



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Hana Lim

v

QL Co Group Pty Ltd
(U2023/3110)

COMMISSIONER WILSON

MELBOURNE, 30 AUGUST 2023

Application for an unfair dismissal remedy. Dismissal not consistent with Small Business Fair Dismissal Code. Merits considered. Dismissal found to be unfair. Remedy considered – reinstatement not appropriate; compensation appropriate and ordered.

[1] This decision concerns an application for an unfair dismissal remedy made by Ms Hana Lim (the Applicant) pursuant to s.394 of the *Fair Work Act 2009* (the Act). The application was filed in the Fair Work Commission (the Commission) on 13 April 2023 after she was dismissed by QL Co Group Pty Ltd with effect from 27 March 2023. Ms Lim’s application named the Respondent as Mr Jack Qian, who is the owner of QL Co Group Pty Ltd. After consultation with the parties each agreed the Respondent should be identified as QL Co Group Pty Ltd and an order to that effect was issued by me on 18 July 2023.¹

[2] For the reasons set out below I find Ms Lim was unfairly dismissed and that an order for monetary compensation is appropriate to make.

PRELIMINARIES

[3] The merits of the application were the subject of a determinative conference convened by me on 18 July 2023 at which Ms Lim appeared for herself and Mr Qian, appeared for QL Co Group Pty Ltd (QL Co Group or the Respondent).

[4] After consulting with the parties on the subject, as required by s.399 of the Act, I determined the matter would best proceed by way of a determinative conference, with me considering that course to be the most effective and efficient way to resolve the matter. Each party had an opportunity at the determinative conference to discuss their perspective of the dispute before the Commission and respond to questions for the purposes of clarification. Both Ms Lim and Mr Qian gave oral evidence as well as providing statements and other documents for my consideration. Ms Lim brought forward two witnesses, Ms Sinae Yu, a friend of hers who had worked in the business, and Mr Hansu Lim, her brother, each of whom provided a short witness statement and oral evidence. Two former co-workers, Ms Geu re Bang and Ms Jeong also provided short witness statements; however as they did not give oral evidence I have not relied upon the contents of the two statements in forming my decision.

[5] Section 396 of the Act requires the determination of four initial matters before consideration of the merits of the application. Those matters are whether the application was made within the period required in s.394(2), whether the person was protected from unfair dismissal, whether the dismissal was consistent with the Small Business Fair Dismissal Code, and whether the dismissal was a case of genuine redundancy.

[6] Mr Qian submits QL Co Group's dismissal of Ms Lim was consistent with the Small Business Fair Dismissal Code, with that subject being dealt with in detail below.

[7] Neither party put forward that any of the other initial matters required consideration. In relation to the three elements within s.396 that are not in dispute, I find that Ms Lim was a person protected from unfair dismissal at the time of her dismissal; that the application was lodged with the Commission within the 21-day period for making applications required by s.394(2) and that her termination was not a genuine redundancy.

Late filing of Applicant's material

[8] At the start of the determinative conference Mr Qian raised an objection about the late filing of material by the Applicant in response to the Commission's hearing directions.

[9] Directions for the filing of evidence and submissions were provided to parties on Wednesday 24 May 2023. The Directions required Ms Lim, the Applicant to file and serve her material in support of her unfair dismissal application by 4.00PM on Monday 12 June 2023 which she did apparently not do. The same directions required the Respondent to file its material in response to the application by 4.00PM on Monday 3 July 2023.

[10] Ms Lim wrote to my Chambers on Saturday 10 June 2023 asking where to send her submissions and asking whether the Respondent needs to be copied into the lodgement. Owing to the public holiday in Victoria on the Monday, my Associate responded to Ms Lim on Tuesday 13 June 2023 confirming the email address for filing and serving materials and cautioned Ms Lim that as the Commission had not received her submissions she was non-compliant with the Commission's directions and her application was at risk of being listed for a non-compliance hearing if she did not urgently take steps to file her materials.

[11] On Wednesday 14 June 2023 my Chambers directed Ms Lim to file her materials that day cautioning her that if the Commission did not hear from her by 5.00PM her application would be listed for a non-compliance hearing.

[12] After business hours on Wednesday 14 June 2023 a voicemail was left on my Chambers telephone number. Shortly after four emails were received from Ms Lim by my Chambers. Those emails queried whether the Applicant's material had been received, as well as asserting that she had filed as directed.

[13] Also on 14 June 2023, the Respondent wrote to my Chambers asking the next steps in the process and when he would be informed of the result of the Small Business Fair Dismissal Code objection it had raised in the Form F3. The Respondent sent a further email on 15 June

2023 restating the Small Business Fair Dismissal Code objection query and asking about the non-compliance process.

[14] On Thursday 15 June Ms Lim wrote to my Chambers asking if her emails had been received. In response I caused correspondence to be sent to Ms Lim reiterating the need for her material to be filed immediately. In response Ms Lim emailed to advise she would attempt to resend the materials that night.

[15] In reply the Respondent acknowledged the update from the Commission and restated the Small Business Fair Dismissal Code objection query. A further email was received from the Respondent at 5.30PM that day requesting the matter be listed for a non-compliance hearing.

[16] The Applicants submissions were received by the Commission late on Thursday 15 June 2023 by a Dropbox link although the Commission could not open all of the documents. Ms Lim was asked to resubmit the documents in a format that could be opened as well as to file a witness statement for herself.

[17] In response to the series of correspondence received from both parties, I advised the parties that after reviewing all of the material provided, I did not find there had been non-compliance sufficient to dismiss the matter and I reset the filing directions including with the Respondent being given until 10 July 2023 to file its materials (a week longer than originally directed). The Applicant was also provided the opportunity to file material in reply to the jurisdictional objection by 4.00PM on Thursday 13 July 2023.

[18] Ms Lim filed a witness statement for herself and resubmitted the documents originally unable to be opened by the Commission on Sunday 18 June 2023.

[19] The Respondent filed its material in compliance with the amended directions on Monday 10 July 2023.

[20] Ms Lim did not file any materials in reply to the jurisdictional objection.

[21] On the day prior to the determinative conference, Ms Lim sought to admit further documents into evidence. In response my Chambers advised the parties:

“The Directions issued in the above referenced matter required you to file your material by 4.00PM Monday 12 June 2023 and any material in reply to the jurisdictional objection by 4.00PM on Thursday 13 July 2023. That was your opportunity to put forward your case and that opportunity has now ended.

If however there are critical documents that you have not filed in response to matters raised by the Respondent you can apply to have them admitted during the hearing.”

[22] At the commencement of the hearing the Respondent reagitated its earlier written objection of 15 June 2023 that Ms Lim was non-compliant with the Commission’s directions as she did not file her material until after the deadline.² Further Mr Qian alleges that Ms Lim has continued to amend her evidence as the documents she submitted through the Dropbox link had been last modified on 18 June 2023.³ During the hearing I acknowledged Mr Qian’s

concerns, expressing the view that I did not find his case had been disadvantaged as a result of these matters ruling that the matter would proceed on the basis of the digital hearing book prepared and circulated by my Chambers prior to the hearing.

[23] Having now had the opportunity to consider all the circumstances of Ms Lim's filings I neither find that she unreasonably failed to comply with the Commission's directions (the test in s.399A) or that her application has not been made in accordance with the Act, is frivolous or vexatious or has no reasonable prospects of success or that it requires dismissal for another reason (the tests in s.587).

[24] Ms Lim's application therefore requires determination by me.

BACKGROUND

Employment relationship and dismissal

[25] Ms Lim commenced working with QL Co Group on 20 December 2021 when the business in which she worked was acquired by the company and her employment transferred.

[26] Ms Lim submits that when QL Co Group decided to open a new store in the Chadstone Shopping Centre, she and Mr Qian verbally agreed on a 1-year contract for her role as General Manager at both store locations. She was to be paid \$96,000 per year, as well as being paid a monthly bonus associated with opening the new store. The monthly bonus paid to Ms Lim was set at \$5,000 per month plus GST commencing in October 2022 was to be paid to Ms Lim as if that part of her engagement was as an independent contractor.⁴ Ms Lim believes it was agreed that she would relocate to reside closer to the location of the new store.⁵ Mr Qian disputes that Ms Lim was asked to relocate in order to work at the new store however the Respondent offered Ms Lim assistance if she decided to move.⁶

[27] For around four months Ms Lim managed both store locations. She submits this required her to work beyond her regular working hours and she took on additional tasks to assist the owners as they were new to the industry.

[28] By early February 2023 Mr Qian had become unhappy with Ms Lim's performance. He thought she had not been working enough for his shops and that she had been bullying other staff. Ms Lim however thought she had been working very hard, to breaking point even. On 8 February 2023 Mr Qian and his wife Cindy met with Ms Lim⁷ and expressed concerns to the effect that Ms Lim was insufficiently on the premises; sales and cost metrics were bad; as was the feedback to them from other staff. Mr Qian says this conversation amounts to a warning to Ms Lim, although she denies strongly that it was.⁸

[29] Despite not agreeing she was warned, Ms Lim was sufficiently concerned about what was discussed in the meeting to send Mr Qian a lengthy text message the next morning, on 9 February 2023 at 7:15AM part of which says "I will resign after Valentine's Day":

"Jack I am sorry to text you this the first thing in the morning. I have no bad feeling toward you, I understand most things you do as a business person. You are still one of good people I know.

Without lying I worked more than 80 hours each week on December(my mum wrote down, one week was 100hours) and I was on the roster three days a week in January but I was working extra days with plant& other markets and I was ordering for both shop by talking with wholesalers, I went go staff meeting& other corporate meetings, all sort of things, ordering flowers even took me every second day for at least two hours at home I was always willing to push myself if shop needed me assuming you and Cindy understand me being flexible.

I can see myself if I go 5days roster after valentine day, I have so many things to do extra at home. And I don't feel like I rest fair enough in Jan. Specially hearing from you work five days after vday (sic) week, not having break I already feel horrified. Now I am working at With Flowers, I see myself working at night everyday doing manager job. I was always available to my work. I was flexible if shop need me but seems like shop is not flexible toward me. I don't have time to do these manager work things at my shift since I need to do florist duty at work. Specially I am still training all the girls include Angela, I love working but this is not how I wanna live. I don't think you understand my workload. It's okay everyone has different views on things. When I spoke to you I realized we have different point of view of how I should work. Even last time I talk about similar topic after December about January. I never thought I asked a thing unfair to you but also I don't expect you to understand me as well. People value people differently. I feel uncomfortable ask things that I thought it's obvious to me. So I think it will be issue we will crush in the future again.

I will resign after Valentine day. I am happy to give you a month notice since you need to find my replacement as a manager. So I will work until 15/03 but if you don't need me I can go earlier as 15/02 which I don't think it's possible.

PS. It's not the teaching job I am resigning for. I don't have any clue what I gonna do after. I only accept one day to school. I am just having a break for while and then will think about what I am going to do. I still really like Cindy and you, I have no issue with Cindy. I just know that it's hard for people to change view on things and I don't wanna fight about it. I feel uncomfortable. I think you need to feel fair and right for yourself as well as me. I don't want to force things happen. I still think you are one of nice person I met, we are just having different expectations on work.

I will still do my best through Valentine day week. Nothing change about this.⁹

[30] Ms Lim denies that this was a resignation, although agrees the text was sent and explained in her oral evidence that after it had been sent she and Mr Qian met and agreed she would not resign.¹⁰ She had sent the text after becoming exhausted working lengthy additional hours. When she and Mr Qian met she says they agreed she would reduce her hours so that she worked 5 days a week with a hybrid working from home and working from the store arrangement which would take effect after the period of being short-staffed and the peak period of Valentines Day.¹¹ Mr Qian disputes this characterisation and submits that he provided Ms Lim with a warning over the complaints he had received about her management of staff and her not working sufficient hours to fulfil her full-time contract. Mr Qian disagrees that a hybrid working arrangement was permitted submitting that as a retail shop there is no point in staff

staying at home to work.¹² However, Mr Qian agrees that after receiving Ms Lim's text message they met and agreed "we would both have a try again, if she or we are still not happy, she can leave, or we can let her go (fire her)".¹³

[31] Mr Qian gave this evidence about the discussion he had with Ms Lim on 8 February 2023, conceding that while he advanced criticisms of Ms Lim's performance, he did not inform her that she would be dismissed if there was no change:

"THE COMMISSIONER: Just coming back to 8 February.

MR QIAN: Yes.

THE COMMISSIONER: Did you tell there these things? That she wasn't on the premises, the sales and costs were bad, and the feedback from staff was bad?

MR QIAN: That's why I talk to her.

THE COMMISSIONER: No, did you tell her those things?

MR QIAN: Yes, yes.

THE COMMISSIONER: Did you then say, 'If these things don't improve, you'll be dismissed'.

MR QIAN: Not really. I didn't say, 'You will be dismissed', but I talk to her, 'This is a very big problem'. That's why she said she have too much stress because I talk to her this, and she want resign.

THE COMMISSIONER: All right. So that was on 8 February, and you say there were three reasons; she wasn't in the premises, the sales versus costs ratio was bad - - -

MR QIAN: Yes, that's the management, yes.

THE COMMISSIONER: - - - and the feedback from staff was bad. Did you raise each of those matters with Ms Lim?

MR QIAN: Yes.

THE COMMISSIONER: All right. Did you raise other matters, other criticisms with her?

MR QIAN: Sorry, others?

THE COMMISSIONER: Did you raise other criticisms with her?

MR QIAN: At that time, no.

THE COMMISSIONER: All right. So was that the first time you gave Ms Lim warnings about her performance?

MR QIAN: Yes.”¹⁴

[32] Mr Qian submits that after Valentines Day, Ms Lim continued to work reduced hours without permission, and he received complaints from staff that she was uncontactable, and it accumulated in a downturn in business with the loss of possible contracts.¹⁵

[33] In mid-March 2023 an employee named Winter resigned. Winter is ethnically Korean, as is Ms Lim and she later said to Mr Qian by text that one of her reasons for leaving the business was because Ms Lim “didn’t like Koreans”. Mr Qian argues this was “hate speech” or unlawful discrimination on the part of Ms Lim. Winter did not give evidence in these proceedings.

[34] On 26 March 2023 Mr Qian and his wife Cindy met with Ms Lim from about 9 PM to 11 PM at Chadstone Shopping Centre after the shop had closed.¹⁶ It is unclear precisely what was conveyed in the meeting, however Ms Lim’s evidence is that she “heard a lot of negative things about me”¹⁷ and that she was pressed repeatedly to take leave from the next day.¹⁸ Mr Qian’s wife, Cindy, forwarded Winter’s text message to Ms Lim after their discussion on 26 March 2023.¹⁹

[35] Mr Qian characterises the discussion on 26 March 2023 as involving him giving a warning to Ms Lim over her non-attendance at the shop and her management of staff.²⁰ Mr Qian’s evidence is that he advised Ms Lim to take a holiday and they could use that time to both consider whether they can continue to work with each other, although Ms Lim did not agree to take a holiday effective immediately. At midnight on the same day, Ms Lim called Mr Qian and advised she had received another job offer and wanted a discussion the following day.²¹

[36] A further meeting took place on 27 March 2023 between Ms Lim, Mr Qian and Cindy. The meeting was lengthy, with Ms Lim estimating it started at about 3 PM and went for about 4 or 4 and a half hours.²² Mr Qian agrees the meeting started at about 3 PM.²³

[37] Mr Qian’s evidence is that he did not decide to dismiss Ms Lim until he was actually in the meeting with her on 27 March 2023.²⁴ His oral evidence is that he gave Ms Lim reasons for her dismissal including that she paid insufficient attention to the shop and was not there, and that she had not managed its sales/costs ration appropriately.²⁵

[38] Ms Lim’s evidence is that she was dismissed after Cindy had left the meeting,²⁶ whereas it was Mr Qian’s evidence that she was there at the time.²⁷ Ms Lim gave this evidence about how her dismissal was communicated:

“THE COMMISSIONER: And who was involved in that conversation?

MS LIM: In the beginning, from 3 o'clock to 4.30, Cindy was with me as was Jack, and Cindy had to go do her shift because she had to work from 4.30. So me and Jack only stayed from the 4.30 to about 7.30.

THE COMMISSIONER: And what things were discussed in that period?

MS LIM: First time I tried to, like, give them suggestion about whatever they concern, if there was anything concern I try to give them what we can do to solve whatever the issue it is. But it was more about Cindy and Jack kind of accusing me - like, just telling me kind of how bad I am sort of thing. In that communication I heard like, I'm, you know, like, everyone doesn't like me and I'm the risk of the business. If I'm staying, everyone going to leave.

And also my facial expression is not great and then giving the example of not actually staff, like one of his wife's friend, who work in the restaurant next to us, she just sometime visit our store, and then she's told her like, I look like I'm upset in the shop. Those kind of comment and even saying like, my previous boss I used to have, because they bought the business from my previous boss, saying like he wouldn't think I'm rude or something, just things that I never heard of things. It's quite like personal than like it's like, proper reason.

And it was quite hurting because it's just like hard to hear like, everyone doesn't like me and I'm the risk of the business.

THE COMMISSIONER: So within that fairly long discussion - - -

MS LIM: Yes.

THE COMMISSIONER: - - - when was it suggested that you - - -

MS LIM: Are getting fired?

THE COMMISSIONER: - - - should be fired?

MS LIM: So after like, a lot of thing, 'You can't do this', 'You're not good at this', whatever like and happened, and then I think after Cindy left he said, 'From our conversation today, I made the decision you can't work with us, because I can't work with you'. And I said to him, 'But you didn't give me any warning'. And then he actually started - he was counting money in his hand, and I said, 'And how do I know?' And I ask him like, 'I don't feel like it's fair because it's just all of a sudden and I am happy to change if there is anything like' - because he was telling me management style is different.

And then I told him, 'I'm happy to follow whatever his management style it is'. But then also he couldn't explain clear what his actually management style will be. Just he said I'm the risk of the business because if I'm staying, everyone don't like me and they will leave. So they are, you know, risk to losing staff because of me. And I don't think it's quite nice to doing, even fire is hurting and at the same time getting like, comments like that. And then also he brought, like, his wife brought up like, they're quite rich and powerful and stuff, which I didn't know why I have to hear in that conversation as well.

And then also like, talk about my mum is actually problem because she taking care of me too much. So I don't work hard enough.

THE COMMISSIONER: All right. Well, thank you. So when you said Mr Qian said, 'You can't work with us', was that inside or outside of Starbucks?

MS LIM: Inside of Starbucks.

THE COMMISSIONER: Inside. So by that stage, there was still another hour to go in the conversation. So what did you talk about in that period?

MS LIM: Well, I - actually I ask him to let me go because it was too much already. But he insist that telling me like, he's not bad person and I am not being used, something like those kind of conversation. And then I just ask him, 'Look, like if there is a problem, I'm happy to try a different way to solve the issue and let's see that that solve the issue'. 'And then if you're still not happy, then you can let me go', because I try at least whatever they are not happy with.

But they said, 'No, I already made my mind and that's it'.²⁸

[39] When Ms Lim was dismissed she was paid two weeks' pay in lieu of notice.

[40] Ms Lim summarises the reasons Mr Qian gave her for her dismissal in the following way:

1. That her management style was not suitable to build the business;
2. That they received complaints from other employees about her;
3. That she was overly confident; and
4. That she did not work hard enough and prioritised her health.²⁹

[41] Ms Lim elaborated on these matters in the following way in her submissions:

“This was the first time for me to hear these reasons as there was no conversation regarding these reasons prior to this day. The reasons given were vague and I told them that I was willing to make any necessary changes to suit them better, however, Jack said he had already made up his mind and I was left with no choice but to leave. When I specifically asked Jack why he never gave any prior warnings, he said that he was keeping count in his head, but they were never expressed in any form. Here are some more contexts for the reasons given when I was being dismissed:

Regarding the reasons given about the different management styles, I asked what I can do to change, and what specific type of management style they were looking for, they could not give me a clear answer but insisted that my style did not fit their needs.

Regarding the reasons given for my not getting along with other employees and the staffs' complaints about my management style. Cindy said that “I have a bad facial expression and always look angry”, so the other employees feel uncomfortable communicating with me. She gave me an example of her friend who works at Shanghai

Red restaurant in Chadstone Shopping Centre as a shop manager who sometimes visits the store at times and said I have a bad facial expression and I was not friendly to her. They also told me I was rude to my previous boss Steve, whom I had no problem with. Jack also told me that everyone complains about me but when I asked them who they were, he mentioned that they were two employees who expressed their feelings about me, and he suspects that everyone feels the same.

About me being overly confident, Jack quote “Your strength is being confident because when we go to meeting with a client you can convince them to do business with us by showing how confident you are about your work, but your weakness is being too confident” I asked what he means by being too confident, but he couldn’t give me an answer.

Regarding the reason for me not working hard enough and caring too much about my health; Cindy quote “Your mum is also a problem, having your mum care about you too much of your health makes you work less hard than before”. When the second store first opened, I worked much more than my regular hours. Some days, I would work over 18 hours in a day just to keep the business in check. One of the worst was when I injured myself working during the Valentine’s Day week when I worked over 37 hours in two days. Due to the injuries, I had to attend medical clinics for treatment. The employers were aware of this and did not bring this up as an issue at the time, however, on the day of dismissal, they brought this up as one of the examples of me not working hard. They were not happy with the fact that I couldn’t work as much as I used to due to my injuries which resulted from overworking.

At the time of dismissal, I assured them that I am happy to follow their style of management and make the necessary changes. Jack agreed that the solutions I was suggesting would solve most of the problems, but I was still a risk to the business because everyone does not like my management style they would leave if I stayed. Cindy also mentioned that Cindy had a very rich and successful father in China which was irrelevant to the topic of conversation we were having. They also made some personal comments about my mother about the fact that my mom cared “too much” about my health. These comments were unprofessional and caused damage to my mental health.”³⁰

[42] Ms Lim’s recollects that Mr Qian did not raise discrimination against other employees as a reason for her dismissal during the dismissal conversation on 27 March 2023.³¹

[43] Mr Qian submits that Ms Lim was dismissed for serious misconduct and poor work performance. In his submissions on the subject, he raises the allegation that Ms Lim discriminated against ethnically Korean employees as a reason for her dismissal.³² Mr Qian also relies in his documentary evidence on concerns about Ms Lim’s ability to manage two shops as a reason for her dismissal.³³

[44] Mr Qian also submitted that Ms Lim’s dismissal was consistent with the Small Business Fair Dismissal Code. As part of that submission he put forward both that Ms Lim was not dismissed and that she resigned, pointing to the text message she sent on 9 February 2023, and that she also had periods of unauthorised absence. As Mr Qian agrees that after receiving Ms

Lim's text message the two met and agreed "we would both have a try again, if she or we are still not happy, she can leave, or we can let her go (fire her)",³⁴ I find there was no effective resignation and give no further consideration to the claim.

[45] Ms Lim was notified of her dismissal in the conversation with Mr Qian on 27 March 2023 and which included his wife for at least part of the meeting. Ms Lim asserts there were no prior discussions about performance issues and that this occasion was the first time she was notified of any issues with her carrying out the duties of her role.³⁵

[46] The parties each put forward a number of other matters in their respective submissions:

- Ms Lim submits that she was injured during the course of her employment in Valentines Day week 2023 when she was required to work additional hours to meet customer demand. Mr Qian disagrees that she was injured as a result of her work as Ms Lim did not use any sick leave or annual leave entitlements after Valentines Day, rather she continued to work reduced hours of 3 days per week, and she also worked her second job and attended her gym.³⁶
- Ms Lim also asserts that she has been underpaid half of the bonus which was agreed between herself and Mr Qian for accepting the General Manager role at the new store location. She further submits that she has not been paid superannuation for the period 19 June 2022 to 27 March 2023.
- Mr Qian submits that during the employment relationship Ms Lim "lied" to him about her working hours, accusing her of contracting to work 47.5 hours per week and then working 38.³⁷

Small Business Fair Dismissal Code objection

[47] Mr Qian objects to Ms Lim's unfair dismissal application on the basis that the employer is a small business employer, and the dismissal was consistent with the Small Business Fair Dismissal Code (the Code). A copy of the Code checklist provided with the Respondent's Employer Response Form, the Form F3, reports two reasons for Ms Lim's dismissal, namely serious misconduct related to her discrimination of other people as well as unsatisfactory conduct, performance, or capacity to do the job.

[48] Ms Lim submits that the reason for dismissal was not serious misconduct with that claim being "a defamation of character".³⁸

CONSIDERATION – WHETHER DISMISSAL UNFAIR (s.387)

[49] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission 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.

[50] Section 396 requires consideration of a dismissal's consistency with the Code and whether it was a case of genuine redundancy before considering the merits of the application.

[51] It is not in dispute that the Respondent is a small business. The question is whether the Respondent can rely upon the provisions of the Code as a basis for contending that the Applicant was not unfairly dismissed. The Code is made by legislative instrument pursuant to s.388 and provides for circumstances of "summary dismissal" and "other dismissal". It is well accepted the Code does not deal with matters of redundancy and in the absence of a termination of employment related to a person's conduct or capacity it is not possible to form a view that their dismissal was consistent with the Code.³⁹

Consistency with the Small Business Fair Dismissal Code

[52] At the time of Ms Lim's dismissal, QL Co Group employed 12 employees⁴⁰ and so is a Small Business Employer, with s.23 of the Act defining the term to be an employer employing fewer than 15 employees at a particular time. QL Co Group argues Ms Lim's dismissal was justified under both parts of the Code for the two reasons summarised above; that is, serious misconduct for reason of racial discrimination that would allow termination as a "Summary Dismissal" as well as for work performance issues that would allow dismissal under the "Other Dismissal" part of the Code. The relevant parts of the Code are these:

"Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer

providing additional training and ensuring the employee knows the employer's job expectations."

[53] It has been held on the subject of reliance on the Summary Dismissal part that:

"(1) If a small business employer has dismissed an employee without notice - that is, with immediate effect - on the ground that the employee has committed serious misconduct that falls within the definition in reg.1.07, then it is necessary for the Commission to consider whether the dismissal was consistent with the "Summary dismissal" section of the Code. All other types of dismissals by small business employers are to be considered under the "Other dismissal" section of the Code.

(2) In assessing whether the "Summary dismissal" section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal, and second whether the employer's belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element."⁴¹

[54] The allegations of serious misconduct surround the contention that Ms Lim expressed racially discriminatory views. The Respondent's evidence about the subject consists of two text message strings; one from the employee, Winter, to Mr Qian on 15 March 2023 after she had resigned; and another apparently from Ms Lim, undated. The first text is the more substantial and expresses dissatisfaction on the part of Winter with Ms Lim as a manager. Mr Qian's concern about the text appears to chiefly be a concern she had left the business and the loss that created for the shop rather than the racial connection being unacceptable. The second text string is provided with little context at all, with its date and recipient unidentified. The texts in evidence and their content are as follows:

- On Saturday 18 March 2023 Mr Qian's wife Cindy received a text message from Winter which said:

"Cindy,

How is your day going~? I'm sorry I quit all of a sudden.

Cindy, I think you're really great at coming from China to Australia to do business and treat people sincerely. I'm proud of you and Jack. I'll miss you guys.

Actually, I want to talk something for you. I was constantly stressed by Hana from the start of this work.

When Cass and Luren quit, I wanted to that as well but I couldn't quit because of the maintenance of my life.

She called me at almost midnight and told me how hard she worked.

She told me how proud herself. But she told me she was disappointed as a florist.

I know she is busy. I don't know why she telling so much negative and a story I don't even need to know.

Not only that, before working with June at Master Flora for the first time, she said she was worried about working with me because June had a sensitive personality, but she actually wasn't. I know June is nice person for me.

I know what Hana's worried about, but with so many negative comments.

She even said she didn't like Koreans, but I don't think so.

She doesn't seem to get along with people.

She doesn't seem to know what she's doing wrong. I hope you understand and take care of her as a business partner.

But that's not why I'm the only one leaving Australia.

I have some problems that need to be solved in Korea. A lot of people are asking me to help.

I want you to tell all the florists that I'm sorry I left all of a sudden and that I've been grateful.

I'm going to miss you.

Hope everything goes well!!”⁴²

- An undated text string between Ms Lim and an unknown person, which included Ms Lim stating “I don’t want any more Korean” and “I don’t think wanna work with Korean”.⁴³ There are two parts to the string, with it being unclear whether they are parts of the one string on the same date, or from separate dates (underlining added in each case):

- First text string:⁴⁴

Lim: No all the florists use it
Recipient: Ok. Do you want he try from tomorrow?
Lim: Anyway it will be really hard to find florist at the moment
Lim: Everyone will stay shop they work
Lim: Cuz Christmas
Lim: Anyway we do what we can do.
Recipient: I feel we can try from Chinese website and Korean website as well
Recipient: Try whatever we can do
Lim: I don't want any more Korean
Lim: Abit scared lol [crying emoji] I am kind of Aussie

- Second text string:⁴⁵

Lim: Seems like she is not happy
 Recipient: Not happy what? Yesterday you talk to her what did she said
 Recipient: I can't listen phone
 Lim: Yeh okay.
 Recipient: My family still here
 Lim: She is working now. I wanna go ask if she is not happy.
 Lim: I am really sad.
 Lim: I don't think wanna work with Korean
 Lim: [crying emoji]
 Recipient: Yep. Ask
 Recipient: We you want her go?

[55] The inference to be drawn from the content of the texts is clear enough: Ms Lim did not want more ethnically Korean workers in the shop. Mr Qian argues the comments should found an objectively held belief on the part of the Respondent that it was conduct on the part of Ms Lim that was sufficiently serious to justify her summary dismissal.

[56] However that proposition fails when it is considered against the elements of the Code: there was no immediate action taken by Mr Qian when he learned of the communication and he never asked Ms Lim for an explanation of the alleged conduct. Instead, the evidence is that the text from Winter was not provided to Ms Lim until after the late-evening meeting on 26 March 2023. Further Mr Qian's evidence about the meeting on 26 March was that the matters discussed ranged over a number of criticisms of Ms Lim's attention to duty and her capacities as store manager as well as the reasons why Winter had resigned.

[57] The product of this evidence is that it took one and a half weeks for Mr Qian to raise Winter's complaint with Ms Lim and that evidently, he did not ask for an explanation from her. He then failed to explain to her that the racial comments were one of the reasons she was being dismissed. The content of the second text string appears not to have ever been taken up with Ms Lim prior to these proceedings. These matters mean that no finding can be made by me that the complaint was sufficiently serious in Mr Qian's mind to warrant dismissal. His expression now of a belief that this was so serious as to warrant immediate dismissal fails the test of being objectively held.

[58] Mr Qian's submission that Ms Lim was dismissed because of summary dismissal, consistent with the Code, therefore fails.

[59] I also do not find that Ms Lim was dismissed consistent with the second part of the Code, namely "Other Dismissal". The Code requires in regard to that category that an employee must be given "a reason why he or she is at risk of being dismissed". It must be a valid reason based on their conduct or capacity to do the job and the employee must be warned they risk being dismissed if there is no improvement. The employee must be given an opportunity to respond to the warning, giving them a reasonable chance to rectify the problem, having regard to the employee's response. Further, rectifying the problem "might involve the employer

providing additional training and ensuring the employee knows the employer's job expectations".

[60] No findings are available on the evidence before me that these steps were taken by Mr Qian in relation to Ms Lim. The evidence therefore does not lead me to conclude that Ms Lim was given a reason why she was at risk of being dismissed; or warned that such was the case; and she was not given an opportunity to respond to or rectify the deficiencies seen by her employer in her performance.

[61] The evidence shows there was a tension of some kind between the parties in the week prior to Valentines Day in February. It was sufficiently serious for Ms Lim to communicate that she would resign after Valentines Day. Mr Qian's evidence is that in response to that situation he provided Ms Lim with a warning over the complaints he had received about her management of staff and her not working sufficient hours to fulfil her full-time contract. However, he does not give particulars either about the words that were communicated or how they were communicated and conceded in his oral evidence that he had not explicitly said to Ms Lim that she would be dismissed unless her work performance improved.

[62] Mr Qian submits that on 26 March 2023 "we gave her another warning" followed by a request that Ms Lim go on a holiday in order for the two to consider whether they want to work with each other or not. Ms Lim denies there was a warning, although she accepts she was asked to go on a holiday.⁴⁶ In the circumstances of the evidence I do not accept that a warning was given to Ms Lim about her performance on 26 March 2023. Mr Qian points to no words or document that would reasonably lead to such a conclusion; further it would be unreasonable to give Ms Lim a warning late one day and then dismiss her the following day for the performance related reasons within the warning.

[63] While I accept that Mr Qian or possibly his wife Cindy likely communicated dissatisfaction with Ms Lim in the 8 February and 26 March 2023 discussions there is no contention on Mr Qian's part in these proceedings that he connected that dissatisfaction with the two necessary requirements of the "Other Dismissal" part of the Code; namely that Ms Lim "risks being dismissed if there is no improvement" and that she be given an opportunity to rectify the problems he or his wife perceived about Ms Lim's performance. I find that those things were not done and that accordingly the requirements of the "Other Dismissal" part of the Code have not been met.

[64] I find after consideration of the Code that Ms Lim's dismissal was not consistent with the Code.

Whether dismissal otherwise unfair (s.387)

[65] Determination of whether Ms Lim's dismissal was consistent with the Code, is one of the initial matters that must be decided before determination of the merits of her application. Having determined her dismissal was not consistent with the Code, I am subsequently required to consider the merits of her application in the manner set out in s.387, the provisions of which section are as follows:

"387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

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

[66] Determination of whether a dismissal was harsh, unjust or unreasonable requires each of the matters specified in s.387 to be taken into account. The Full Bench has summarised the approach that should be taken by the Commission to the criteria within s.387 in the following way:

“The following propositions concerning consideration as to whether there is a valid reason for dismissal for the purpose of s.387 are well established:

- a valid reason is one which is sound, defensible and well-founded, and not capricious, fanciful, spiteful or prejudiced;⁴⁷
- a reason would be valid because the conduct occurred and justified termination; conversely the reason might not be valid because the conduct did not occur or it did occur but did not justify termination (because, for example, it involved a trivial misdemeanour);⁴⁸
- it is not necessary to demonstrate “serious misconduct” or misconduct sufficiently serious to justify summary dismissal in order to establish a valid reason for dismissal;⁴⁹

- the existence of a valid reason to dismiss is not assessed by reference to a legal right to dismiss⁵⁰ (so that, for example, where summary dismissal has occurred, it is not necessary to determine whether the right of summary dismissal was legally available); and
- the criterion for a valid reason is not whether serious misconduct as defined in reg.1.07 has occurred, since reg.1.07 has no application to s.387(a) (although a finding that misconduct of the type described might well ground a conclusion that there is a valid reason for dismissal based on the employee's conduct).⁵¹⁵² (original references)

[67] A dismissal is unfair in the case of a person protected from unfair dismissal, dismissed by the employer which is not a small business employer and for reasons other than genuine redundancy, if it was harsh unjust or unreasonable, taking into account the criteria within s.387. I will deal with each of the criteria within s.387 in turn.

(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)

[68] To be a valid reason the reason must be "... sound, defensible or well-founded." A reason which is "... capricious, fanciful, spiteful or prejudiced ..." cannot be a valid reason.⁵³ The reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.⁵⁴ The valid reason for termination is not to be judged by legal entitlement to terminate an employee, "... but [by] the existence of a reason for the exercise of that right" related to the facts of the matter.⁵⁵ Ascertainment of a valid reason involves a consideration of the overall context of the "practical sphere" of the employment relationship.⁵⁶

[69] It is not the Commission's role to "stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court."⁵⁷ However, the Commission "must consider the entire factual matrix in determining whether an employee's termination was for a valid reason."⁵⁸

[70] Mr Qian has put forward several versions of the reasons for Ms Lim's dismissal with the consistency being that Ms Lim racially discriminated against the employment of ethnically Korean employees and that she was a poor manager of the store. He also makes numerous claims of Ms Lim lying to him and his wife, before and after termination, however those claims applying do not coalesce to a reason for Ms Lim's dismissal but instead appear to be put forward as examples of Ms Lim's character.

[71] The evidence about the matter of serious misconduct has been referred to previously. The allegation is serious and on Mr Qian's evidence Ms Lim's references to race is plainly unacceptable. The matters of poor management on Ms Lim's behalf are that she paid insufficient attention to the shop; she was not at the shop often enough; and that she had not sufficiently managed its sales/cost ratio leading to losses. Mr Qian also advanced claims about Ms Lim's capacity to keep staff, not only in relation to Winter, but another employee who resigned named Lauren.

[72] In relation to the claim that Ms Lim has racially discriminated, it is noted Winter's text was only provided to Ms Lim late on 26 March 2023, the night before the date she was dismissed. The reason it was provided to her is not known by me.

[73] Mr Qian obviously liked Winter as an employee and had regard for her skills and I therefore cannot exclude that the purpose of providing the text to Ms Lim was to express disappointment that a valuable and well-regarded employee had resigned, rather than it being provided for the purposes of Ms Lim's response to its racial content. The fact that it took one and a half weeks for Mr Qian to provide the text to Ms Lim diminishes the likelihood that Mr Qian regarded the racial content as misconduct, serious or otherwise, such as to justify an immediate termination of employment.

[74] As to its content the text, unsupported with oral evidence from its author, Winter, in total is of a person explaining why they resigned. Evidently Winter reports Ms Lim as having said "she didn't like Koreans" and then commenting "but I don't think so". The context within which this may have been said or what it means is unclear. Winter explains as well that Ms Lim is not the only reason she resigned as was leaving Australia; in addition she has "some problems that need to be solved in Korea. A lot of people are asking me to help". The context of the second text string is less clear and appears to be a discussion about the performance of an employee.

[75] Ms Lim denies in her written statement that she made references to Korean employees with a discriminatory purpose, however prevaricated about the subject in her oral evidence when asked directly whether she had said those words.⁵⁹ Given her avoidance of direct questions from me as to whether she had said those words and what she meant, I consider it more likely than not that she did express the views reported by Winter and that she meant that the store employed sufficient ethnically Korean employees and did not need more. The same may be said about the second text relied upon by Mr Qian. There is though, no evidence of direct discrimination on the part of Ms Lim. Ms Lim's witness, her friend Ms Sinae Yu supported Ms Lim by denying Ms Lim discriminated on grounds of race. Ms Yu stated the allegation Ms Lim had discriminated against Korean employees was false and made mention of Ms Lim's efforts to assist Korean employees adapting to the work environment.⁶⁰

[76] Because the complaint was not put to Ms Lim for response; was not the sole reason for Winter's resignation; and was not acted upon expeditiously by Mr Qian I do not find it to be a valid reason for Ms Lim's dismissal. The allegation is not that she said the words in front of customers or other staff or that she hired or fired staff because of their ethnicity. Instead, the complaint is from an employee who has not given evidence in these proceedings who reports Ms Lim as having made the reference she did on a date unknown and within an unestablished context.

[77] In relation to the first text, Winter did not give oral evidence and so there is no illumination of what she meant by the text or the circumstances that led to it being sent. Ms Lim denies she was racially motivated, and it is unclear in relation to the second text when she sent it or what was actually meant by its content. There is no evidence Mr Qian challenged Ms Lim about the racial overtones of the texts at any time proximate to receiving them; instead, the evidence suggests that the first time the matter was raised was in the meeting held with Ms Lim late on 26 March 2023. If Mr Qian or his wife had taken up with Ms Lim the subject and

implications of her texts immediately after they were received then in time and after appropriate warning and with repetition racist comments on the part of Ms Lim may have become a valid reason for dismissal, as it would be if there was cogent evidence Ms Lim's actions discriminated in the provision of services or decisions about employment or if she racially vilified people. However, in the context of this matter the subject is not established as a valid reason for termination.

[78] I am also not satisfied the Respondent's reliance on matters of poor performance on the part of Ms Lim are a valid reason for her termination. In that regard Mr Qian advanced the matters of Ms Lim paying insufficient attention to the shop; that she was not at the shop often enough; and that she had not sufficiently managed its sales/cost ratio leading to losses. The evidence supports that Mr Qian raised those matters with Ms Lim in their discussion on 8 February 2023, however all that was said at the time was that the matters were a "very big problem". He did not say to her that she would be dismissed if things did not improve. In response Ms Lim exhibited stress and offered her resignation.⁶¹ The complaints made by Mr Qian in relation to Ms Lim's involvement in the resignation of Lauren are general and unsupported by evidence that his complaints on the subject were formally taken up with Ms Lim.

[79] Mr Qian put forward profit and loss statements for the December 2022 and March 2023 quarters in support of his contention that Ms Lim had not been controlling the costs/sales ratio. The statements show a net operating loss of similar dimensions in the two quarters, however with markedly different outcomes in critical components:⁶²

- Sales improved by 77%;
- Costs of goods sold rose by 80%;
- Wages and salaries increased by 88% and superannuation by 79%.

[80] No doubt some of the changes to these accounting lines (and others) are attributable to Ms Lim's performance. Some are no doubt linked to the opening of a new store, and others may well be attributable to decisions made by Mr Qian and his wife. There is though no evidence about directions or performance expectations or indicators having been raised with Ms Lim, or that they were her direct responsibility to control.

[81] In all while the evidence shows these performance matters had been raised with Ms Lim as problems there was no statement about the need for improvement for her continued employment. There is also no evidence about the specifics of things to be concentrated on and improved and no evidence about the extent of improvement by the dismissal date. In respect of the criticisms about Ms Lim's control of costs and sales and profitability there is insufficient evidence about the things Ms Lim was expected to control and what she then did or did not do.

[82] It is possible that with correct counselling, assistance to change and specific directions as to what had to be done and sufficient time to make changes that these performance matters may coalesce to be a valid reason for Ms Lim's dismissal. However, they did not do so at 27 March 2023. The reasons relied upon by Mr Qian for Ms Lim's dismissal at that date were not, in all the circumstances sound, defensible or well-founded. As a result, consideration of this criterion resolves in Ms Lim's favour toward a finding of unfair dismissal.

(b) whether the person was notified of that reason

[83] Ms Lim was notified of her dismissal in the course of the conversation Mr Qian had with her on 27 March 2023. As I am not satisfied that there was a valid reason for Ms Lim's dismissal, consideration of this criterion has no application toward my decision.⁶³

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[84] For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal there needs to be a finding that there is a valid reason for dismissal.⁶⁴ Consideration of this criterion is also a neutral factor in my decision.

(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

[85] At no stage did Ms Lim request a support person to assist her in any discussions with her employer and so consideration of this criterion is a neutral factor in my decision.

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal

[86] Mr Qian puts forward that Ms Lim was warned about the consequences of poor performance despite conceding that at no stage did he actually tell her that the consequence of failure may well be dismissal. The best that Mr Qian's evidence rises to is to suggest that he and his wife, Cindy, put forward criticisms of Ms Lim with the expectation that she do something about them. The circumstances of these matters do not allow a finding that any stage Ms. Lim was warned about the consequences of continuing unsatisfactory performance.

[87] Accordingly, consideration of this criteria weighs in favour of a finding that Ms Lim was unfairly dismissed.

(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

[88] The Respondent is a small business employer. It is possible that Mr Qian's lack of knowledge about managing staff performance or the procedures to be followed when dismissing a person led to the situation in which the Respondent now finds itself. While this is the case, it is my view that Ms Lim's dismissal was substantively unfair to the point that making allowances for the defects in the Respondent's dismissal procedures is insufficient to avoid a finding of unfair dismissal.

(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

[89] A human resource management specialist would plainly not recommend the procedures actually followed by the Respondent in dismissing Ms Lim and so it cannot be ruled out that

the absence of such assistance impacted on the procedures actually followed in terminating Ms Lim's services. Again, it is my view that making allowances for the defects in the Respondent's dismissal procedures is insufficient to avoid a finding of unfair dismissal.

(h) any other matters that the FWC considers relevant

[90] I do not consider there to be any further matters requiring consideration under s.387(h).

Conclusion on the s.387 criteria

[91] After considering each of the criteria within s.387, I am not satisfied there was a valid reason for QL Co Group's dismissal of Ms Lim and that her dismissal was procedurally unfair. Accordingly, I find that Ms Lim's dismissal was an unfair dismissal.

[92] The Act requires the Commission to consider whether a dismissal was harsh, unjust or unreasonable by taking into account the matters at ss.387 (a) to (h). The meaning of the term "harsh, unjust or unreasonable" was considered by the High Court in the matter of *Byrne and Frew v Australian Airlines Limited*:

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."⁶⁵

[93] It has been further held that a dismissal may be *unjust*, because the employee was not guilty of the misconduct on which the employer acted; *unreasonable*, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or *harsh*, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct.⁶⁶

[94] I find that Ms Lim's dismissal was harsh and unreasonable. It was harsh because her dismissal was disproportionate to the misconduct or performance established at the point she was dismissed. It was unreasonable because critical matters had not been put to Ms Lim for response and because it did not give Ms Lim a chance to improve her performance in light of the Respondent's criticisms of her performance or to give her time or assistance in order to overcome those criticisms.

REMEDY

[95] The sections of the Act dealing with remedy once a finding of unfair dismissal has been made are set out in ss.390 – 393.

[96] Pursuant to sub-s.390(3) an order for the payment of compensation to a person must not be made unless the Commission "*is satisfied that reinstatement of a person is inappropriate*"

and also that the Commission “*considers an order for payment of compensation is appropriate in all the circumstances of the case.*”

[97] Ms Lim does not seek reinstatement from her application accusing Mr Qian of having lied to her and threatening her. QL Co Group also argue against reinstatement for several reasons including that Ms Lim’s employment cost the business too much; that she had contacted staff after being dismissed and had deleted the Respondent’s Instagram account.

[98] I agree after listening to each give evidence and provide submissions that in this case reinstatement would be inappropriate. The Respondent is a small business employer in which trust of each other would be highly important, with the absence of that trust leaning against a proposition that reinstatement should be actively considered.

Compensation – what must be taken into account in determining an amount?

[99] Having determined that reinstatement is *inappropriate* compensation may only be ordered if the Commission considers an order for payment of compensation is *appropriate* in the circumstances of the case (s.390(3)(b)). That is, an order for compensation is not automatic if reinstatement is found to be inappropriate and is instead a discretion to be exercised subject to certain further consideration. In this regard s.392(2) of the Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

- “(a) the effect of the order on the viability of the Respondent’s enterprise;
- (b) the length of the Applicant’s service;
- (c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;
- (d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
- (e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
- (f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.”

[100] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent’s enterprise

[101] There is no evidence before me about the effect of an order for compensation on the viability of the employer's enterprise.

Length of the Applicant's service

[102] Ms Lim's length of service with QL Co Group was relatively short having transferred her employment to the Respondent on 20 December 2021 when it took over the business in which she worked. At the date of her dismissal, she had worked for QL Co Group for only marginally more than 1 year and 3 months.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[103] Assessment of the remuneration an applicant would have received had it not been for their dismissal is both an essential and difficult task.

[104] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive... the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."⁶⁷

[105] As set out above, I have not found that the reasons for dismissal relied upon by QL Co Group were valid reasons at the time Ms Lim was dismissed, although noting that with time and proper warning and coaching they may well have become a valid reason for Ms Lim's dismissal.

[106] As things stood in late March 2023 Mr Qian obviously had major concerns with Ms Lim's capacity to manage his stores and in particular whether she was paying proper attention to their profitability, with rectification of those matters requiring some time. The other two matters relied upon by Mr Qian for Ms Lim's dismissal, racially based comments and her attendance in the store, are issues which would likely be quickly remedied with a properly based and documented warning.

[107] The matter of profitability though requires not only warning and coaching, but also likely time in order to overcome the fundamental criticism. Even so and in the circumstances of this case I do not expect that the time required to overcome Mr Qian's criticism would be many months. Consideration of his evidence and the documents provided by him suggests that the main concerns he had about the profitability of the stores were to do with the variables of the cost of goods sold and employment costs as well as whether he was getting value for money from the amounts he was paying Ms Lim to manage the stores as an employee and to establish the Chadstone store as a viable concern through an independent contractor-based bonus arrangement. In this regard Mr Qian regarded Ms Lim's salary arrangements as "extraordinarily high".⁶⁸ Some targeted and pointed directions to Ms Lim about wastage and other matters associated with the cost of goods sold would likely assist in quickly moving that metric to an

acceptable level. Similarly, a direction to Ms Lim about the need for her to physically be present in the stores for a greater amount of time would have a similar effect as her salary was in effect a sunk cost meaning that greater attendance on her part might reduce the need for engagement of other employees, at least to a minor if not substantial degree.

[108] In the scale of the Respondent's stores it could be expected that some positive change in profitability might take place in a period of in the range of 1 to 2 months, albeit that the complete problem may not be eradicated within that period.

[109] There are two factors that would likely mean Ms Lim's employment would have ended within a relatively short period after 27 March 2023 and which then constrain the anticipated period of employment.

[110] First, I do not consider the relationship between Ms Lim and her employer at that time to be sufficiently cooperative and productive to see positive change of sufficient amount in a period of 1 to 2 months. If a fairly given warning was issued to Ms Lim there may have been some but not sufficient change as to safeguard her employment during that period. That is not to say that a longer period of time would be required to fairly test her performance but is instead to observe that I do not think Ms Lim would have been sufficiently responsive within that time to avoid a dismissal. The employer had performance complaints, certainly, and they would require being acted upon with alacrity, which is what I doubt would occur. By March the employment relationship was broken, and it is doubtful that a fairly issued warning would have been sufficient to overcome the evident performance problems.

[111] Second, I consider it likely Ms Lim would not have reacted particularly well to a formal documented warning to her about matters of performance, including the profitability of the stores she managed. She presented in the Commission as someone who was overwhelmed by the situation, believing earnestly that she had already worked incredibly hard in the business and had little more to provide in the face of what she saw as unreasonable demands on the part of Mr Qian. She reacted to the February discussion by saying she would resign. This situation suggests that Ms Lim would not have a medium or long-term future with the Respondent. I consider it likely she may well have walked away from employment shortly after the point of being given a documented warning.

[112] A warning issued to Ms Lim about her racial comments would have been coupled with an expectation that they never be repeated or acted upon; however, a dismissal on that subject would be dependent on a repetition and I am not satisfied that Ms Lim would have immediately contravened a warning (or at least not within the estimate of time for change on the performance matters given above of 1 to 2 months).

[113] On the basis of the above factors, I consider that the anticipated period of employment would be in the range of 1 to 2 months, perhaps 8 weeks at most. I do not consider it appropriate to go to the top of the range as Ms Lim may well have resigned earlier than the upper point or objected, passively or overtly to any warnings she was given. On the other hand, and taking into account that Mr Qian may not have acted quickly on the need to give warnings, to explain them fairly and reasonably or to finally act upon a demonstrated failure to improve performance as well as that Ms Lim may have been reluctant to actually resign given that she had no

employment to go to I set the anticipated period of employment in the upper part of the indicated range, at 6 weeks.

Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[114] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.⁶⁹ What is reasonable depends on the circumstances of the case.⁷⁰

[115] Ms Lim is plainly devastated by her dismissal which has impacted her motivation to obtain further employment. Prior to dismissal she obtained minor casual employment as an instructor in floristry at a TAFE College and appears to enjoy that work which has continued after her dismissal. Since dismissal Ms Lim has not actively sought other employment although she did assist a friend at their floristry shop for a short period around Mother's Day but was not paid for that work.

[116] Despite being emotionally impacted by her dismissal as an applicant to this Commission, Ms Lim has an obligation to seek alternative employment in order to mitigate her losses. Having been dismissed from QL Co Group. In the circumstances I am not satisfied Ms Lim has done this as assiduously as she should have and must take this into account in determining an appropriate amount of compensation. The compensation to be awarded to Ms Lim will therefore be reduced by an amount of 10% as a result of this failure on her part.

Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[117] Ms Lim received two weeks' pay in lieu of notice when she was dismissed;⁷¹ however she has not earned any remuneration from employment or other work in the period between her dismissal on 27 March 2023 and the making of an order for compensation consequent upon this decision. While the evidence includes that there was a separate contractual arrangement between Ms Lim and QL Co Group for her work as an independent contractor and not as an employee associated with the opening of the Chadstone shop there is no evidence that these payments continued after the date her employment with the Respondent ended.

Amount of income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation

[118] There is no evidence that would suggest Ms Lim is likely to earn any income in the period between making the order for compensation and the actual compensation.

Other relevant matters

[119] I do not consider there are any other relevant matters that required being taken into account in setting the amount of compensation other than to follow the Commission's usual practice in its calculation.

Compensation – how is the amount to be calculated?

[120] The well-established approach to the assessment of compensation in unfair dismissal matters is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket (Sprigg)*.⁷² The approach and Sprigg reasoning has been confirmed several times in Full Bench decisions, and most recently in *ERGT Australia Pty Ltd v Kevin Govender*.⁷³

[121] The approach in *Sprigg* is as follows:

Step 1: Estimate the remuneration the Applicant would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[122] I have estimated the remuneration Ms Lim would have received, or would have been likely to have received, if QL Co Group had not terminated her to be \$11,077 on the basis of my finding that she would likely have remained in employment for a further period of 6 weeks. Added to that amount is \$1,163 being the amount of statutory superannuation contributions Ms Lim would have received for the anticipated period of employment. A deduction to both elements of 10% should be made in relation to Ms Lim’s efforts to obtain further employment after being dismissed. A deduction for Ms Lim’s demonstrated misconduct is dealt with separately.

[123] I have set the anticipated period of employment at the upper-end of what would be a reasonable period taking into account Ms Lim’s length of service (which was relatively short with the Respondent, being the period between December 2021 and 27 March 2023). This estimate of how long Ms Lim would have remained in employment is the “anticipated period of employment”.⁷⁴

Step 2

[124] The second step in *Sprigg* requires the deduction of moneys earned since termination, with the only exclusions being moneys received from other sources and unrelated to work done.

Step 3

[125] It is necessary to consider the impact of both favourable and unfavourable contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment,⁷⁵ noting that it may not be appropriate to deduct contingencies if all of the projected period of continued employment has passed.⁷⁶ In Ms Lim’s case, I find there are none

that ought to be taken into account in this matter, since the whole of the anticipated period of employment has passed.

Step 4

[126] I have considered the impact of taxation but have elected to settle a gross amount as set out in the table below and the compensation to be ordered will be subject to taxation according to law.

[127] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that “the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case.”⁷⁷ I calculate the compensation to be paid to Ms Lim only on the basis of the agreed salary for her employment contract, and include no amount for the independent contractor-based bonus associated with the opening of the Respondent’s Chadstone store. This is for several reasons. First Part 3 – 2 (Unfair dismissal) provides rights only in respect of employees having been dismissed from employment, and the evidence is that the parties intended the store-opening bonus to be something dealt with outside the employment relationship. Having regard to s.332 as well as the *Fair Work Regulations 2009* I am satisfied there is no obligation on my part to take into account in setting an amount of compensation remuneration payments that may have come from outside the employment relationship. Second, I consider the overall amount of compensation to be made through my order to be at the upper end of what is required even if regard were to be had to including consideration of the independent contractor arrangement. There are no other matters discernible to me that would cause a need to adjust the overall amount of compensation for any of the circumstances of the case.

Compensation – is the amount to be reduced on account of misconduct?

[128] If I am satisfied that misconduct of the Applicant contributed to the employer’s decision to dismiss, I am obliged by section 392(3) of the Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[129] In determining the amount by which it is appropriate to reduce an order for compensation on account of misconduct, the Commission must consider, amongst other things, whether the Applicant engaged in misconduct and, if so, whether that misconduct contributed to the Respondent’s decision to dismiss the person. A Full Bench of the Commission has observed that, “[t]he section seems to require such consideration even if the FWC has found there was no valid reason for the person’s dismissal.”⁷⁸ However, the Full Bench goes on to say that, “if there was no valid reason for the dismissal we think that may be relevant to the FWC’s decision as to the ‘appropriate’ amount by which to reduce the amount of compensation the FWC would otherwise order.”⁷⁹

[130] I am satisfied in this case that a deduction must be made for Ms Lim’s misconduct in the form of her racially based comments about other staff. The evidence points to her having told Winter that she did not want to employ other Koreans as well as expressing the same or similar sentiments in the second text (although the context of the commentary is less clear and the recipient of the text unknown). Those things are obvious misconduct on the part of Ms Lim, and especially as to the comments reported by Winter which I have accepted were made. Such

comments have no place in the workplace or elsewhere, even in private communications. While the comments do not amount to serious misconduct, chiefly as the employer did not act on the report, they are nonetheless misconduct and plainly not to be accepted. A 10% for misconduct should therefore be made.

[131] My calculation of the amount payable to Ms Lim is set out in the following table:

1. Estimate the amount the employee would have received or would have been likely to receive if the employment had not been terminated,	6 weeks projected lost income at the rate of \$1,846.15 per week (\$96,000 per year)	\$11,077
	Employer superannuation contribution – 10.5%	+ \$1,163
Subtotal		\$12,240
	Deduction attributable to mitigation efforts (10%)	- \$1,224
	Deduction for misconduct (10%)	- \$1,224
2. Deduct monies earned since termination,		\$0
3. Deductions for contingencies,		\$0
TOTAL		\$9,792
4. Calculate any impact of taxation,		<i>To be taxed according to law</i>
5. Apply the legislative cap.		<i>Does not exceed the compensation cap.</i>

[132] An order for compensation consistent with the above table will be issued by me at the same time as this decision. The order will require a payment of wages in the amount of \$8,862 to be taxed according to law and of superannuation in the amount of \$930 to be paid into Ms Lim's nominated superannuation fund (a total of \$9,792), each to be paid within 14 days of the date of this decision.

[133] Ms Lim's application is determined accordingly.



COMMISSIONER

Appearances:

Ms H. Lim for herself
Mr J. Qian for the Respondent

Hearing details:

Melbourne;
18 July;
2023.

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<PR765619>

¹ [PR764323](#).

² Transcript, PN 29-31.

³ *Ibid*, PN 32.

⁴ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at Digital Court Book (DCB) p.149.

⁵ *Unfair Dismissal Application Form, Form F2*, 13 April 2023, item 3.2, appearing at DCB pp.12-14; *Applicant Outline of Submissions: Merits*, 15 June 2023, item 6d, appearing at DCB pp.38-39.

⁶ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at DCB p.147; see also *Respondent Outline of Submissions: Merits*, 10 July 2023, item 2c, appearing at DCB p.177.

⁷ Transcript, PN 337.

⁸ *Ibid*, PN 192.

⁹ Respondent Document “*Evidnce*” (original spelling of document), filed 10 July 2023, appearing at DCB, pp.264-268.

¹⁰ Transcript, PN 197-212.

¹¹ *Hana Lim Witness Statement*, 18 June 2023, appearing at DCB p.86.

¹² *Jack Qian Witness Statement*, 10 July 2023, appearing at DCB p.223.

¹³ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at DCB p.144.

¹⁴ Transcript, PN 347-364.

¹⁵ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at DCB 142-150.

¹⁶ Transcript, PN 405.

¹⁷ *Ibid*, PN 149.

¹⁸ *Ibid*, PN 128-136.

¹⁹ *Ibid*, PN 792-812.

²⁰ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at DCB p.144.

²¹ *Ibid*, item 3.2.

²² *Applicant Outline of Submissions: Merits*, 15 June 2023, item 6d appearing at DCB p.37; Transcript, PN 144-158.

²³ *Form F3, Employer Response Form*, 27 April 2023, item 3.2, appearing at DCB p.145.

²⁴ Transcript, PN 413-414.

²⁵ *Ibid*, PN 461-469.

²⁶ *Ibid*, PN 171.

²⁷ *Ibid*, PN 421.

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- ²⁸ Transcript, PN 160 – 178.
- ²⁹ *Unfair Dismissal Application, Form F2*, 13 April 2023, item 3.1, appearing at DCB p.11; *Applicant Outline of Submissions: Merits*, 15 June 2023, item 3c, appearing at DCB, p.28.
- ³⁰ *Applicant Outline of Submissions: Merits*, 15 June 2023, item 6c, appearing at DCB pp.37-38.
- ³¹ *Hana Lim Witness Statement*, 18 June 2023, appearing at DCB p.85.
- ³² *Employer Response Form, Form F3*, 27 April 2023, item 2.2 and 3.1, appearing at DCB pp.140-141 and p.142.
- ³³ *Employer Response Form, Form F3*, 27 April 2023, item 3.1, appearing at DCB p.142; see also *Respondent Outline of Submissions: Merits*, 10 July 2023, item 4c, appearing at DCB p.183.
- ³⁴ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at DCB p.144.
- ³⁵ Transcript, PN 112.
- ³⁶ *Employer Response Form, Form F3*, 27 April 2023, item 3.2, appearing at DCB p.150.
- ³⁷ *Ibid*, item 3.2, appearing at DCB pp.149-150.
- ³⁸ *Applicant Outline of Submissions: Objections*, 15 June 2023, item 3e, appearing at DCB p.58.
- ³⁹ See *Iannello v Motor Solutions Australia Pty Ltd* [\[2010\] FWA 3125](#), [12]-[13]; and *Ms Paula Groszek v Toyvision International Pty Ltd* [\[2015\] FWC 697](#), [33]-[39].
- ⁴⁰ *Respondent Outline of Submissions: Objections*, 10 July 2023, appearing at DCB p.202.
- ⁴¹ *Ryman v Thrash Pty Ltd* [\[2015\] FWC 5264](#), [41].
- ⁴² Respondent Document “*Evidence*”, filed 10 July 2023, appearing at DCB pp.272-275.
- ⁴³ *Ibid*, appearing at DCB pp.277-278.
- ⁴⁴ *Ibid*, appearing at DCB p.277.
- ⁴⁵ *Ibid*, appearing at DCB p.278.
- ⁴⁶ Transcript, PN 127, 192.
- ⁴⁷ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- ⁴⁸ *Edwards v Giudice* [1999] FCA 1836; (1999) 94 FCR 561, [6]-[7].
- ⁴⁹ *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWC 1033](#), [32]; *Annetta v Ansett Australia* (2000) 98 IR 233, [9]-[10].
- ⁵⁰ *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWC 1033](#), [32]; *He v Lewin* [2004] FCAFC 161; 137 FCR 266, [15].
- ⁵¹ *Sharp v BCS Infrastructure Support Pty Limited* [\[2015\] FWC 1033](#), [33]-[34]; *O’Connell v Wesfarmers Kleenheat Gas Pty Ltd* [\[2015\] FWC 8205](#), [22]-[23].
- ⁵² *Titan Plant Hire Pty Ltd v Shaun Van Malsen* [\[2016\] FWC 5520](#), [28]; see also *Sydney Trains v Hilder* [\[2020\] FWC 1373](#), [26].
- ⁵³ *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.
- ⁵⁴ *Robe v Burwood Mitsubishi Print R4471* (AIRC FB, Ross VP, Polites SDP, Foggo C, 11 May 1999).
- ⁵⁵ *Miller v UNSW* [2003] FCAFC 180 (Gray J), [13].
- ⁵⁶ *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.
- ⁵⁷ *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWC 4185](#), [46] citing *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ⁵⁸ *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWC 4185](#), [46] citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, 413.
- ⁵⁹ Transcript, PN 826-859.
- ⁶⁰ *Sinae Yu Witness Statement*, 15 June 2023, appearing at DCB, pp.87-89.
- ⁶¹ Transcript, PN 347-364.
- ⁶² Respondent Document “*Evidence QL_CO_GROUP_PYY_LTD_Profit_and_Loss_2022Oct-2023Mar*”, filed 10 July 2023, appearing at DCB p.259.

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- ⁶³ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (unreported AIRCFB, [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFB 762](#), [46]-[49].
- ⁶⁴ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (unreported, AIRCFB, 2000), [41].
- ⁶⁵ [1995] HCA 24 (McHugh and Gummow JJ), [128].
- ⁶⁶ *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1,10 citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (McHugh and Gummow JJ), [128].
- ⁶⁷ *He v Lewin* [2004] FCAFC 161, [58].
- ⁶⁸ *Jack Qian Witness Statement*, 10 July 2023, appearing at DCB, p.223.
- ⁶⁹ *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* [PR908053](#) (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].
- ⁷⁰ *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFB, Ross VP, O’Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.
- ⁷¹ Transcript, PN 910-913.
- ⁷² (1998) 88 IR 21.
- ⁷³ [\[2021\] FWCFB 5389](#), [35].
- ⁷⁴ *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].
- ⁷⁵ *Enhance Systems Pty Ltd v Cox* [2001] AIRC 1138, [39]
- ⁷⁶ *Bowden v Ottrey Homes* [\[2013\] FWCFB 431](#), [54].
- ⁷⁷ *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWCFB 7206](#), [17].
- ⁷⁸ *Read v Gordon Square Child Care Centre Inc* [\[2013\] FWCFB 762](#), [83].
- ⁷⁹ *Ibid.*