return to work appointments.*

[60] It is frankly impossible to perceive how a return to work plan could be developed for the Applicant when she did not attend any of the work capacity assessments. I accept the Respondent's submission that the Applicant did not engage in any meaningful way with the attempts to formulate a return-to-work plan.

[61] The Applicant refers to the medical certification she obtained each time she failed to attend a work capacity assessment, however, a review of those certifications discloses that they provide little explanation. The medical certificate of 25 August 2022 from Liverpool Health Service, for example, outlines that Applicant was "*…suffering from"* and then ends diagnosis without stating anything. It then provides *"She will be unable to attend work/school from 25/08/2022 to 25/08/2022"*, which was an entirely unremarkable statement as she had not attended work for 9 months, but goes nowhere to explaining any alleged difficulty in attending a work capacity assessment.

[62] Similarly, the certification on 29 September 2022, that *"She WILL BE UNFIT TO CONTINUE her USUAL OCCUPATION"* was unremarkable but went nowhere to explaining non-attendance at a work capacity assessment.

[63] Possibly the most concerning certificate was that relating to 14 October 2022, that provided *"She WILL BE UNFIT TO CONTINUE her USUAL OCCUPATION <u>due to a medical consultation</u>"* [Emphasis added].

[64] It is tolerably clear that, while the Applicant could attend a medical consultation on 14 October 2022, she apparently chose to attend a different consultation to that involving her workers compensation claim.

[65] While the Respondent was not provided with the medical certificates until after the Applicant's dismissal, had they have been provided prior to dismissal they would have provided

no explanation for the Applicant's absences. To the contrary, they would have informed the Respondent that the Applicant was quite capable of attending medical assessments, but, in a form of incomprehensible circularity, the assessments she attended were for the purpose of obtaining medical certificates to explain her non-attendance at work capacity assessments and vocational work assessments.

[66] It is notable to observe that the Applicant was to be provided with expense payments for vehicles to take her to and from work capacity assessments, together with an Interpreter.

[67] While the Respondent candidly conceded the difficulty with challenging medical certificates,[8] it is clear that the provision of such certificates is not the end of any consideration by an employer.[9] Nonetheless, the above analysis of the certificates provided proceeds on their specific terms, without challenge to their veracity.

[68] I am satisfied that the Applicant failed to comply with the Respondent's or Workers' Compensation insurer's directions to attend work capacity assessments and vocational work assessments. This failure was unreasonable and was not explained by the medical certificates provided to the Respondent justifying the Applicants non-attendance, which were filed after the dismissal took place.

[69] I find that from 28 September 2022, the Applicant was fully aware of the Respondents insurers attempts to organise a return to work plan, but nonetheless knowingly failed to comply with that reasonable request. In so not complying, the Applicant engaged in a course of correspondence in response to the Respondent's legitimate enquiries that can only be described as obfuscation.

[70] There was a valid reason for the Applicant's dismissal based upon her failure to attend work capacity assessments whilst she was on workers compensation and employed by the Respondent. These failures on behalf of the Applicant constituted a valid reason for the dismissal.

(b) Notification (s.387(b))/ Opportunity to Respond (s.387(c))

[71] The Respondent notified the Applicant of the reason for dismissal (s.387(b)), however the Respondent only did so in the termination letter on 19 October 2022.

[72] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made, in plain and clear terms. In *Crozier v Palazzo*

Corporation Pty Ltd the Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations Act 1996* stated the following:[10]

> *"[73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."*

[73] While the Applicant was notified of the reason for her dismissal in plain and clear terms she was not so notified before the decision was taken to terminate her employment.

[74] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance, and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.

[75] The Applicant was given an earlier opportunity to respond to the reasons eventually given for the dismissal. In the 31 August Letter, the Respondent said "*We are concerned for your welfare. Please advise us as soon as possible if there is any reason preventing you from attending work, or alternatively, if you have decided that you will not be continuing with your employment.".* However, six days later the Applicant set out in detail the matters on which she was invited to respond, and coherently outlined the timeline of correspondence between the parties and explicitly stated that she wished to continue with her employment.

[76] This response issued by the Applicant seems to have been disregarded by the Respondent, as they subsequently issued the Applicant with the termination letter on 19 October 2022, in circumstances where:

(a) The Respondent had last communicated with the Applicant on 19 September 2022;

(b) The Respondent relied on the contents of the iCare email of 7 October 2022, without outlining that reliance to the Applicant; and

(c) At least insofar as the failure to attend such appointments on 29 September 2022, 12 October 2022 and 14 October 2022, the Respondent had not sought the response of the Applicant.

[77] I find that the Respondent did not adequately provide the Applicant with a reasonable opportunity to respond to the allegations against her. I am consequently not satisfied in the circumstances that the Applicant had a full opportunity to respond to the reasons relied by the Respondent in dismissing her, in particular that she had abandoned her employment. This weighs in favour of a finding that the dismissal was unfair.

(c) Support Person (s.387(d))

[78] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[79] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> *"This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."*[11]

[80] This factor remains neutral in consideration, as there was never any opportunity to request nor provide a support person to the Applicant.

(d) Warnings

[81] This matter does not relate to unsatisfactory performance and therefore does not arise for consideration.

(e) Size of the business/human resources

[82] The Respondent's *Form F3 - Employer Response* indicates that at the time of the Applicant's dismissal it employed approximately 9 employees. There is no evidence before me,

and nor did either party contend, that the Respondent's size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

(f) Other relevant matters

[83] The Applicant says she commenced employment with the Respondent in October 1999, while the Respondent says she commenced on 23 June 2012. On either calculation I find the Applicant to be a long-term employee of the Respondent and weigh that factor as resulting in harshness of the dismissal.

[84] An issue arose in the proceedings regarding the contact from the Respondent to the Applicant occurring by email, in circumstances where the Applicant had asked that communication be by post. I do not consider that to be an issue of substance as:

(a) The Applicant knew how to use email;[12]

(b) The Applicant communicated with iCare by email;[13] and

(c) The Respondent acceded to the request to communicate by mail in August 2022, and there was no issue thereafter.[14]

[85] I have noted and taken account of the submissions of both parties on other relevant factors. I consider the fact that the Applicant was effectively summarily dismissed, or at least terminated without notice, to also be of relevance.

Conclusion as to Whether the Dismissal Harsh, Unjust or Unreasonable

[86] In all of the circumstances and having taken account of each of the factors in section 387 and my findings thereon, particularly the absence of an opportunity to respond, I have determined that the termination of the Applicant's employment was harsh, unjust and unreasonable. It follows from this that the Applicant's dismissal was unfair.

Remedy

[87] The circumstances as to when the Commission may order remedy for an unfair dismissal are set out in s.390 of the Act.

[88] Section 390 is in the following terms:

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.

[89] In respect to s.390(1)(a), it is not in dispute that the Applicant was protected from unfair dismissal. In respect to s.390(1)(b), for the reasons set out above, I am satisfied that the Applicant has been unfairly dismissed, and the Applicant has made an application satisfying s.390(2).

[90] Having regard to the matters in s.390(3)(a), while the Applicant seeks reinstatement, I am satisfied that reinstatement is inappropriate. The Applicant continues to be unfit for her pre-injury duties, and considering the significant limitations on whatever work may be performed in 4 hours a day, 4 days a week (for example a lifting capacity of 1 kg), it is realistic to assess the Applicant has no current reasonable capacity for work.

[91] The matters to be taken into account in making an order for compensation are set out in s.392 of the Act as follows

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.

[92] As noted by the Full Bench in *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries*,[15] the well-established approach to the assessment of compensation under s.392 of the Act is to apply the "*Sprigg formula*" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (Sprigg).[16] This approach was articulated in the context of the Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages.*[17]

[93] It is important to note the remedy sought by the Applicant that was originally outlined in her correspondence of 2 and 5 November 2022, and repeated in the Application as follows:

I'm seeking outcome of my dismissal by my employer to be unfair dismissal and not abandonment of employment as stated by my employer in Abandonment of Employment letter dated 19/10/2022.

I'm also seeking compensation.

I'm also seeking outcome of my dismissal by my employer to be wrongful dismissal because my employer didn't provide notice period of termination in Abandonment of Employment letter dated 19/10/2022. However , Letter of Engagement that I signed states that "under the Fair Work Act 2009 the employer might terminate your employment at

any time by providing you with notice in writing". I' ve attached letter of Engagement that l signed.

I believe that I' m entitled to 5 weeks of notice, 4 weeks and 1 additional week because I'm over 45 years. I began working for the employer in October 1999 when the business was called Safety Assembly, but I was working for same boss Bruce Green. In 2019 the business name changed from Safety Assembly to Safety Assembly Moulding Pty Ltd, but Bruce Green continued to be the boss. Letter Final Pay dated 31/10/ 20 22 outlining part of entitlements paid to me states that Bruce Green was director of Safety Assembly and

Safety Assembly Moulding Pty Ltd on 23/06/2012. Thus , I'm entitled to weeks of notice, 4 weeks and 1 additional week because I'm over 45 years, because I have been employed more than 5 years by Bruce Green and worked for his business. I believe I'm entitled to payment in lieu of notices total of 5 weeks.

By lodging this application I'm also seeking payment of remaining unpaid entitlements which are I believe are still owed to me on termination of my employment by my employer on 19/10/ 2022 including:

- *• Payment in lie u of not ices total of 5 week s, 4 weeks and 1 additional wee k because I'm over 45 years old totalling $4968.50.*

FAIR WORK COMMISSION

Form f2- Unfair dismissal application

Employer is required to provide employee with notice period of termination, however, an Abandonment of Employment Letter dated 19/10 /2022 didn't provide notice period of termination .

- *Accrued Annual leave for period from 26/09/2022 to 19/10/2022 of 10.512 hours totalling $2 74.89. On 31/10/2022, 13 days aft er my employment was terminated by my employer on 19/10/2022, I was paid 222.074 hours of accrued annual leave by my employer , However, I haven't been paid complete amount of accrued annual leave and I'm still owed 10.512 hours of annual leave totalling $274.89 for per io d from 26/09/2022 to 19/10/2022 because annual leave paid was calculated up to 25/09/ 2022, 3 weeks and 3 days prior to termination of my employment by my employer on 19/10/2022.*

- *Accrued Long Service Leave from October 1999 to 23/06/2012. My employment with the business commenced prior to 23/06/ 2012 and not as of 23 / 06 / 2012 based on Bruce Green being Director of Safety Assembly and Safety Assembly Mounding Pty Lt d as stat ed in the Final Pay Lett e r dated 31/10/2022 as employer's bases for calculation of long service leave hours. I have Super annuation Statement as evidence that my employment commenced with the business prior to 23/06/2012. My employment commencement with the business shouldn't be changed based on Bruce Green being Director.*

Superannuation for period of 26/ 09/ 2022 to 19/10/2022.

[94] It is immediately apparent that the financial remedies sought by the Applicant are more akin to an underpayment claim that, notwithstanding this decision, may be pursued by the Applicant in the appropriate jurisdiction. It is not part of the task of the Commission in determining compensation to address allegations of underpayment.

The effect of the order on the validity of the employer's enterprise – s.392(2)(a)

[95] There was no submission that there would be any effect of the order on the viability of the employer's enterprise.

The length of the person's service with the employer – s.392(2)(b)

[96] The Applicant's period of employment was significant. The Applicant's length of service would have weighed in favour of increasing the amount of compensation ordered.

The remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed – s.392(2)(c)

[97] The assessment of the length of continued employment is a discretionary decision. It is clear that by the time of the Applicant's dismissal the relationship between the Applicant and Respondent had seriously deteriorated, to the extent that it was unlikely to continue for any significant period thereafter.

[98] In those circumstances, I consider that the Applicant's employment would only have continued for a period to allow for procedural fairness to be afforded to the Applicant. I estimate that the Applicant's employment would have continued for a further two weeks, which would

have allowed for sufficient time for the Respondent to notify the Applicant of the reason for dismissal, provide an opportunity for her to respond and to give her notice of dismissal.

Mitigation/Remuneration Earned – s.392(2)(d) and (e)

[99] The Applicant received workers compensation payments, which must be taken into account. Those payments continued for approximately two weeks after dismissal, and until 4 November 2022.

Other Matters Relevant – 392(2)(g)

[100] The Applicant did not apparently receive any pay in lieu of notice. However, had notice been given, there would have been no requirement to make ordinary payments to the Applicant as she was absent, and on workers compensation.

Misconduct reduces amount – 392(3)

[101] Section 392(3) of the Act provides:

> *(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.*

[102] In *Butterfly Systems Pty Ltd v Sergeev*,[18](Sergeev) the Full Bench of the Commission found:[19]

> *Two relevant considerations arise from the terms of the provision. Firstly, the specific use of the term "misconduct", as opposed to "serious misconduct", indicates that conduct of less severity than that encompassed in the definition of serious misconduct in Regulation 1.07 of the Fair Work Regulations 2009, is within the purview of the provision. Secondly, the provision requires the Commission to reduce the amount of compensation it would otherwise order by an appropriate amount, on account of misconduct, if satisfied that the misconduct contributed to the employer's decision to dismiss.*

[103] The conduct of the Applicant constituting valid reasons satisfies the definition of misconduct and contributed to the decision of the Respondent to dismiss her. Had I considered it appropriate that compensation be ordered, I would have reduced any order by 50%.

Conclusion and order as to remedy

[104] I consider that reinstatement is not an appropriate remedy. I estimate the Applicant would have remained in employment a further two weeks had she not been terminated.

[105] I do not consider the Applicant would have earned ordinary remuneration in that two week period and so make no order for compensation. Had I have made an order for compensation; I would have reduced such payment on account of misconduct by 50%.

Conclusion

[106] I find that the Applicant did not abandon her employment, and she was dismissed by the Respondent, and that dismissal was harsh, unjust or unreasonable.

[107] As to remedy, I am satisfied that reinstatement is inappropriate, and find there is no basis to award any compensation to the Applicant.

[108] I reiterate that the financial remedies sought by the Applicant are in the form of an underpayment claim that, notwithstanding this decision, may be pursued by the Applicant in the appropriate jurisdiction.

DEPUTY PRESIDENT

Appearances:

Mrs Nada Hinic (the Applicant)

Mr A Guy (the Respondents Representative)

Hearing details:

Friday 17 March 2023 (In-Person) at 10:00AM

Final written submissions:

Final Submissions from the Applicant 11 April 2023

Final Submissions from the Respondent 18 April 2023

Printed by authority of the Commonwealth Government Printer

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[1] Transcript PN 123.

[2] Transcript PN 546.

[3] Transcript PN 411 to 414.

[4] Transcript PN 143.

[5] [2020] FWCFB 1373.

[6] Ibid at [26]

[7] Transcript PN 544.

[8] Transcript PN 416.

[9] *Grant v BHP Coal Pty Ltd* (2014) 244 IR 342.

[10] (2000) 98 IR 137, at [73].

[11] *Habbershaw v Jo-Ann Aay T/A Hermitage Produce* (2021) FWC 5111, 33.

[12] Transcript PN 235.

[13] Transcript PN 239.

[14] Transcript PN234.

[15] [2016] FWCFB 7206, at [16].

[16] (1998) 88 IR 21.

[17] [2013] FWCFB 431.

[18] [2021] FWCFB 18.

[19] Ibid at [35].