DECISION

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

Tao Yang
v
SAL HR Services Pty Ltd
(U2023/949)

DEPUTY PRESIDENT HAMPTON ADELAIDE, 4 JULY 2023

Application for an unfair dismissal remedy – jurisdictional objection – whether applicant dismissed – found resignation foreshadowed but not expressly stated and should not have been relied upon by the respondent as the cessation of employment – dismissal found – dismissal harsh and unreasonable – compensation awarded.

1. What this decision is about

[1] Mr Tao Yang (Mr Yang or the **Applicant**) has applied to the Fair Work Commission (the **Commission**) for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the **FW Act**) following his alleged unfair dismissal from SAL HR Services Pty Ltd (**SAL** or the **Respondent**).

[2] Mr Yang commenced employment with SAL on 13 September 2021 as a casual warehouse store person. On 14 February 2022, the Applicant was engaged as a fulltime employee in the same role.[1]

[3] SAL is a lighting wholesale business which operates nationally. It has warehouses in Sydney (along with its Head Office), Melbourne, Perth, Brisbane and Adelaide. The Adelaide operation, where the Applicant worked, is the smallest warehouse where four employees were engaged at the time of the events relevant to this application. Two of these employees, including the Applicant, were engaged directly to undertake warehouse work.

[4] The Applicant last performed work for SAL on 6 February 2023. Following an exchange with his immediate manager (Mr Wang) and some consequential discussions with that manager and the Respondent's General Manager, Mr Tang, he left the workplace and on the following day filed this application. What happened on 6 February 2023, and who is responsible for the conclusion of the employment, is very much in dispute.

[5] Mr Yang contends that he was (directly) dismissed by the Respondent's General Manager. He also contends that the dismissal was unfair on various grounds and during the hearing indicated that he was seeking compensation of 6 weeks' wages.[2]

[6] SAL objects to the application on the basis of jurisdiction; that is, it asserts that Mr Yang was not dismissed. It contends that Mr Yang advised that he was resigning, and this was subsequently accepted by his manager. This it further asserts, was not a forced resignation and it denies that any dismissal was contemplated or expressed by its General Manager. It also contends, in the alternative, that any dismissal would have been justified based upon Mr Yang's work performance, his history of alleged late attendance at work, and his conduct on 6 February 2023. SAL also opposed any award of compensation.

[7] Mr Yang has a limited command of English and participated in all the proceedings of the Commission with a Mandarin interpreter. SAL was represented by Mr Fei Rong, its Administrator who also provides some internal human resources services as part of a much broader administration role. In the absence of external representation, I assisted both parties to present their cases and to deal with the various requirements and considerations established by the FW Act relevant to this matter.

[8] I have now heard this matter. The hearing canvassed evidence and submissions concerning the following:

- Jurisdiction – whether Mr Yang was dismissed within the meaning of s.386 of the FW Act? – **was there a dismissal?**

- Merit – if there was a dismissal, was it unfair having regard to the considerations established by s.387 of the FW Act? – **merit**

- Remedy – if any dismissal was unfair, should a remedy (compensation was sought by Mr Yang) be granted and if so, how much? – **remedy**.

[9] It was established, and not in contention, that Mr Yang was protected from unfair dismissal and eligible to make the application, that SAL was not a small business, and that the cessation of the employment did not involve a redundancy.[3]

[10] For reasons that follow, I have determined on balance that:

- Mr Yang was dismissed – but not for the reasons he has contended;

- The dismissal was unfair; and

- Some compensation was appropriate.

[11] The basis of those findings and the Orders made by the Commission are set out in this decision.

2. The cases presented by the parties

2.1 The Applicant

[12] The Applicant's fundamental position is that he was dismissed by SAL on 6 February 2023. Further, the failure of SAL to provide any warning or opportunity to improve his work performance, was "unlawful" and unreasonable. This position is advanced based on the following contentions:[4]

- He was "only late a handful of times and other people [were] late all the time."
- He received no warning that his lateness "was a serious problem that [SAL] would fire [him] for."
- It was unfair that he was fired "for…attitude, but other people weren't."
- It was unfair because SAL did not give him a warning or a chance to improve.

[13] The Applicant provided a witness statement[5] and relevant documentation,[6] and gave affirmed evidence.

[14] The Applicant stated that on 6 February 2023, the Respondent's General Manager told him to the effect that he was fired after "experiencing conflict in the early morning" and that the Respondent "decided this as an oral resignation."[7] The Applicant further stated that after he spoke with the General Manager (again) over the phone, he was told in effect that he was fired because he could not cooperate with his Operations Manager, who was not satisfied with the Applicant's working attitude.[8] In his submissions, the Applicant submitted that it was "paradoxical" of the Respondent to argue that he orally resigned while also citing behaviour issues such as his alleged frequent lateness and absence from work.[9]

[15] The Applicant provided written evidence which included:[10]

- Written Submissions[11]
- Personal and Annual Leave Documents[12]
- SMS Messages of Attempts to Find Work[13]
- Payslip from (new employer)[14]

2.2 The Respondent

[16] The Respondent contends that on 6 February 2023, the Applicant informed the Operations Manager that he resigned;[15] the Respondent accepted the voluntary resignation on that day and express posted a notice that acknowledged and confirmed the Applicant's entitlements after his voluntary resignation.[16] This meant that the Commission lacked jurisdiction to deal with the matter because the Applicant voluntarily resigned and was not dismissed.[17] In the alternative, the Respondent contends that:

- The Applicant had on several occasions been late for work without explanation and was repeatedly warned that he needed to arrive on time and notify the Operations Manager in advance if he was going to be late.[18]

- On several occasions, the Applicant had not followed instructions regarding tasks and was repeatedly warned that he should follow correct process.[19]

- There were several performance management meetings where the Applicant's problems were discussed and he was given opportunities to improve but over time, the Applicant had not improved his performance sufficiently.[20]

- On 6 February 2023, during another performance management meeting, the Applicant's lateness and mistakes at work were discussed again.[21] The purpose of the conversation on 6 February was to "address these issues, provide guidance, and find ways to improve the applicant's punctuality and adherence to procedures."[22]

[17] The Respondent led written and affirmed evidence from the following:

- Fei Rong, Administrator;[23]
- Wei Yong Tang (also known as Tony Tang), General Manager;[24]
- Li Wang (also known as Max Wang), Operational Manager, SA Branch;[25] and
- Scott Cullen, Sales Assistant.[26]

[18] The Respondent also submitted documents as evidence which included:

- Letter of offer to Applicant of casual employment dated 13 September 2021[27]
- Document entitled "Grounds for Summary Dismissal" that was attached to the Applicant's employment contract[28]
- Document entitled "Minimum Period of Notice" that was attached to the Applicant's employment contract[29]
- Applicant's acceptance of employment offer[30]
- Notice of full-time employment for the Applicant dated 7 February 2022[31]
- Acknowledgement of "acceptance of resignation notice" dated 6 February 2023 that the Respondent sent to the Applicant via express post[32]
- Express post material namely lodgement receipt from Australia Post and return to sender details[33]
- Tracking material related to express post material namely information about attempted delivery of item[34]
- Confirmation of payments made to the Applicant on dismissal[35]
- Information regarding the Applicant's arrival times prepared based on screenshot timestamps[36]
- CCTV recording of some of the warehouse exchange between the Applicant and Mr Wang.[37]

[19] The Respondent also relied upon various screen shots of CCTV footage which it contended demonstrated when Mr Yang first attended work on the days shown in the footage.

This was the foundation for exhibit R11. This material was all subject to evidence from Mr Wang and put to the Applicant in cross-examination.

3. Observations on the evidence

[20] There are sharp and significant factual disputes between many of the witnesses. In particular, the Applicant's version of the events, and what was stated during the course of the various exchanges that took place on 6 February 2023, differs from that provided by the General Manager (Mr Tang) and Mr Wang.

[21] I have assessed each of the witnesses based upon the consistency and overall credibility of their evidence, the degree to which their evidence related to events and conversations that they directly observed or participated in, and their willingness to make obvious concessions rather than to advocate a position.

[22] I found that in general terms the Applicant, Mr Yang, was a plausible witness who attempted to assist the Commission with his evidence. He did however have a tendency to generalise and exaggerate some of the key exchanges and his sense of injustice strongly influenced some of his recollections. He also had a tendency to downplay the contribution that he made to the events on the day in question.

[23] I found the evidence of Mr Rong to be reliable. He did not however generally observe or particate in any of the key events.

[24] I found the evidence of Mr Tang to be consistent, measured and credible. I accept his evidence where it conflicts with that provided by the Applicant. His recall of the detail of the conversations with the Applicant was not always clear, however I accept the substance of his evidence on those matters.

[25] I found that Mr Wang attempted to assist the Commission with his evidence. However, as with the Applicant, the sense of unfairness associated with his actions and intentions being questioned, strongly influenced his evidence. This led to a tendency to exaggerate certain matters, although I do not completely discount his evidence about most of the verbal exchanges with the Applicant on the day in question.

[26] I found the evidence of Mr Cullen (Sales Assistant) to be of little assistance. This is not because he was attempting to be anything less than honest, rather, his evidence about what happened was largely based upon what he had been told or what he had presumed based upon the little that he heard and saw. His failure to recognise the limits of his actual knowledge means that I treat his evidence with considerable caution.

[27] The CCTV footage of the day in question was of some assistance. However, it captured only part of the exchange and did not contain any sound. Despite this, the vision of when the Applicant allegedly threw (and damaged) some product on 6 February 2023 was helpful and revealed that the evidence about this from Mr Wang and Mr Cullen was significantly exaggerated.

[28] The screen shots of the CCTV footage of the Applicant's arrival at the workplace on 21 separate days between 23 December 2022 and 6 February 2023[38] provided by the Respondent were problematic. They were selective and no proper explanation was provided about some of those screen shots which showed the Applicant already in the warehouse dressed in his work uniform (that he put on whilst at work) with his paperwork already in hand, when according to the Respondent he must have already passed another camera upon entering the building. This undermined the related evidence about the extent of the Applicant's repeated arrival at the workplace after the 8.00 am scheduled start. I do however accept that he was sometimes at least a few minutes late, and at least on some occasions, by more than that. I will return to the significance of this aspect later.

4. What happened on 6 February 2023?

[29] Having regard to the evidence that is before the Commission, I find on the balance of probabilities that the events of 6 February 2023 were as set out below.

[30] The Applicant attended for work some minutes after the scheduled 8.00 am starting time. The exact time is not presently critical, but it was late enough for Mr Wang to notice. Mr Wang, with some justification, was annoyed about this given that he was the only other warehouse employee at the Adelaide operations and expected either some advance notice that the Applicant would be late, or at the very least, an explanation.

[31] Mr Wang raised his concerns about the time of attendance with the Applicant and received what he considered to be an unsatisfactory response. This set the tone for the subsequent exchange.

[32] At approximately 8.25 am, Mr Wang inspected the packages of goods that had been assembled by the Applicant. Mr Wang understood that the packing task involved had been completed. He could not find, or read, the information that the Applicant was required to put on the outside of the boxes that was intended to confirm their contents and order numbers. It is probable that the Applicant had made some notation on the boxes, but this was not large enough or compliant with the procedures of the business. Mr Wang raised his concerns about this with the Applicant.

[33] Mr Wang advised the Applicant to the effect that the warehouse procedures could not be changed, and the Applicant responded that he had not yet completed the task. In the context of the earlier exchange about lateness, the tension between the 2 men escalated. Both men, speaking in Mandarin, spoke with raised voices and pointed to each other and the packages that were stacked on a pallet. The Applicant expressed concerns that he was being treated more strictly than others and Mr Wang was emphasising that compliance with the company procedures was important. The Applicant became frustrated and his gestures increased. I observe that the 2 men were many metres apart and no threats, verbal or otherwise, could be implied from their exchange.

[34] Mr Wang said to the Applicant words to the effect that he had concerns about the Applicant's attitude, and what he saw as his uncooperative behaviour and regular lateness for work. Mr Wang, in effect, sought an assurance that the Applicant would in the future comply with warehouse procedures and cooperate. I am not persuaded that Mr Wang told him to "fuck

off" or directly threatened the Applicant's employment as claimed by the Applicant. The Applicant would however have been reasonably concerned that this latter threat was possible given the circumstances.

[35] At that point, Mr Yang, who remained at a packing station, picked up and dropped (from a small height of approximately 50mm) a metal lighting track. This was done as a gesture of frustration and was not necessary or appropriate, but it was not thrown in the manner that was alleged by the Respondent.

[36] Mr Yang then said something to the effect, that he had enough of this and wanted to leave. This was stated in a highly emotional manner as he walked to leave the area. It is also possible that Mr Yang said, or more probably implied as part of that exchange, that he wanted to or would quit his job.

[37] The Applicant demanded to speak to the General Manager, Mr Tang. The Applicant and Mr Wang went into the office and Mr Wang phoned Mr Tang and handed the phone to the Applicant. During what was a brief discussion, the Applicant complained that he was being treated unfairly and Mr Tang advised that he needed to find out what had happened, and as he had a series of commitments that morning, the Applicant should speak to Mr Rong (the Administrator). Mr Tang did not dismiss or threaten to dismiss the Applicant during that conversation.

[38] The phone was then handed back to Mr Wang who was advised by Mr Tang that he wanted to speak further with him after his meetings.

[39] The Applicant then approached Mr Wang and said words to the effect of "what's next?". Sensing the intensity of the situation, Mr Wang invited the Applicant to calm down, take off his work jacket and discuss the matters as soon as Mr Wang had completed a task that he was undertaking. The Applicant then immediately left the workplace and went to his car. It is probable that the applicant remained in his car in the car park and after some minutes directly phoned Mr Tang.

[40] The evidence about this second telephone discussion between the Applicant and the General Manager, Mr Tang, is somewhat unsatisfactory. The recall of the detail from both involved was not clear and I suspect that each has tended to conflate (confuse and mix) the 2 telephone discussions. The Applicant continued to protest what he saw as his unfair treatment and Mr Tang confirmed that there were performance concerns and that the Applicant needed to work with and get along with Mr Wang. It is also probable that Mr Tang again indicated that the Applicant should take the issues up with Mr Rong.

[41] I am not persuaded that either party to the second telephone discussion made any reference to a resignation or that Mr Tang used any words that would have confirmed that the Applicant was being dismissed.

[42] After having been outside of the workplace for about 20 minutes, the Applicant returned to the office and requested that Mr Wang speak with him outside. Mr Wang agreed to do so and considered that the carpark would be a "calmer" location to hold the discussion. The Applicant sought to defend himself against the earlier suggestions that he was regularly late for work and

had not followed correct procedure. Mr Wang considered that the Applicant continued to be uncooperative and not taking responsibility for his actions. He then stated words to the effect, that the Applicant had earlier expressed an intention to quit and given his ongoing behaviour, Mr Wang would "respect your choice" and it "seems that parting ways is the most appropriate course of action". [39]

[43] Mr Yang then immediately went to his vehicle and left the premises. He correctly in my view understood that his employment had concluded at that point.

[44] Subsequently, Mr Rong sent by express post to the Applicant's home address, an "Acknowledgment and Acceptance of Resignation Notice" in the following terms:

> "Dear Tao,
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> This is to confirm receipt and acceptance of your oral resignation notice, received at 9:22 am on Monday 06/02/2023…
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> Although I was reported repeatedly about your late to work and absence from work, our SA operation manager Li Wang had discussed about your poor performance and requested you to make an improvement in several instances. However, during another meeting on Monday, while Li pointed out your issues again, you've thrown packed products on the packaging machine and informed Li that you quit.
>
> It came to our surprise that you had to decide to leave because of a performance management meeting…"[40]

[45] It is likely that delivery of this postal item was later refused by Mr Yang.

[46] Mr Yang lodged this application with the Commission on 7 February 2023.

[47] The Respondent paid the Applicant for work performed up to and including 6 February 2023 and paid out his outstanding annual leave.

5. Was Mr Yang dismissed?

[48] Section 386 of the FW Act relevantly provides as follows:

> "**386 Meaning of dismissed**
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> (1) A person has been ***dismissed*** if:
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> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
>
> … …." "[41]

[49] Mr Yang, in effect, relies upon s.386(1)(a) of the FW Act. Having put the parties on notice during the hearing, I have also considered whether there was a resignation, whether any purported resignation was effective, and whether any resignation was forced. Ultimately, I would not consider that any valid resignation would have been forced, but this final aspect does not arise for reasons that are set out below.

[50] Although applied under the predecessor to the FW Act,[42] the following approach of the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*[43] in my view remains generally apposite to the consideration of s.386(1) of the FW Act:

> "[21] In this Commission the concepts have been addressed on numerous occasions and by a number of Full Benches. In *Pawel v Advanced Precast Pty Ltd* (Pawel) a Full Bench said:
>
> > "[13] It is plain that the Full Court in Mohazab considered that an important feature in the question of whether termination is at the initiative of the employer is whether the act of an employer results directly or consequentially in the termination of the employment and that the employment relationship is not voluntarily left by the employee. However, it is to be noted that the Full Court described it as an important feature. It plainly cannot be the only feature. An example will serve to illustrate this point. Suppose an employee wants a pay rise and makes such a request of his or her employer. If the employer declines and the employee, feeling dissatisfied resigns, can the resignation be said to be a termination at the initiative of the employer? We do not think it can and yet it can be said that the act of the employer i.e. refusing the pay rise, has at least consequentially resulted in the termination of the employment. This situation may be contrasted with the position where an employee is told to resign or he or she will be terminated. We think that all of the circumstances and not only the act of the employer must be examined. These in our view, will include the circumstances giving rise to the termination, the seriousness of the issues involved and the respective conduct of the employer and the employee. In the instant case the uncontested factual findings are that the applicant had for almost the whole of his employment performed welding duties; that there was no objective threat to his health and safety involved in the requirement that he undertake welding duties so long as it was not on a continuous basis and that the welding he was required to do was not continuous."
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> [22] In the Full Bench decision of *ABB Engineering Construction Pty Ltd v Doumit* (ABB Engineering) it was said:
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> > "Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that

> of the employer, that gives rise to the termination. The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary."
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> [23] In our view the full statement of reasons in Mohazab which we have set out together with the further explanation by Moore J in Rheinberger and the decisions of Full Benches of this Commission in Pawel and ABB Engineering require that there to be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether "the act of the employer [resulted] directly or consequentially in the termination of the employment." Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in Mohazab. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign." (footnotes omitted)

[51] A more recent Full Bench reinforced the relevance of the above approach in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli*[44] in the following terms:

> "[33] Notwithstanding that it was clearly established, prior to the enactment of the FW Act, that a "forced" resignation could constitute a termination of employment at the initiative of the employer, the legislature in s.386(1) chose to define dismissal in a way that retained the "termination at the initiative of the employer" formulation but separately provided for forced resignation. This was discussed in the Explanatory Memorandum for the *Fair Work Bill* as follows:
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> > "1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., Mohazab v Dick Smith Electronics Pty Ltd (1995) 62 IR 200).
> >
> > 1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or

> a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).
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> 1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:
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> - where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
> - where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign."

> [34] It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd*, that "The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the then Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No. 1)* and summarised by the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*" (footnotes omitted). The body of pre-FW Act decisions concerning "forced" resignations, including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen Pty Ltd (in liq)*; *Ryan v ISS Integrated Facility Services Pty Ltd*; *Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust*." (footnotes omitted)

[52] An employer is generally able to treat a clear and unambiguous resignation as a resignation. However, where a resignation is given in the heat of the moment or under extreme pressure, special circumstances may arise. That is, in some circumstances it may be unreasonable to assume a resignation and accept it immediately. Further, the employer may have a duty to confirm the intention to resign if, during that time, they are put on notice that the resignation was not intended.[45]

[53] Accordingly, the general principles to be applied in this case are well settled. Stated succinctly, they include:

- The question as to whether there was a dismissal within the meaning of the FW Act is a jurisdictional fact that must be established by the Applicant;
- A termination at the initiative of the employer involves the conduct (or course of conduct) engaged in by the employer as the principal constituting factor leading to the termination. There must be a sufficient causal connection between the conduct and the resignation such that it "forced" the resignation;
- The employer must have engaged in some conduct that intended to bring the employment relationship to an end or had that probable result;
- Conduct includes an omission;

- Resignations that are clear and unambiguous may be treated on face value unless special circumstances are present which warrant the employer confirming the intention of the employee;

- Considerable caution should be exercised in treating a resignation as other than voluntary (forced) where the conduct of the employer is ambiguous and it is necessary to determine whether the employer's conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign; and

- In determining the question of whether the termination was at the initiative of the employer, an objective analysis of the parties' conduct is required.

[54] I have found that during one of the discussions between the Applicant and Mr Wang, the Applicant did advise to the effect that he intended to quit his job. This was stated during a highly emotional discussion, and it could not be said that an actual resignation was provided. In any event, given the context, I do not consider that it was reasonable for the Respondent to treat this as a resignation and seek later in the day to rely upon it. The actions of the Applicant in seeking to resolve his sense of unfairness with the General Manager and later again with Mr Wang, and his return to the workplace to do so, should have created uncertainty about whether any resignation was intended. These are the kind of exceptional circumstances[46] referred to earlier. In that context, the Respondent made no further inquiries to determine whether the Applicant's purported resignation was really intended. Further, given the conduct of both parties on the day in question, at the time when it was purportedly accepted by SAL, I do not consider a reasonable period of time had lapsed, after the Applicant advised or implied to the Respondent that he intended to quit his job, for an objective understanding about that intention to be reached.

[55] Mr Wang, on behalf of the Respondent and later confirmed by Mr Rong, in accepting the purported resignation, actually brought the employment to an end at the employer's initiative.

[56] This was a dismissal within the meaning of the FW Act. There is jurisdiction to deal with the merit of this application.

6. Was the dismissal of Mr Yang unfair

Section 385 of the FW Act provides as follows:

"**385 What is an unfair dismissal**

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

(a) the person has been dismissed; and

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

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

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

[57] There is no dispute that the application was made within the time required by s.394(2) of the FW Act, or that Mr Yang was a person protected from unfair dismissal. Further, it is common ground that the Small Business Fair Dismissal Code and the genuine redundancy provisions of the FW Act (as a jurisdictional objection and more generally) are not relevant.

[58] Accordingly, the Commission must determine whether the dismissal was harsh, unjust, or unreasonable within the meaning of the FW Act. If so, the dismissal of Mr Yang will be unfair and the relevant remedy provisions must be applied to consider whether a remedy is to be awarded.

[59] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission 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 is 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."

[60] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[47]

[61] I set out my consideration of each below.

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

[62] Valid in this context is generally considered to be whether there was a sound, defensible or well-founded reason for the dismissal, and the reason should not be "capricious, fanciful,

spiteful or prejudiced".[48] Further, in considering whether a reason is valid, the requirement should be applied in the practical sphere of the relationship between an employer and an employee where each has rights, privileges, duties and obligations conferred and imposed on them. That is, the provisions must be applied in a practical, common-sense way to ensure that the employer and employee are each treated fairly.[49]

[63] 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. The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[50]

[64] It is also clear from the authorities that the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts before the Commission. That is, it is not enough for an employer to rely upon its reasonable belief that the termination was for a valid reason.[51] The employer bears the evidentiary onus of proving the conduct or incapacity on which it relies.[52] For there to be a valid reason related to the Applicant's conduct, I must find that the conduct occurred and justified termination.[53] "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."[54]

[65] I have earlier made findings about the Applicant's conduct on 6 February 2023. I do consider that some of his conduct was misconduct, albeit not particularly serious. That is, he was not respectful of Mr Wang, and he did unnecessarily pick up and drop the metal lighting track onto the work bench. It was not, however, thrown or dropped in a violent manner. The Applicant's action would have been deserving of some more minor sanction, such as a warning.

[66] There is also some room for criticisms about the timing of the Applicant attendance at work. Although exaggerated by the Respondent, he often attended some minutes after the 8.00am scheduled start. I observe that other employees may have attended at different times, the Applicant and his Manger (Mr Wang) were the only ones working in the warehouse and late attendance had consequences for the work to be performed. However, as was made clear by Mr Wang himself, there was some latitude in the time of attendance, and this was agreed at the time of interview leading to the employment. The frequency of such lateness, and more importantly, the absence of prior notice and/or an explanation freely provided were reasonable concerns held by management.

[67] However, the concerns about the Applicant being late for work were never considered serious enough by the Respondent to lead to any formal disciplinary action or a warning.

[68] I observe that despite the events of 6 February 2023 and the other matters now relied upon by the Respondent being known, SAL still did not consider these to be serious enough to commence formal processes to support a dismissal. In fact, during the proceedings, SAL expressly denied that it had any intention to do so.

[69] In any event, I do not consider that these grounds provide a sound, defensible or well-founded reason for dismissal. This includes that I am not satisfied that the alleged misconduct took place in the manner and to the extent contended by SAL

[70] I will deal with the alleged performance matters below.

[71] Having regard to the matters I have referred to above, I am not satisfied that there was a valid reason for the dismissal related to Mr Yang's conduct or capacity.

Section 387(b) – Was Mr Yang notified of the reasons for dismissal?

[72] Notification of a valid reason for termination must be given to an Applicant before the decision is made to terminate their employment,[55] and in explicit[56] and plain and clear terms.[57]

[73] Although the Respondent described the initial discussions with Mr Yang on 6 February 2023 as a "performance discussion", this is not a proper description. It may have been intended to be a general and informal discussion reminding the Applicant of the work requirements and seeking his cooperation, but was in reality, an unsatisfactory exchange of views conducted in a cursory and excited manner. It was not notification of reasons as part of a disciplinary process. This meant that Mr Yang was not notified of the reasons for dismissal, at least in the sense referred to in the relevant consideration. I have also not found the existence of a valid reason for dismissal.

[74] Having regard to the matters referred to above, I find that the Applicant was not notified of the (valid) reason for his dismissal prior to the decision to dismiss being made as contemplated by s.387(b) of the FW Act.

Section 387(c) – whether Mr Yang was given an opportunity to respond to any reason related to his capacity or conduct.

[75] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[58]

[76] 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.[59] 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 will generally satisfy the requirements.[60]

[77] Further, in order to be given an opportunity to respond, the employee must be made aware of allegations concerning their conduct so as to be able to respond and defend themselves before the point is reached where a firm decision has been made irrespective of anything the employee might say in his or her defence.[61]

[78] The sequence of events leading to the dismissal have been set out earlier. I am not satisfied that the Respondent provided Mr Yang with an opportunity to respond to any reason related to his capacity or conduct as contemplated by s.387(c) of the FW Act.

Section 387(d) – any unreasonable refusal by the Respondent to allow Mr Yang a support person.

[79] 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.

[80] As noted by a Full Bench of this Commission, "[t]he subsection is not concerned with whether or not the employee was informed that he or she could have a support person present".[62]

[81] No such request was made in this matter.

Section 387(e) – if the dismissal is related to unsatisfactory performance by Mr Yang – whether he had been warned about that unsatisfactory performance before the dismissal.

[82] The dismissal indirectly related to unsatisfactory performance. There are aspects of the allegations that do touch upon how Mr Yang carried out his duties.

[83] There is no reliable evidence that Mr Yang was ever warned that his employment was in jeopardy.

Section 387(f) – the degree to which the size of the Respondent's enterprise would be likely to impact on the procedures followed in effecting the dismissal.
Section 387(g) – the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal.

[84] I will deal with these matters together.

[85] The Respondent is not a small organisation. I also find that it did not have a dedicated human resource management specialist or expertise in the enterprise. I accept that this would have been likely to impact on the procedures followed in effecting the dismissal and have made allowance for this in assessing the fairness of the decision.

Section 387(h) – Other relevant matters

[86] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[87] Mr Yang was not given notice of termination or any pay in lieu of notice.

[88] Although Mr Yang's conduct, performance and attitude on the day in question was not appropriate, his dismissal was disproportionate and harsh.

[89] I have taken all these matters into account in assessing the dismissal.

Was the dismissal of Mr Yang harsh, unjust or unreasonable?

[90] I have made findings in relation to each matter specified in s.387 as relevant.

[91] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[63]Although I have taken the (contrary) considerations in s.387(f) and (g) into account, the other considerations strongly indicate that the dismissal was unfair.

[92] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Yang was harsh and unreasonable. It was therefore unfair within the meaning of the FW Act.

7. Remedy

[93] Mr Yang does not seek reinstatement to his former position, but rather, compensation of 6 weeks' wages. This is opposed by the Respondent.

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

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

390 When the FWC may order remedy for unfair dismissal

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

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

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

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

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

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

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

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

… …

392 Remedy—compensation

Compensation

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

Criteria for deciding amounts

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

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

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

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

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

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

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

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

Misconduct reduces amount

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

Shock, distress etc. Disregarded

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

Compensation cap

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

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

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

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

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

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

393 Monetary orders may be in instalments

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

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

[96] Section 390 of the FW Act makes it clear that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate **and** that compensation is appropriate in all the circumstances. As Mr Yang does not seek reinstatement and the Respondent strongly opposes that form of remedy, I find that such would be inappropriate in all of the circumstances of this matter.

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

[98] A Full Bench in *McCulloch v Calvary Health Care Adelaide*[64] (***McCulloch***) confirmed, in general terms, that the approach to the assessment of compensation as undertaken in cases such as *Sprigg*[65] remains appropriate in that regard.

[99] Section 392(2) of the FW Act requires me to take into account all of the circumstances of the case including the factors that are listed in paragraphs (a) to (g). Without detracting from the overall assessment required by the FW Act,[66] it is convenient to discuss the identified considerations under the various matters raised by each of the provisions.

The effect of the order on the viability of SAL

[100] Nothing was put on this aspect, but SAL is a relatively large business and there is no indication that an order of the kind being considered here would impact upon the viability of that business.

The length of Mr Yang's service with SAL

[101] Mr Yang worked for the Respondent for over 16 months, which is not a significant duration.

The remuneration Mr Yang would have received, or would have been likely to receive, if he had not been dismissed

[102] This involves, in part, consideration of the likely duration of Mr Yang's employment in the absence of what I have found to be an unfair dismissal. That is, the establishment of the anticipated period of employment.[67]

[103] The anticipated period of employment requires consideration as to how long the employment would have continued before it otherwise came to an end **fairly**, or on some **justified or mutual basis**. An applicant employee might also leave of their own volition and this is a prospect in this case given the events relevant to this matter.

[104] This is not an easy assessment in the context of this case. There were indications of tension in the relationship and there were matters that would properly have been raised as performance and conduct concerns. In the absence of warning prior to that point or a valid reason for dismissal at the point of termination, this would suggest that a reasonable forward projection of employment should be made. However, the Applicant's response to the discussion with Mr Wang on 6 February 2023 would also indicate that some caution should be exercised in presuming ongoing employment. This is reinforced by the absence of any real effort by the Applicant to contact Mr Rong on the day in question to have the issues addressed, despite this being twice suggested by Mr Tang, the General Manager, at the time.

[105] I consider that the anticipated period of employment for present purposes should be some 5 weeks, **including** a period of notice. This reflects the balancing of all of the circumstances and inferences arising from the facts of this particular matter.

[106] Mr Yang was generally paid an ordinary weekly wage of $1,062[68] (rounded) per week, plus superannuation contributions.

[107] The projected remuneration that Mr Yang would have received based upon the anticipated period of employment with SAL and the rate of remuneration paid would therefore have been $5,310 plus superannuation contributions.

The efforts of Mr Yang to mitigate the loss suffered by him because of the dismissal

[108] I am satisfied that Mr Yang made reasonable efforts to obtain employment after the dismissal. He did provide evidence of the job applications and other endeavours he made to secure other work.

[109] I do not consider that any discount to the compensation based on this consideration should be made.

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

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

[110] The evidence about this aspect is very limited. Mr Yang gave evidence that he undertook some limited casual work (a few hours as a casual cleaner) in the Chinatown restaurant district in Adelaide about a week after he was dismissed. He indicated that he received no pay slips or other employment documentation. Mr Yang also stated that he undertook some work "tomato picking" for about 2 weeks – also without any details being provided to the Commission. Further, he obtained ongoing employment about six weeks prior to the hearing, which would have been a commencement in or around 24 April 2023, some 11 weeks after his dismissal.

[111] In the absence of actual information and convincing evidence from the Applicant about the detail, I will determine this matter on the basis that he was paid at least the national minimum wage for a casual ($26.73 per hour) for 6 hours a week commencing one week after the dismissal. This amounts to $160.40 (rounded) per week. I have adopted this approach to be fair to both parties whilst taking into account that it was the Applicant's responsibility to provide whatever information he had.[69]

[112] Given that I have projected the remuneration loss over 5 weeks, I consider that an amount of $641.60 (4 weeks at $160.40 per week – the first week after the dismissal was without any remuneration) should be taken into account under s.392(2)(e) of the FW Act.

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

[113] I have taken into account the projected nature of the anticipated loss of remuneration over a known period and given the circumstances of this case, it is not appropriate to make a further allowance for contingencies.[70]

[114] There was some misconduct on 6 February 2023 and I consider that this should be taken into account as provided by s.392(3) of the FW Act. A deduction from the projected loss figure of 5 per cent is relevant and appropriate in this case.

[115] In accordance with s.392(4) of the FW Act, I make no allowance for any shock, distress or humiliation that may have been caused by the dismissal. I also observe that compensation pursuant to s.392 is not in the nature of damages or a penalty for the actions of the employer.

[116] The maximum compensation limit in this case is the lesser of 26 weeks remuneration[71] before the dismissal occurred ($27,612) or the stated statutory compensation cap of $81,000.[72] The amount of compensation otherwise arising from the statutory considerations is less than the lower figure.

[117] Taxation as required would be payable on any amount determined. I consider that superannuation of 10.5 per cent[73] should be taken into account in relation to the compensation to be paid in this matter.

Conclusions on remedy

[118] Having regard to the circumstances of this matter applied to the considerations established by s.392 of the FW Act, I consider that it is appropriate to make an award of compensation to Mr Yang in lieu of reinstatement. Further, I consider that the compensation should amount to $4,402.90 plus superannuation contributions, given the circumstances of this case and the terms of the FW Act.

[119] The above compensation figure has been derived by taking the projected remuneration loss, discounting this figure by 5 per cent on the basis of the misconduct consideration, and deducting the deemed payments that were received from the new employment during the period of anticipated employment with SAL in the absence of the dismissal.

8. Conclusions

[120] I find that Mr Yang's dismissal was unfair within the meaning of the FW Act.

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

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

[123] An Order[74] consistent with the above is being issued in conjunction with this Decision.

DEPUTY PRESIDENT

Appearances:

T Yang, the Applicant on his own behalf.

F Rong, on behalf of SAL HR Services Pty Ltd, the Respondent.

Hearing details:

2023
Adelaide
June 7.

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<PR762807>

[1] Notice of Full Time Employment – exhibit R6, paragraph 1.

[2] Transcript PN328 to PN331.

[3] Sections 382, and 385(c) and (d) of the FW Act have been met.

[4] Drawn from Form F2 Unfair dismissal application, page 5.

[5] Exhibit A1.

[6] Exhibits A2, A3 and A4.

[7] Exhibit A1.

[8] Ibid.

[9] Submissions, paragraph 3.

[10] There were also some documents provided that were part of the Respondent's materials.

[11] Exhibit A1.

[12] Exhibit A2.

[13] Exhibit A3.

[14] Exhibit A4.

[15] Form F3 Employer response to unfair dismissal application, page 6; Respondent's Outline of Submission, paragraphs 6, 26, 27, 31.

[16] Form F3 Employer response to unfair dismissal application, page 6.

[17] Form F3 Employer response to unfair dismissal application, page 5; Respondent's Outline of Submission, paragraph 25.

[18] Form F3 Employer response to unfair dismissal application, page 6; Respondent's Outline of Submission, paragraphs 2, 3, 26.

[19] Ibid.

[20] Form F3 Employer response to unfair dismissal application, page 6; Respondent's Outline of Submission, paragraph 4.

[21] Form F3 Employer response to unfair dismissal application, page 6; Respondent's Outline of Submission, paragraph 5.

[22] Respondent's Outline of Submission, paragraph 5.

[23] Exhibit R1.

[24] Exhibit R13.

[25] Exhibit R14.

[26] Exhibit R15.

[27] Exhibit R2.

[28] Exhibit R3.

[29] Exhibit R4.

[30] Exhibit R5.

[31] Exhibit R6.

[32] Exhibit R7.

[33] Exhibit R8.

[34] Exhibit R9.

[35] Exhibit R10.

[36] Exhibit R11.

[37] Exhibit R12.

[38] Exhibit R11.

[39] Exhibit R14.

[40] Exhibit R7.

[41] Subsections (2) and (3) are not relevant to this matter.

[42] *Workplace Relations Act 1996* (Cth).

[43] [2006] AIRC 496 (PR973462).

[44] (2017) 271 IR 245; [2017] FWCFB 3941.

[45] *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375 at [12].

[46] Ibid.

[47] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [69].

[48] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

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

[50] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) IRCA 267 per Moore J at [685].

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

[52] *King* at [24].

[53] *Edwards*at [7].

[54] *King* at [23]-[24].

[55] *Crozier at* 151.

[56] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[57] Ibid.

[58] *Crozier* at [75].

[59] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[60] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[61] *Wadey v YMCA Canberra* [1996] IRCA 568.

[62] *Jurisic v ABB Australia Pty Ltd* [2014] FWCFB 5835 at [84].

[63] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357 at [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [92]; *Edwards* at [6]–[7].

[64] [2015] FWCFB 873.

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

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

[67] *McCulloch*.

[68] Based upon the evidence of Mr Rong that the Applicant worked 40 hours per week and was paid $26.56 per hour – transcript PN368 to PN371. This is also consistent with the payments made upon termination.

[69] The Applicant was expressly put on notice prior to the hearing that he should attend prepared to provide the relevant information as part of his case.

[70] See the discussion of contingencies in *McCulloch* at [20] – [23]; *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc T/A Ottrey Lodge* [2013] FWCFB 431, at [52]; *Ellawala v Australian Postal Corporation* AIRC Print S5109, per Ross VP, Williams SDP and Gay C, 17 April 2000 and in *Enhance Systems Pty Ltd v James Cox* AIRC Print PR910779, per Williams SDP, Acton SDP and Gay C, 31 October 2001.

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

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

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

[74] PR763637.