# DECISION

*Fair Work Act 2009*
s.394—Unfair dismissal

**Ali Raza**
**v**
**First Call Staffing Pty Ltd T/A First Call Services**
(U2022/7229)

**Nilakshi Kanapaddala Gamage**
**v**
**First Call Staffing Pty Ltd T/A First Call Services**
(U2022/7234)

DEPUTY PRESIDENT HAMPTON ADELAIDE, 3 AUGUST 2023

*Termination of employment – two related applications heard together – jurisdictional objection dismissed following earlier proceedings – applications subject to hearing on merit and remedy – no participation by the Respondent in final hearing – given notice and other circumstances appropriate for matter to be heard and determined in absence of the employer based upon evidence that is properly before the Commission – dismissals found to be unfair – compensation ordered.*

## 1. What this decision is about

**[1]** This decision concerns applications by Ali Raza **(Mr Raza)** and Nilakshi Kanapaddala Gamage (**Ms Gamage**) – collectively the **Applicants** – each seeking an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**). As the applications made by Mr Raza and Ms Gamage largely concern the same factual and legal circumstances, by consent, they have been dealt with together.

**[2]** Much of the background to this matter has been set out in an earlier decision of this arm of the Commission. That decision,[1] issued on 9 May 2023 (***jurisdictional decision***), dealt with a jurisdictional challenge to the applications made by the Respondent in each case, First Call Staffing Pty Ltd T/A First Call Services (**FCS** or **Respondent**).[2] The Commission found that each of the applicants were engaged by FCS and were employees at the time of their dismissal.

**[3]** Accordingly, the Commission dismissed the jurisdictional objections and the matters have now been subject to further hearing to determine whether the dismissals were unfair - **merit**, and if so, whether a remedy should be provided - **remedy**.

**[4]** In the lead up to the further hearing of these matters, the Respondent ceased to be represented by counsel and thereafter, its Director, Mr Robert Wall, generally participated in the proceedings on behalf of FCS.

**[5]** Despite Mr Wall attending a Directions Conference on 11 July 2023, and confirming the Respondent's intention to file materials and to contest each of the applications, FCS has not provided any additional materials as required by the directions issued by the Commission and did not participate in the further hearing of these applications. I am satisfied that proper notice of these matters and the further hearing has been provided to FCS and that it is appropriate that I have heard and now determined the applications in the absence of the Respondent's full participation.[3] I observe that this does not mean that the Applicants win by default given the nature of the unfair dismissal jurisdiction and the Commission's statutory charter. I will return to this aspect in my observations on the evidence.

**[6]** This decision should be read in conjunction with the *jurisdictional decision*, including the observations made about each of the parties, the difficulties associated with the proceedings and the findings made therein.

**[7]** For reasons that follow, I have found that each of the Applicants were unfairly dismissed within the meaning of the FW Act and that a measure of compensation should be awarded.

## 2. The cases presented by the parties on Merit and Remedy

### 2.1 Mr Raza and Ms Gamage

**[8]** The Applicants, in effect, presented joint cases in this matter. Whilst there are some factual differences concerning dates and roles, the relevant propositions and contentions concerning the merit and remedy issue were consistent. They, appropriately, relied upon each other's evidence and submissions where relevant.

**[9]** In effect, the Applicants contended, as broadly relevant to the present matters that are before the Commission, that:

- FCS terminated them on the basis of false allegations and later on they were apologizing and saying it was a misunderstanding and technical glitch – only when the Respondent was aware of the prospect of legal proceedings.

- After the termination email, no one from FCS was responding to emails, calls or messages until an email was sent, copied to the Commission, in which the Applicants sought details of the reason of termination and requesting a discussion.

- FCS did not give any notice or any warning or mention any performance related issues.

- The termination email itself involved harsh and rude communication, followed by the silent treatment.

- They faced discrimination several times due to being southeast Asians – sarcastic comments.

**[10]** Accordingly, the Applicants contended that the Commission should find that all of these above factors prove that the dismissal was harsh, unjust and unreasonable according to s.387 of the FW Act.

**[11]** As to remedy, various proposals have been advanced by the Applicants throughout the proceedings including that the Commission should award:[4]

- The maximum compensation "(26 Weeks pay) that can be ordered along with back pay, relevant sick/ annual leave, all year's Tax and superannuation which falls within the compensation cap for 2021-2022 financial year collectively."

- Compensation for mental trauma and stress as it was a full-time job, noting that the applicants were aware the Commission has no jurisdiction over that area.

- Reinstatement "so the applicants can resign respectfully on the same day if they require applicants not to charge FCS with human rights violation and other legal actions",

- A proper public apology including within the work environment – "FCS need to accept their mistake publicly and undertake to the Commission never to commit the same mistake intentionally and not to discriminate."

- Penalty for false witnesses to misguide the Commission under s.718A.

**[12]** During the final hearing, both Applicants confirmed that they were now seeking the maximum monetary compensation available under the FW Act as the remedy in their matter.

**[13]** Both Mr Raza and Ms Gamage provided further witness statements[5] and provided additional sworn evidence as part of the further hearing in these matters.

### 2.2 First Call Services

**[14]** As outlined earlier, no position was advanced by the Respondent in the further hearing of these applications.

## 3. Observations on the additional evidence

**[15]** I confirm the observations made about the Applicants' evidence in the jurisdictional decision,[6] which largely remain appropriate.

**[16]** I have also taken into account that the further witness statements of the Applicants have clearly been developed together with almost identical wording. This does not mean that I consider that the evidence has been concocted; rather, I have treated the detail of some of the recollections with caution recognising that this detail has been collectively recalled and stated.

I also required each Applicant to give their oral evidence independently as part of each hearing in these matters.

**[17]** Further, where the Applicants expressed opinions in their statements about the consequences of certain actions, I have treated this material as submissions. To the extent that the statements provided by the Applicants referred to factual matters involving the other, I have only given weight to facts that each actually witnessed.

**[18]** As required, and despite the absence of FCS from the further hearing, I have considered and determined each of the statutory considerations based upon the material that is before the Commission. Where in the normal course the Respondent would be required to demonstrate a fact, such as any alleged valid reason for dismissal, the absence of any evidence has been taken into account with predictable consequences. In other circumstances, the Applicants' evidence has been left unchallenged. However, even in that context I have actively explored the veracity and basis of some of that evidence to the extent that it was critical to the various statutory considerations.

## 4. Were the dismissals of Mr Raza and Ms Gamage unfair?

**[19]** 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."

**[20]** There is no dispute that the applications were made within the time required by s.394(2) of the FW Act, or that each of the Applicants was a person protected from unfair dismissal. Further, there is no indication that the Small Business Fair Dismissal Code and the genuine redundancy provisions of the FW Act (as a jurisdictional objection and more generally) are relevant.

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

**[22]** 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."

**[23]** I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[7] I am also required to consider each of the factors as they might differently apply to the Applicants. As will become clear, the same general circumstances and events impacted both dismissals and they can conveniently be dealt with together. This also reflects the fact that, at least in terms of the significant events, FCS treated and dismissed the Applicants together.

**[24]** I set out my consideration of each below.

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

**[25]** 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".[8] 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.[9]

**[26]** 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).[10]

**[27]** 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.[11] The employer bears the evidentiary onus of proving the conduct or incapacity on which it relies.[12] For there to be a valid reason related to the Applicant's conduct, I must find that the conduct occurred and justified termination.[13] "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."[14]

**[28]** Although the Respondent has not provided evidence going to the dismissal as part of the additional hearing, there was (largely uncontested) evidence about the circumstances that applied at the time of the dismissal dealt with as part of the jurisdictional decision.[15] There is also now additional relevant evidence before the Commission.

**[29]** On 28 June 2022, FCS wrote to the Applicants in the following terms:

> "Hi Ali/Nikki,
>
> Unfortunately, recent failings, non-actioning and non-responsiveness has resulted in a loss of commercial confidence, which cannot be overcome.
>
> Therefore, it is with regret that I must inform you that your services will no longer be required by First Call Services, effective immediately.
>
> We would like to thank you for past services and wish you all the best for the future.
>
> Kindest Regards,
>
> Andrew van Horen
> Operations Manager."[16]

**[30]** The evidence about how and when Secure Services (the alleged labour hire company) were advised of the termination of the Applicants is unclear. Secure Services played no role in the dismissals, the communication of the dismissals, or the post-dismissal discussions between the Applicants and FCS that followed the termination. Payments to the Applicants ceased.

**[31]** The evidence now before the Commission confirms that the decision to conclude the Applicants' employment was based, at least in part, on them allegedly not being responsive to contact and request from FCS. However, that evidence also confirms that FCS were not utilising the correct contact details for the Applicants, leading to a subsequent apology. There was no discussion with the Applicants about these matters prior to the provision of the termination email.

**[32]** It is also the case that there were other alternative means (beyond the incorrect email address) that could have been utilised by FCS to contact the Applicants. This included the fact that each of the Applicants were in regular (daily) contact during this period with others in the operational part of the business and Mr Raza and/or Ms Gamage could have easily been telephoned by Mr van Horen or anyone else in senior management. Further, as the Applicants have indicated, the dismissal email was provided to them using a correct (and different) email.

**[33]** There is no evidence before the Commission that would support an alleged loss of "commercial confidence" or "recent failings" as referenced in the 28 June 2022 letter.

**[34]** I set out below some of the post-dismissal events. I do so here for context to the extent that they shed any light on the existence of a valid reason for the dismissals. The exchanges are also relevant for other purposes that I will come to later in this Decision.

**[35]** Following the dismissal, the Applicants made various (largely unsuccessful) attempts to contact Mr Wall about the manner and justification for the dismissal. The Applicants also communicated to FCS, and publicly, their dissatisfaction with their treatment and dismissal and threated to launch proceedings. This included some communications that were also copied to this Commission and other institutions. Soon after, FCS sent the following on 12 July 2022:[17]

> "Hello Nikki and Ali
>
> I understand that you have raised concerns in relation to not only the termination of your services, but the manner in which you were terminated and the notification provided to you.
>
> It is apparent to me that the entire process may have been a victim of miscommunication and misunderstanding.
>
> Both Andrew and myself wrote to you on several occasions seeking your services and response. However we didn't see any emails come back. These emails were sent to admin@firstcallservices.com.au. It was our understanding that this was the commercial email on which to correspond with you. I can only put this down to a technical glitch or a misunderstanding by us as to which email would best ensure delivery and receipt of our correspondence to you and from you. Perhaps this was an error and that being the case. I offer my apologies. Eventually we sent correspondence to your personnel emails and it was on these emails that we provided, at your request, explanations as to why the service is being terminated. I wish I had some communications with you earlier, however we did not and I apologize for this breakdown in communications. I always believe personal and timely communication between all people is best, I wish this opportunity had presented.
>
> On behalf of Andrew and myself I offer you our sincerest apologies that you felt the correspondence was rude and without reason. We did not wish to cause you any discomfort or perception that we were disrespectful and respected your position both personally and professionally.
>
> Could I please ask for some time to resolve this matter to your satisfaction outside of any legal jurisdiction, both knowing that any agreement would only erode funds with the involvement of the legal fraternity.
>
> Come back and talk to me please, I am available at your discretion."

**[36]** The Applicants' response included that all future communications should occur in writing (email).

**[37]** On the next day, FCS also sent the following to the Applicants:[18]

> "Hello Nikki and Ali,
>
> Thank you for getting back to me. I understand the urgency to get this resolved, for both of us.
>
> I suggest an in-person meeting is the best way forward. Please let me know when we can meet in Adelaide late this afternoon/evening at a location convenient to you?
>
> I have taken full ownership of this and would respectfully ask an opportunity to work through each of the concerns with you one by one and in person, today.
>
> Please get back to me so I can arrange my travel
>
> Kind regards
> Gregory Metzger
> Chief Executive Officer".

**[38]** The following exchange also took place later on13 July 2022:[19]

> "**Email**
> Hi Gregory,
>
> Thank you very much for the given concern and we live 5 hours drive away from Adelaide 5290, and as currently Ali is overseas and I am having some medical issues we cannot meet in person. Unfortunately we can only be available for online meeting if that helps.
>
> Let us know the time to arrange the online meeting.
> Note: Online meeting will be recorded!
>
> Get Back to us at your convenience.
>
> ... …
>
> **Email**
> Hello Nikki and Ali,
>
> I understand your predicament, although I was looking forward to going on a road trip to visit you.
>
> Can we lock in a teams meeting this evening at 6pm Melbourne time (5.30pm SA), as this should also suit you, Ali better overseas.

Please let me know if this is suitable?"

**[39]** On 14 July 2022, Mr Van Horen communicated the following:[20]

> "Good Morning Nikki and Ali,
>
> I am writing to you in person, to apologise for the inadvertent miscommunication which led to the current situation.
>
> Having only just recently joined FCS, I was unfortunately reliant on information I was given by others within the organisation.
>
> As a result of this, my first communications to you were erroneously sent to the incorrect email address resulting in my believing that you were being unresponsive.
>
> In hindsight, I now realise that this perceived irresponsiveness was the result of you never having received these emails.
>
> However, this perceived irresponsiveness, when escalated, resulted in the subsequent notification I sent to both of your personal emails.
>
> I regret this error, but wish to clearly state that this in no way, was intended disrespectfully, maliciously and certainly not discriminatory.
>
> I hope you can accept my sincerest apologies.
>
> Kindest regards
>
> Andrew van Horen
> Operations Manager"

**[40]** At some point in this period, FCS conducted an on-line discussion with the Applicants. During that discussion, FCS apparently offered to re-engage the Applicants on some basis that is not before the Commission; but also advised that they were not engaged by it, but rather a labour hire company. Both aspects were rejected by the Applicants, and I will return to this development as part of my later consideration of remedy.

**[41]** 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 the Applicants' conduct or capacity.

**Section 387(b) – Were the Applicants' notified of the reasons for dismissal?**

**[42]** Notification of a valid reason for termination must be given to an Applicant before the decision is made to terminate their employment,[21] and in explicit[22] and plain and clear terms.[23]

**[43]** Having regard to the matters referred to above, I find that neither Applicant was notified of any (valid) reason for his or her dismissal prior to the decision to dismiss being made as contemplated by s.387(b) of the FW Act.

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

**[44]** 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.[24]

**[45]** 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.[25] 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.[26]

**[46]** 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.[27]

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

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

**[48]** 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.

**[49]** 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".[28]

**[50]** No such request was made in this matter.

**Section 387(e) – if the dismissal is related to unsatisfactory performance by the Applicants – whether they had been warned about that unsatisfactory performance before the dismissal.**

**[51]** The dismissal indirectly related to unsatisfactory performance.

**[52]** There is no reliable evidence that either Applicant was ever warned that their employment was in jeopardy or otherwise unsatisfactory.

**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.**

**[53]** I will deal with these matters together.

**[54]** The Respondent is not a small organisation. I 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 dismissals and have made allowance for this in assessing the fairness of the dismissals.

**Section 387(h) – Other relevant matters**

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

**[56]** Neither Applicant was given notice of termination, or any pay in lieu of notice. This adds to the harshness of the dismissal, particularly given the context and manner in which each dismissal was conducted.

**[57]** I have taken all these matters into account in assessing the dismissals.

**[58]** To the extent that both Applicants relied upon the notion of "discrimination" as part of their dismissals, I accept that some individuals in the business may have made inappropriate remarks which deserve censure. However, the evidence that is before the Commission does not permit a finding about this element, in connection with the dismissals, to be made with sufficient certainty for present purposes.

**Was the dismissal of each Applicant harsh, unjust or unreasonable?**

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

**[60]** I have considered and give due weight to each as a fundamental element in determining whether the terminations were harsh, unjust or unreasonable. [29]Although I have taken the (partially contrary) consideration in s.387(g) and the neutral impact of s.387(d) into account, the other considerations strongly indicate that both dismissals were unfair.

**[61]** I find that Mr Raza's dismissal was harsh, unjust and unreasonable.

**[62]** I find that Ms Gamage's dismissal was harsh, unjust and unreasonable.

## 6. Remedy

**[63]** The Applicants seek compensation.

**[64]** 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."

**[65]** The concept of "remuneration" in the present and related context has been held to include superannuation.[30]

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

**[67]** 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. I do not consider that the reinstatement of either of the Applicants is appropriate. There is no reasonable prospect of workable relationships being reestablished and this was not ultimately sought by the Applicants.

**[68]** The other issues initially raised by the Applicants, including potential underpayment of wages, the payment of appropriate taxation and superannuation, some form of penalties for FCS and their witnesses, and the issuing of apologies are not matters that the Commission can be address as part of an application of this kind. They are issues, at least as they related to the non or underpayment of entitlements, that might be addressed in other forums.

**[69]** Given that reinstatement is not appropriate, under the FW Act it is then necessary to consider whether compensation in lieu of reinstatement is appropriate.

**[70]** A Full Bench in *McCulloch v Calvary Health Care Adelaide*[31] (***McCulloch***) confirmed, in general terms, that the approach to the assessment of compensation as undertaken in cases such as *Sprigg*[32] remains appropriate in that regard.

**[71]** 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,[33] it is convenient to discuss the identified considerations under the various matters raised by each of the provisions.

**[72]** As the circumstances of each Applicant are marginally different as they might impact upon compensation, it is appropriate that I deal with them separately for present purposes.

## 6.2 Compensation for Mr Raza

### The effect of the order on the viability of FCS

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

### The length of Mr Raza's service with FCS

**[74]** In the absence of alternative credible evidence from FCS, I have taken into account the entirety of the period of service that Mr Raza provided to FCS; albeit he was paid by different

entities during that time. Mr Raza worked for the Respondent between April 2020 and late June 2022, which is not an insignificant duration. I have taken this into account including in my assessment of the projected remuneration loss below.

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

**[75]** This involves, in part, consideration of the likely duration of Mr Raza'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.[34]

**[76]** 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.

**[77]** This is not an easy assessment in the context of this case. Mr Raza was engaged in various roles, including in the administration/operations area of FCS prior to his move to Mt Gambier, where he exclusively occupied such a role until the point of his dismissal. There was no written contract or arrangements concerning the administration/operations role and very limited discussions about it. There was however a regular pattern of work and it was evident that FCS were keen to have Mr Raza continue with the role even when he moved from the Melbourne head office to Mt Gambier, and when he visited Pakistan for a short period.

**[78]** The pattern of work was 4 days in week 1 and 3 days in week 2, with each day being a 12-hour night "shift". Although there was some confirmation of the roster ahead of each fortnight, this appears to be largely to indicate the project/client upon which Mr Raza would be engaged.

**[79]** Despite the absence of warning or any apparent performance concerns, in the context of the absence of any formal or informal discussion about the expected nature of the length of the engagement, it is difficult to predict that the employment would have continued indefinitely. However, there is also no basis for finding that, but for the dismissal, the employment would not have continued for a reasonable period.[35]

**[80]** I consider that the anticipated period of employment for present purposes should be some 32 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.

**[81]** Mr Raza was generally paid an estimated $1050 per week[36]. No taxation was deducted from this amount and no superannuation contributions were made.

**[82]** The projected remuneration that Mr Raza would have received based upon the anticipated period of employment with FCS and the rate of remuneration paid would therefore have been $33,600. I have not included superannuation as part of the projected remuneration loss as it appears to me that in the circumstances of this case, the prospects for the payment of superannuation as something that would have been, or would have been likely to receive, is too remote. I have however included superannuation as part of the final calculation of the compensation due as another appropriate matter under s.392(2)(g) of the FW Act.

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

**[83]** I am satisfied that Mr Raza 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. Indeed, this included seeking work outside of Mt Gambier and undertaking work in both Melbourne and Adelaide.

**[84]** I have considered the fact that Mr Raza declined what appears to have been an offer that may have been akin to reinstatement made by FCS some 2 weeks after the dismissal. In most cases, this would represent a significant barrier to a finding that an applicant has sought to mitigate their losses. The fact that he may have been humiliated by the dismissal would not, by itself, provide a proper basis to justify rejection of the proposal. However, the details of the proposal are not before the Commission, and accordingly, it is difficult to place weight upon it. Further, whatever the proposal was, it was also accompanied by the notion that he was not engaged by FCS but rather a labour hire company who had no involvement with Mr Raza at any time other than their name appeared on the bank statements as making payments to him for a period.[37] This threw into considerable doubt the whole basis of any potential "reinstatement" or re-engagement, and in the rather unique context of these events it was not unreasonable for Mr Raza to reject the notion at that point.

**[85]** 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 Raza 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 Raza during the period between the making of the order for compensation and the actual compensation**

**[86]** Mr Raza has obtained some (replacement) employment following his dismissal. This involved the resumption of some (non-FCS) work based in Melbourne that he had previously been undertaking whilst engaged by FCS in that city. However, it was not being undertaken at the time of the dismissal and I consider that the remuneration involved clearly falls within the meaning of s.392(2)(e) of the FW Act and must be taken into account.

**[87]** The Melbourne based work commenced in early July 2022 and involved in the order of $9,277 (gross plus superannuation) in the 32 week period after his dismissal.[38] For reasons outlined earlier, remuneration for present purposes should include superannuation which has been paid and amounts to $974 over that period.[39]

**[88]** There is no evidence of any other relevant remuneration being earned by Mr Raza in the 32 week period after his dismissal.

**[89]** Given the basis of the projected remuneration loss, I consider that an amount of $10,251 in connection with the Melbourne work should be taken into account under s.392(2)(e) of the FW Act. This amount is to be deducted from the compensation figure otherwise arising from the considerations of the FW Act.

**[90]** Mr Raza has also obtained some other limited work as an Uber Eats driver, however as this has commenced outside of the anticipated period of employment, I do not consider that it is appropriate to make a deduction on the basis of that remuneration.

**[91]** I also do not consider that it is appropriate to make any further deduction under s.392(2)(f) of the FW Act, given the defined period over which the projected loss of remuneration has been calculated, which does not include the period between the order and the payment.

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

**[92]** 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.[40]

**[93]** There was no misconduct that should be taken into account as provided by s.392(3) of the FW Act.

**[94]** 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.

**[95]** The maximum compensation limit in this case is the lesser of 26 weeks remuneration[41] before the dismissal occurred ($30,030) or the stated statutory compensation cap of $81,000.[42] The amount of compensation otherwise arising from the statutory considerations is less than the lower figure.

**[96]** Taxation as required would be payable on any amount determined. Although this was not done by FCS on the payments made during employment, the Commission's orders should reflect that this obligation will arise from the compensation. I observe that the non-payment/deduction of taxation during the employment by FCS is a matter for the ATO. I also consider that superannuation of 10.5 per cent[43] should be taken into account in relation to the compensation to be paid in this matter. Although superannuation was not paid by FCS, it would have been payable during the employment, and I consider that this should be contemplated in a compensation order of this kind that is intended to compensate in lieu of reinstatement.

**Conclusions on remedy for Mr Raza**

**[97]** 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 Raza in lieu of reinstatement. Further, given the circumstances of this case and the terms of the FW Act, I consider that the compensation should amount to $23,349 plus superannuation contributions of $2,335.

**6.3 Compensation for Ms Gamage**

**The effect of the order on the viability of FCS**

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

**The length of Ms Gamage's service with FCS**

**[99]** In the absence of alternative credible evidence from FCS, I have taken into account the entirety of the period of service that Ms Gamage provided to FCS; albeit she was paid by different entities during that time. Ms Gamage worked for the Respondent between April 2020 and late June 2022, which is not an insignificant duration. I have taken this into account including in my assessment of the projected remuneration loss below.

**The remuneration Ms Gamage would have received, or would have been likely to receive, if he had not been dismissed**

**[100]** This involves, in part, consideration of the likely duration of Ms Gamage'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.[44]

**[101]** 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.

**[102]** The discussion and findings on this aspect set out for Mr Raza are largely relevant to Ms Gamage. FCS generally treated both Applicants in the same manner and the arrangements for the administration/operations role were also almost identical, at least in relation to their roles following their move to Mt Gambier. These are the roles at the time that the dismissals took place and provide the immediate reference point for present purposes. In the case of Ms Gamage, FCS sought that she continue her work remotely including during a visit to Sri Lanka.

**[103]** Largely for the reasons set out earlier, I consider that the anticipated period of employment for Ms Gamage for present purposes should also be some 32 weeks, **including** a period of notice.

**[104]** Ms Gamage was generally paid an estimated $1050 per week[45]. No taxation was deducted from this amount and no additional superannuation contributions were made.

**[105]** The projected remuneration that Ms Gamage would have received based upon the anticipated period of employment with FCS and the rate of remuneration paid would therefore have been $33,600. I have not included superannuation as part of the projected remuneration loss as it appears to me that in the circumstances of this case, the prospects for the payment of superannuation as something that would have been, or would have been likely to receive, is too remote. I have however included superannuation as part of the final calculation of the compensation due as another appropriate matter under s.392(2)(g) of the FW Act.

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

**[106]** With some hesitation, I am satisfied that Ms Gamage made reasonable efforts to obtain employment after the dismissal. She provided evidence of many job applications and other endeavours made to secure other work. During her evidence, Ms Gamage indicated that she did not pursue new employment for a period of some 2 weeks after the dismissal. However, Ms Gamage did commence a return to her Melbourne-based non-FCS work in very early July 2022 and this is evidence of timely mitigation.

**[107]** My earlier findings about the impact of what may have been akin to an offer of some form of reinstatement apply equally to Ms Gamage.

**[108]** I also consider that Ms Gamage's continuation of the unpaid internship, which has been undertaken to further her skills base, was not unreasonable.

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

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

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

**[110]** As outlined above, Ms Gamage has obtained some (replacement) employment following her dismissal. This involved the resumption of some (non-FCS) work based in Melbourne that she had previously been undertaking whilst engaged by FCS in that city. However, it was not being undertaken at the time of the dismissal and I consider that the remuneration involved clearly falls within the meaning of s.392(2)(e) of the FW Act and must be taken into account.

**[111]** The Melbourne based work recommenced in early July 2022 and involved in the order of $6,303[46] (gross plus superannuation) in the 32 week period after her dismissal. For reasons outlined earlier, remuneration for present purposes should include superannuation which has been paid and amounts to $662 over that period.[47]

**[112]** There is no evidence of any other relevant remuneration being earned by Ms Gamage in the 32 week period after her dismissal.

**[113]** Given the basis of the projected remuneration loss, I consider that an amount of $6,965 in connection with the Melbourne work should be taken into account under s.392(2)(e) of the FW Act. This amount is to be deducted from the compensation figure otherwise arising from the considerations of the FW Act.

**[114]** Ms Gamage also continued some employment in Mt Gambier that she was already undertaking whilst engaged by FCS. There is no evidence that the extent of that work increased in light of the dismissal and on that basis I do not consider that it is appropriate to make a deduction of that remuneration. That is, I have taken it into account; however, I do not consider that the deduction of remuneration from this continuing employment, which was already in

place and being worked at the same level during the Mt Gambier-based employment with FCS, is appropriate in the circumstances of this case.

**[115]** I also do not consider that it is appropriate to make any further deduction under s.392(2)(f) of the FW Act, given the defined period over which the projected loss of remuneration has been calculated, which does not include the period between the order and the payment.

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

**[116]** 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.[48]

**[117]** There was no misconduct that should be taken into account as provided by s.392(3) of the FW Act.

**[118]** 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.

**[119]** The maximum compensation limit in this case is the lesser of 26 weeks remuneration[49] before the dismissal occurred ($30,030) or the stated statutory compensation cap of $81,000.[50] The amount of compensation otherwise arising from the statutory considerations is less than the lower figure.

**[120]** Taxation as required would be payable on any amount determined. Although this was not done by FCS on the payments made during employment, the Commission's orders should reflect that this obligation will arise from the compensation. I observe that the non-payment/deduction of taxation by FCS during the employment is a matter for the ATO. I also consider that superannuation of 10.5 per cent[51] should be taken into account in relation to the compensation to be paid in this matter. Although superannuation was not paid by FCS, it would have been payable during the employment, and I consider that this should be contemplated in a compensation order of this kind that is intended to compensate in lieu of reinstatement.

**Conclusions on remedy for Ms Gamage**

**[121]** Having regard to the circumstances of this matter applied to the considerations established by s.392 of the FW Act, I consider that it is appropriate to make an award of compensation to Ms Gamage in lieu of reinstatement. Further, given the circumstances of this case and the terms of the FW Act, I consider that the compensation should amount to $26,635 plus superannuation contributions of $2,664.

## 7. Conclusions

**[122]** I find that the dismissals of Mr Raza and Ms Gamage were both unfair within the meaning of the FW Act.

**[123]** I have found that compensation is appropriate in lieu of reinstatement for each of the Applicants and the amounts determined above are also appropriate in all of the circumstances.

**[124]** The compensation payments are to be made within 14 days of this Decision.

**[125]** Orders[52] consistent with the above are being issued in conjunction with this Decision.

DEPUTY PRESIDENT

*Appearances*:

*A Raza* and *N Gamage*, the Applicants on their own behalf.

No appearance for the Respondent.

*Hearing details:*

2023
MS Teams Video Hearing
July 26.

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[1] *Raza and Gamage v First Call Services* [2023] FWC 184.

[2] The applications were amended by consent following the *jurisdictional decision* to name the correct respondent party.

[3] Section 600 of the FW Act.

[4] Drawn from the written submissions of the Applicants.

[5] Exhibits A15, A16, A17 and A19, A20 A21.

[6] At [39].

[7] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* 130 IR 446 at [69].

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

[9] 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].

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

[11] 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

[12] *King* at [24].

[13] *Edwards* at [7].

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

[15] *Jurisdictional Decision* at [72].

[16] Attachment AR3 to Exhibit A4 – Witness Statement of Mr Raza.

[17] Document NG4 attached to Exhibit A16.

[18] Document NG5A attached to Exhibit A16.

[19] Document NG5B attached to Exhibit A16.

[20] Document NG6 attached to Exhibit A16.

[21] *Crozier at* 151.

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

[23] Ibid.

[24] *Crozier* at [75].

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

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

[27] *Wadey v YMCA Canberra* [1996] IRCA 5.

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

[29] *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].

[30] *Tabro Meat Pty Ltd v Kevin Heffernan* [2011] FWAFB 1080 [21]. See also the other authorities cited by Beaumont DP in *Atherton v Airmaster Australia Pty Ltd* [2018] FWC 3109 at [158] – [162].

[31] [2015] FWCFB 873.

[32] *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.

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

[34] *McCulloch*.

[35] See *McCulloch v Calvary Health Care Adelaide* [2015] FWCFB 873 at [27] as to the caution to be expressed when making a short projection of employment in the absence of a valid reason for dismissal.

[36]Mr Raza's submissions and evidence.

[37] See the findings in the jurisdictional decision about these issues.

[38] Based upon payslips provided by Mr Raza.

[39] Using the superannuation contribution rate applicable at the time – 10.5%.

[40] 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.

[41] 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. In this regard, whilst it is possible that a higher entitlement to wages for both Applicants existed, no basis for such has been suggested in these matters. However, as superannuation should have been paid as an entitlement, I have added this into the calculation of the cap in both cases using the SGC rate at the time of the payments made by FCS. (10%).

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

[43] Based upon the *Superannuation Guarantee Charge Act 1992* (Cth) and related scheme as it applied during the anticipated period of employment.

[44] *McCulloch*.

[45]Ms Gamage's submissions and evidence.

[46] Based upon pay slips provided by Ms Gamage.

[47] Using the superannuation contribution rate applicable at the time – 10.5%.

[48] 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.

[49] 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. In this regard, whilst it is possible that a higher entitlement to wages for both Applicants existed, no basis for such has been suggested in these matters. However, as superannuation should have been paid as an entitlement, I have added this into the calculation of the cap in both cases using the SGC rate at the time (10%)..

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

[51] Based upon the *Superannuation Guarantee Charge Act 1992* (Cth) and related scheme as it applied during the anticipated period of employment.

[52] PR764720 and PR764722