



# DECISION

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

**Corin Deane Davoren**

**v**

**Pejr Business Aviation Pty Ltd**  
(U2021/10924)

COMMISSIONER P RYAN

SYDNEY, 25 JANUARY 2023

*Application for an unfair dismissal remedy – lawful and reasonable directions – directions not reasonable – dismissal harsh, unjust and unreasonable*

## Introduction

[1] Ms Corin Davoren (**Applicant**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that she had been unfairly dismissed from her employment with Pejr Business Aviation Pty Ltd (**Respondent**).

[2] The letter of termination annexed to the Form F2 Application states the Applicant was summarily dismissed from her employment as a flight attendant for failing to follow lawful and reasonable directions to move accommodation in Los Angeles and failing to comply with the requirement for flight and duty rest and attending for flight duty potentially fatigued.

[3] The matter was heard before me on 8, 9 June and 6 and 19 July 2022.

[4] I exercised my discretion to grant permission to both parties to be represented by lawyers the Applicant to be represented by a lawyer, as I was satisfied as to the matters set out in s.596 (2)(a) and (b) of the FW Act. However, at the commencement of the hearing, I was advised that the Applicant would be representing herself. The Respondent was represented by Mr G Fredericks of counsel.

[5] Witness statements were tendered from the following persons:

- The Applicant (Exhibits A1 and A2);
- Ms Jennafer Cohrs, the Respondent's chief pilot (Exhibit R6); and
- Mr Avi Mudaliar, a private office and risk executive employed by the Lederer Group Pty Ltd, a related entity of the Respondent and oversees the Respondent's operations (Exhibit R17).

[6] The Applicant, Ms Cohrs and Mr Mudaliar gave evidence at hearing.

**When can the Commission order a remedy for unfair dismissal?**

[7] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[8] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

**When is a person protected from unfair dismissal?**

[9] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
  - (i) a modern award covers the person;
  - (ii) an enterprise agreement applies to the person in relation to the employment;
  - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

**When has a person been unfairly dismissed?**

[10] Section 385 of the FW 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.

**Relevant Factual Background**

[11] The Respondent is part of a group of entities known as the Lederer Group. The parent or controlling entity is Lederer Group Pty Ltd.<sup>1</sup>

[12] The Respondent operates one Gulfstream 550 Aircraft which seats 14 passengers. The aircraft is registered in the United States of America (US) and operated under US Federal Aviation Regulations and the Lederer Group's Flight Operations Manual.<sup>2</sup>

[13] The Applicant was employed by the Respondent on or about 2 May 2019 in the position of flight attendant.<sup>3</sup> The Applicant reported to the pilot in command during an assigned flight and to Ms Cohrs, the chief Pilot on other matters.<sup>4</sup>

[14] The Applicant's contract of employment sets out her duties as follows:

***Duties***

*You will carry out all lawful directions of the Company through its nominated officers and will discharge such duties and functions as may be delegated to you or assigned to you by the chief pilot. The Company may alter or delete some of the duties from time to time, this will be communicated to you. **In addition to the duties of flight attendant** you want to take duties as directed at the Corporate Head Office, assist with functions at the residence of Mr Lederer and on board crystal lady, the nature of the duties will be advised to you.*<sup>5</sup>

(emphasis added)

[15] The Applicant's contract of employment also states that the Applicant "must follow reasonable and lawful instructions to ensure the work of the employer is done. A 'reasonable instruction' is one that you are physically able to do, will not threaten your health or safety and is reasonable in the circumstances."<sup>6</sup>

[16] The Flight Operations Manual also sets out specific duties for a flight attendant. Section 1.3 of the Flight Operations Manual as follows:<sup>7</sup>

***1.3.6 Flight Attendant***

***A. Reporting:***

*The Flight Attendant reports functionally to the PIC during the assigned flight and administratively to the Chief Pilot on other matters.*

***B. Responsibilities:***

- *Assists the flightcrew in the safe and efficient conduct of the flight;*
- *Notifies the PIC immediately of any emergency situation in the cabin or any inoperative equipment;*
- *Notifies the PIC or CAMO of any discrepancies;*
- *Participates in the Safety Management System.*

***C. Duties:***

- *Ensures that the appropriate safety equipment is onboard and in an operating condition;*

- *Understands the proper use of safety equipment;*
- *Instructs passengers on the use and location of aircraft emergency equipment;*
- *Instructs and assists passengers during an aircraft emergency;*
- *Performs specified safety actions in the event of an onboard emergency;*
- *Understands all details of the flight from the pilot briefing;*
- *Maintains the aircraft cabin, baggage, and galley area in an orderly, safe, and secure fashion;*
- *Maintains familiarity with all cabin services, galley and entertainment equipment;*
- *Stocks the aircraft with provisions after each flight and checks expiration dates on perishable items;*
- *Maintains supply level and freshness of stock room and perishable items;*
- *Cleans linens and other soft goods as needed;*
- *Provides menu planning, catering, and food preparation and presentation;*
- *Ensures food safety;*
- *Maintains and updates passenger preferences list;*
- *Assists passengers and ensures their comfort throughout the flight and upon arrival;*
- *Assumes any duties delegated by the Chief Pilot and/or PIC.*

**D. Qualifications:**

- *Possesses knowledge of culinary arts, food, wine, and menu planning to accommodate first class service to corporate passengers;*
- *Possesses three (3) to five (5) years experience as a Flight Attendant with an airline, business aviation flight department, or government agency (highly desirable);*
- *Has received appropriate training, as determined by the Chief Pilot.*

[17] Clause 2.1.7 of the Flight Operations Manual states that the Lederer Group has developed and implemented a Fatigue Management Program.<sup>8</sup>

**2.1.7 Fatigue Management Program (FMP)**

- A. *Lederer Group Pty Ltd maintains a Fatigue Management Program to assess and manage the inherent risks associated with fatigue for all personnel. The effectiveness of the overall program will also be assessed on a regular basis, typically as part of the Safety Meetings.*
- B. *The following operational principles have been considered in the development, implementation, and continuing administration of the Lederer Group Pty Ltd Fatigue Management Program.*
- *Personnel will be appropriately trained in the assessment and management of fatigue as it relates to their duties and responsibilities, including the procedures for deviating from duty, flight, and rest time limitations.*
  - *All personnel have a responsibility to openly report any fatigue issues they may be experiencing or have observed in other personnel. Management will take necessary and available actions to mitigate these issues, which may include adjusting duty / flight assignments or rest periods.*

*Note: In keeping with an open and honest safety culture, personnel will not be penalized for these issues, so long as they are not a result of willful and negligent behavior.*

- *For crewmembers, consideration should be given to any assigned duties in addition to their flight schedule, such as any office duties or special projects, and how these duties may affect their fatigue.*
- *All personnel involved in the safe operation of aircraft are expected to manage their schedules so as to not be fatigued when carrying out their duties.*
- *Personnel will maximize the use of available sleep opportunities, which reduces cumulative fatigue, especially when operating outside their normal circadian rhythm or during the Window of Circadian Low.*

*Note: Adequate rest facilities are an especially important consideration for aircrews operating away from home base, as they allow the crew to obtain suitable rest between duty periods. Efficient transportation to and from these rest facilities should also be considered.*

- *Crew Resource Management (CRM) principles and techniques may be used to encourage personnel to work together to detect and prevent errors that may be a result of fatigue.*
- *Rest or off-duty periods are related to sleep opportunity and can affect both acute sleep loss and the creation of a cumulative sleep debt.*
- *Circadian factors can affect alertness and performance during operations, as well as the quantity and quality of sleep obtained during rest periods. Special consideration for fatigue monitoring should be given when operating in the Window of Circadian Low.*
- *Cumulative effects can be relevant for continuous and consecutive duty periods and the creation of an accumulated sleep debt.*
- *The CFRs and other regulatory / industry guidance will be periodically reviewed to ensure the company FMP is aligned with applicable regulatory requirements.*
- *Fatigue-related reports and research, such as information provided by the Flight Safety Foundation, will be periodically reviewed to ensure the company FMP is aligned with current industry best practices.*
- *Lederer Group Pty Ltd will use data obtained from SMS forms, external reports / sources, and any other information to continually assess and improve the FMP and related policies and procedures.*

- *As appropriate, feedback should be given to personnel regarding techniques to reduce fatigue.*

[18] Clause 3.8.4 of the Flight Operations Manual sets out the flight, duty, and rest time policies as follows<sup>9</sup>:

#### **3.8.4 Flight, Duty, and Rest Time Policies**

- A. *Lederer Group Pty Ltd aircraft crewmembers will observe the flight, duty, and rest time periods as described in this section and will not work when fatigued. Should operational contingencies require an extension / reduction of these periods, such deviations can only be granted by the PIC, with the specific agreement of all members of the aircraft crew.*

*Note: Deviations to flight, duty, and rest times for two pilot crews are not authorized for more than 2 consecutive duty days. If it is deemed operationally necessary to deviate for more than 2 consecutive duty days, the Chief Pilot must document the reason for the consecutive deviations and issue final approval.*

- B. *Such deviations will be formally recorded on the Extension to Flight Duty Time Form or sent by email authorization and retained on file in FD Manager for trend analysis.*
- *If the form is submitted in advance of the requested deviation, a risk assessment will be completed.*
  - *The form may be submitted after the deviation, as long as there are valid personnel, time, or other reasons that made it impractical to submit the form previously.*
- C. *Per Section 2 of this manual, Extension to Flight Duty Time Forms will be reviewed during each Safety Meeting in order to assess the effectiveness of fatigue policies, procedures, and mitigations.*

##### **3.8.4.1 Definitions**

###### **A. Window of Circadian Low (WOCL):**

- *The WOCL is best estimated to be the hours between 0200 and 0600 for individuals adapted to a usual day-wake / night-sleep schedule. This estimate is calculated from scientific data on the circadian low of performance, alertness, subjective report (e.g., peak fatigue), and body temperature.*
- *For duty periods that cross three (3) or fewer time zones, the WOCL is estimated to be 0200 to 0600 home-base / domicile time.*
- *For duty periods that cross four (4) or more time zones, the WOCL is estimated to be 0200 to 0600 home-base / domicile time for the first 48 hours only. After a*

*crewmember remains away from home-base / domicile for more than 48 hours, the WOCL is estimated to be 0200 to 0600 local time at the point of departure.*

- *Recommended guidelines related to the WOCL should be applied when any of the following operations occur:*
  - *Landing within the window;*
  - *Flight through both sides of the window;*
  - *Duty period that starts at 0400 or earlier within the window.*

*B. Off Duty: A continuous, predefined period of uninterrupted time during which a crewmember is free of all duties.*

*C. Duty: Any task a crewmember is required to perform for the operator, including flight time, administrative work, managerial duties, training, and deadheading.*

*D. Duty Period: A continuous period of time during which tasks are performed for the operator, determined from report time until free from all required tasks.*

*E. Flight Time: The sum of all flight time, calculated from block to block for each flight segment.*

*F. Standby: A crewmember is on standby when they are required to be available to an operator (away from the airport) for assignment to a flight duty period.*

*G. Local Night: A period of eight (8) consecutive hours falling between the period of 2200 and 0800 local time.*

#### **3.8.4.2 Normal Operations**

<b><i>Flightcrew</i></b>	<b><i>Minimum Rest Period</i></b>	<b><i>Duty Period</i></b>	<b><i>Flight Time</i></b>
<i>Two Pilots</i>	<i>10 HOURS</i>	<i>14 hours</i>	<i>12 hours</i>

*Note: Each crew gets maximum sleep opportunity with minimum four (4) hours total; maximum two (2) consecutive duty periods with 18 hours off duty.*

#### **3.8.4.3 Operations During the Window of Circadian Low (WOCL)**

<b><i>Flightcrew</i></b>	<b><i>Minimum Rest Period</i></b>	<b><i>Duty Period</i></b>	<b><i>Flight Time</i></b>
<i>Two Pilots</i>	<i>12 hours</i>	<i>13 hours</i>	<i>11 hours (requires that landings be restricted)</i>

*Note: Each crew gets maximum sleep opportunity with minimum four (4) hours total; maximum two (2) consecutive duty periods with 18 hours off duty.*

#### **3.8.4.4 Exceptions to Duty Times**

*A. The Flight Department conducts the following long flights:*

- *Sydney, Australia to Los Angeles, California, USA via Nadi, Fiji*
- *Los Angeles, California, USA to Sydney, Australia via Honolulu, Hawaii, USA*
- *Caribbean to Honolulu, Hawaii, USA*

*B. Specific mitigation has been developed to address fatigue risks on these long flights.*

*C. These flights will be flown under the following conditions:*

- *Augmented crew, 3 pilots*  
*Note: Caribbean to Honolulu, Hawaii, USA flights may be conducted with 2 pilots, but must have an immediate crew change and off duty in PHNL.*
- *2 full days rest pre- and postflight*
- *Flight time limited to 17 hours*
- *Duty time limited to 19 hours*

[19] The Flight Operations Manual includes the following definitions<sup>10</sup>:

- *“Flight crewmember” and “flightcrew” indicate only the Pilot crewmembers.*
- *“Cabin crewmember” and “cabin crew” indicate only the Flight Attendant crewmembers.*
- *“Aircraft crewmember”, “crewmember”, and “aircrew” indicate both the Pilot and Flight Attendant crewmembers.*

[20] The chief pilot is responsible for developing and maintaining the Flight Operations Manual and ensuring that the latest version is available to all personnel.<sup>11</sup>

[21] In mid-2021 the Applicant had major surgery followed by a recovery period of six weeks. On or about 8 September 2021, the Applicant was certified fit to resume flight attendant duties and returned to work.<sup>12</sup>

[22] At the time the Applicant returned to work, the aircraft was in London and was scheduled to return to Sydney at 6:00am on 4 November 2021 via the following stopovers:

- On or about 24 October 2021: Depart London for New York;
- 28 October 2021: Depart New York for Los Angeles;
- 2 November 2021: Depart Los Angeles for Sydney (refuelling stop in Honolulu).<sup>13</sup>

[23] In October 2021, the Respondent arranged for the Applicant to fly to London by commercial airline to join the aircraft for the remainder of the flight schedule.<sup>14</sup>

[24] Following her arrival in London, the Applicant attended to cleaning the aircraft cabin and preparing it for the onwards flights to the US and Australia.

[25] At 12:36am on 23 October 2021, the Applicant sent an email to Ms Cohrs (copied to Mr Mudaliar) titled “Maintenance Reporting / Interior Detailing” in which the Applicant identified a range of cleaning and defect issues and advised that any defects, along with



photographs of maintenance issues, will be reported in FD Manager for record keeping.<sup>15</sup> FD Manager is a software program which the Respondent uses to assist in the management of its aircraft operations.

[26] On or about 24 October 2021, the aircraft departed London for New York. The crew for the flight were Ms Cohrs, Mr Andrew Thorley (a contracted pilot), and the Applicant.<sup>16</sup>

[27] On 28 October 2021, the aircraft departed New York for Los Angeles with the same crew. Upon approval in Los Angeles, the crew stayed at the Thompson Hotel located in Hollywood.<sup>17</sup>

### **Los Angeles – 1 November 2021**

[28] At approximately 1:00pm on 1 November 2021, Ms Cohrs returned to the Thompson Hotel and discovered that there was construction work underway which was causing loud drilling sounds and vibrations.<sup>18</sup>

[29] At 2.43pm on 1 November 2021, the Applicant sent a text message to Ms Cohrs stating:

*“Do you know what time their driver is scheduled to pick up Mr & Mrs Lederer from their hotel tomorrow?”<sup>19</sup>*

[30] Shortly before 3:30pm on 1 November 2021, Ms Cohrs approached the hotel’s front desk and had the following discussion with an employee identified as ‘Lauren’<sup>20</sup>:

Ms Cohrs: *What is that drilling noise?*

Lauren: *There is construction going on at the hotel.*

Ms Cohrs: *How long is it scheduled to go on for?*

Lauren: *I am very sorry; the work is scheduled to go all week from 7am to 5pm each day.*

Ms Cohrs: *We are flight crew and so we need to rest before our flight and cannot rest with the noise. That won’t allow us proper rest for our flight tomorrow night.*

Lauren: *Definitely not. That is ok, we have an arrangement with the Dream Hotel for situations involving guests during the renovations of this hotel. That hotel is just across the road. I will email my manager and arrange to move you over to that hotel.*

[31] Ms Cohrs was concerned that the noise from construction work would adversely affect the aircraft crew’s 12-hour rest period on 2 November 2021 ahead of departure later that evening.<sup>21</sup>

[32] At 3:30pm on 1 November 2021, Ms Cohrs sent a text message in reply to the Applicant's earlier message stating:

*"No I don't. We might be moved to the Dream Hotel for day rooms tomorrow for the noise."*<sup>22</sup>

[33] At 3:33pm on 1 November 2021, the Applicant responded to Ms Cohrs stating:

*"Ok, I am too busy to move, got a lot to do tomorrow. I'll just deal with it."*<sup>23</sup>

[34] At 4:11pm on 1 November 2021, the Applicant sent a text message to Mrs Lederer seeking catering preferences for the flight from Los Angeles to Sydney.<sup>24</sup>

[35] At approximately 5:35pm, Ms Cohrs and Mr Thorley returned to the Thompson Hotel and had a further discussion with Lauren as follows:

Ms Cohrs: *Hi Lauren, is there any update?*

Lauren: *Yes, it is all arranged, you can go to the other hotel tomorrow at 10am.*

Ms Cohrs: *That won't work for us because we need to be on rest from 5am and we cannot move hotels during the rest period and the rest period will be interrupted when the work starts at 7am.*

Lauren: *Then you'd need to relocate this afternoon. Let me make sure that have rooms available tonight for you.*

Ms Cohrs: *Thank you.*

Lauren: *Just confirming, is this for all 3 of you as the crew?*

Ms Cohrs: *Yes, that is correct.*

Lauren: *Let me get working on seeing if I can move you today.*<sup>25</sup>

[36] Lauren then made a telephone call to the Dream Hotel and advised Ms Cohrs:

Lauren: *You can check out and move to the hotel across the street when you are ready. The good news is that it is at a cheaper rate. I'll have a bell boy help you with your luggage.*<sup>26</sup>

[37] At 5:41pm on 1 November 2021, Ms Cohrs sent a text message to the Applicant which stated:

*"Hi Corin, we're moving hotels this evening instead of the morning. Is 2 hours enough to get packed?"*<sup>27</sup>

[38] At 6.17pm, the Applicant caught an Uber from Thompson Hotel to a supermarket known as Whole Foods to purchase supplies for the flight to Sydney. The Uber receipt records her arrival at Whole Fields at 6.39pm.<sup>28</sup>

[39] Having not received any response from the Applicant, Ms Cohrs made two attempts to telephone the Applicant but was not successful. At 6:33pm, Ms Cohrs sent the Applicant the following text message:

*“Corin, I’ve just tried calling you twice. You need to call me back.”*<sup>29</sup>

[40] At 7.24pm, the Applicant sent a text message to Ms Cohrs stating:

*“I’m sorry, I don’t have reception, in whole foods and no wifi. I don’t have time to be changing hotels the night before I’ll be awake for 37 hrs, I need to get as much sleep as I can due [sic] jet lag. I am out picking up supplies and won’t be back till much later. You move hotels I will stay.”*<sup>30</sup>

[41] At 7.29pm, Ms Cohrs responded stating:

*“Unfortunately that is not an option Corin and if you have time to change rooms you have time to relocate to the hotel across the street. This is not a request.”*<sup>31</sup>

[42] At 7.49pm and while still at Whole Foods, the Applicant took a photograph of her watch displaying the above text message from Ms Cohrs.<sup>32</sup>

[43] At 8.43pm, the Applicant sent text messages to Ms Cohrs stating:

*“Battery is low, have trolley full of supplies and still have more to get. I have delivered [sic] arranged to be delivered to our hotel tomorrow”*<sup>33</sup>

[44] Around this time, Ms Cohrs became concerned that the Applicant was not following her instructions and that the Applicant would be not resting in accordance with the Flight Operations Manual based on the text message that she would be awake for 37 hours.

[45] This prompted Ms Cohrs to telephone Mr Mudaliar to discuss her concerns. Ms Cohrs account of this discussion, which is generally consistent with Mr Mudaliar’s, is as follows<sup>34</sup>:

Ms Cohrs: *The hotel has drilling and pounding, and it is not possible for us to rest. We are moving hotels, but Corin is refusing to move or to have any direct communications with me. She mentioned she will be awake for 37 hours. She will not have had sufficient rest before the flight and I do not think we can rely on her to carry out emergency duties. And, if she is not listening to me now as her Captain, I do not have confidence she will follow my instructions in an emergency. I have been in touch with Terry Jensen, a local flight attendant we have used before who can step in. Corin is compromising the safety of the operation.*

Mr Mudaliar: *It will cause too many issues if you tell Corin you have brought in another flight attendant, is there a way you can get the aircraft home and we will deal with this issue when you get back here?’*

Ms Cohrs: *Ok.*

[46] At 9:01pm, the Applicant checked out of Whole Foods. The receipt identifies that 52 items were purchased.<sup>35</sup>

[47] At 9:25pm, the Applicant arrived back at the Thompson Hotel<sup>36</sup>, by which time Ms Cohrs and Mr Thorley had relocated to the Dream Hotel.<sup>37</sup>

### **Los Angeles – 2 November 2021**

[48] The flight from Los Angeles to Sydney was scheduled to depart at 8:00pm.<sup>38</sup> The scheduled time to depart the hotel to go to the airport was 5:00pm. In her evidence in chief, Ms Cohrs stated that was to allow the crew to rest for a minimum of 12 hours in accordance with the Flight Operations Manual.<sup>39</sup> The pilots for the flight to Sydney were Ms Cohrs, Mr Thorley and another contracted pilot, Mr Rob Thomas.<sup>40</sup> Mr Thomas was resting at another hotel in Los Angeles.<sup>41</sup>

[49] At 7:59am on 2 November 2021, Mrs Lederer sent a text message to the Applicant with catering requirements for the flight to Sydney. Specifically, Mrs Lederer requested Weiner schnitzel from a restaurant called Spagos and pasta and salad from a restaurant called Il Pastaio.<sup>42</sup>

[50] At 8:35am on 2 November 2021, the Applicant sent a message to the pilots for the flight to Sydney as follows:

*Good Morning Team*

*Hope you all had a good nights rest. Please advise what you would like for dinner this evening and I will have it arranged.*

*I have a good selection fro breakfast....fruits, yoghurt,juice, bagels, eggs, salmon, avo, porridge, croissants, toast ect.*

*Im going to suggest I take a separate Uber as I have a truck load of supplies already in my room, plus I will have to [sic] all the catering and flowers. And I also need to pick up one last item for Mrs on the wat from Spagos in town.*

[51] At 8:47, Ms Cohrs responded advising that she had no special requests. A short time later, Mr Thomas responded with his catering request.<sup>43</sup>

[52] Throughout the day, the Applicant left the Thompson Hotel to pick up further catering items. At 11:55am, the Applicant purchased bread and pastry items from a bakery called Tartine Sycamore.<sup>44</sup>

[53] At 12:39pm, the Applicant purchased fresh juices and deli meats from a store called Bristol Farms.<sup>45</sup>

[54] At 1:19pm, the Applicant purchased pasta, salad and other items from Il Pastaio.<sup>46</sup>

[55] At 4:52pm, the Applicant sent Ms Cohrs a message stating that she was “on her way” stopping at Spagos to pick up the Weiner schnitzel and other items at 5:15pm.<sup>47</sup>

[56] Prior to the Applicant’s arrival at the airport, Ms Cohrs had a discussion with the other pilots, Mr Thorley and Mr Thomas to the following effect:

Ms Cohrs: *Corin wouldn’t move hotels and we don’t know if she will have had enough rest. I have completely lost confidence in her ability to function in an emergency given that she is not following instructions. This is not acceptable. I think that if there is an emergency, one of us take over her duties. We should agree if there is an emergency whoever is in the jump seat will handle the back of the aircraft.’*

Mr Thorley: *Ok.*

Mr Thomas: *Agreed.*

[57] It is not in dispute that the Applicant was not informed of this, nor was she otherwise relieved of any duties.<sup>48</sup>

### **The Applicant’s refusal to move hotels**

[58] Whilst in Los Angeles, the Applicant was required to arrange for catering and other supplies for the flight to Sydney. This included restaurant catering, supermarket supplies, water, beverages and wine, and flower arrangements for the aircraft cabin. The Applicant contended the volume of supplies and arrangements made it ‘totally unfeasible’ to change hotels on the evening of 1 November 2021.<sup>49</sup>

[59] Under cross examination, the Applicant stated that the owners, Mr and Mrs Lederer, are very specific regarding their catering requests and that fresh food items must be purchased on the day of departure.<sup>50</sup> As such, the Applicant usually plans to have all supplies collected or delivered to the hotel before the day of departure, so that the only matters she needs to attend to on the day of departure are:

- (i) Purchasing fresh food items; and/or
- (ii) Collecting restaurant items in accordance with any requests from Mr and Mrs Lederer.<sup>51</sup>

[60] The Applicant stated that she does as much as possible on the day before a flight, because it is critically important to have maximum amount of rest on the day of departure.<sup>52</sup>

[61] The Applicant said that if she had changed hotels on the evening of 1 November 2021, it would have resulted in her getting to sleep well beyond her normal sleep time on that evening

as she would have had to make alternative arrangements for additional refrigeration at the Dream Hotel, diverting deliveries of flowers and newspapers, packing up the supplies and shopping in her room, as well as and her own luggage.<sup>53</sup>

[62] The Applicant readily acknowledged she received Ms Cohrs direction to change hotels by 7:49pm at the latest, but stated: *"I could not physically dump everything, go back to the hotel, pack up my entire room, change all the deliveries at that time of night and then go back to the supermarket, collect all my supplies back, check-out, rearrange all the fridges, it just was not possible."*<sup>54</sup>

[63] Upon her return to the Thompson Hotel on 1 November 2021, the Applicant took photos of some of the supplies or items in her hotel room. These photos identify two refrigerators, several bags of shopping, a laptop, keyboard and printer and office supplies. The Applicant accepted that she took those photos to support her position.<sup>55</sup>

[64] There was some dispute as to whether Mr and Mrs Lederer require fresh food items to be picked up on the day of departure. Ms Cohrs stated that she was unaware that Mr and Mrs Lederer required such items to be purchased on the day of departure and that the Applicant should be declining such requests so that she can rest. Ms Cohrs stated that Mr and Mrs Lederer would not have any concern if the requested restaurant items could not be sourced and would be content with frozen croissants warmed up.<sup>56</sup>

[65] However, contrary to Ms Cohrs' understanding, Mr Mudaliar conceded in cross examination that Mr and Mrs Lederer have stipulated that fresh food items must be picked up on the day of departure.<sup>57</sup> Furthermore, the evidence of the Applicant and Mr Mudaliar on this point is consistent with the duty of a flight attendant to possess knowledge of culinary arts, food, wine, and menu planning to accommodate first class service to corporate passengers.<sup>58</sup>

### **Flight to Sydney**

[66] In her evidence in chief, Ms Cohrs said that there were two incidents during the flight from Los Angeles to Sydney that caused her to question whether the Applicant had sufficient rest prior to the flight. First, the Applicant served Ms Cohrs a meal without cutlery and second that the Applicant served Ms Cohrs 'frozen soup'.<sup>59</sup>

[67] In relation to the cutlery, Ms Cohrs said she could not eat the meal until she could request cutlery approximately one and a half hours later when the Applicant next went into the cockpit and that she could not page the Applicant to request cutlery as she did not want to wake the passengers.<sup>60</sup>

[68] In relation to the frozen soup, Ms Cohrs conceded in cross examination that the soup wasn't frozen but was very cold.<sup>61</sup>

[69] I found Ms Cohrs' evidence on these matters less than convincing and consider they have been included in an attempt to bolster the Respondent's case.

### **Events following arrival in Sydney**

[70] The aircraft landed in Sydney on 4 November 2021.<sup>62</sup>

[71] On or about 5 November 2021, Mr Mudaliar has a discussion with Ms Cohrs regarding what occurred in Los Angeles. Mr Mudaliar's account of that discussion is as follows:

Mr Mudaliar: *Can we discuss what happened with Corin in LA?*

Ms Cohrs: *Our hotel was very noisy. I organised for us to move because we need to rest before the flight. Corin refused to move. I made it very clear that I was directing her to move and that it wasn't a choice, but she still would not move. As the other pilots and I didn't know whether she had rested or not and couldn't be confident she would follow a direction from us, we arranged for whoever was in the jump seat to step in and carry out Corin's responsibilities in the event of an emergency as I did not want the safety of the aircraft compromised. If Corin will not follow my directions in the future this will compromise the safety of future flights. And her failure to comply with the flight operations manual and the regulations is very serious too.*

Mr Mudaliar: *Ok. Tim has the expertise in managing employees. I will speak to him and ask for his views.*<sup>63</sup>

[72] Later that day, Mr Mudaliar had a discussion with Mr Tim Golinski, the human resources manager for the Lederer Group. Mr Mudaliar's account of that discussion is as follows:

Mr Mudaliar: *Jenna said that while the aircraft was in LA, Corin refused to move hotels when asked to do so by Jenna. Jenna said this meant that Corin would not have had enough rest and Jenna said Corin did not follow her instructions. Can you tell me the process to follow if the circumstances require a formal reprimand.*

Mr Golinski: *You can't make any decision about how to proceed without hearing Corin's version of events and taking it into account. You need to arrange a meeting to hear Corin's version of events and when arranging the meeting you need to put her on notice of the seriousness of the matter. You should tell her she is required to bring a support person. The email requesting the meeting should come from her direct manager.*<sup>64</sup>

[73] On 8 November 2021, both Ms Cohrs and the Applicant lodged reports. The Applicant lodged a Cabin Defects Report listing various defects within the cabin of the aircraft identified by the Applicant in her email to Ms Cohrs on 23 October 2021.<sup>65</sup> Ms Cohrs lodged a Hazard Incident Report in relation to the events in Los Angeles which stated:

***Summary/Description:***

*Lack of confidence with FA ability to perform emergency procedures due to lack of proper rest pre departure.*

***Describe the hazard/incident or potential safety issue you observed:***

*All 3 Captains involved lost of [sic] confidence in the FA's ability to perform potential emergencies [sic] procedures should they have occurred due to a lack of adequate rest at a suitable hotel (concrete drilling at original hotel), time management of necessary preflight task prior to an extended duty date departure. Observed risk also in the statement via iMessage of her total time awake during flight duty (37 hours).*

*The FA refusal to continuously follow directions and guidance from the Chief Pilot concerned the Captains with the FA's ability to follow direction in a potential emergency.*

*A suitable hotel was provided, but declined and refused by FA numerous times.<sup>66</sup>*

[74] Mr Mudaliar reviewed a copy of the Hazard Incident Report formed the view that the Applicant's "reported actions suggested a serious breach of the safety protocols with respect to fatigue management" and that it was 'imperative' to meet with the Applicant to understand what happened and why and to ascertain whether the Applicant understood the significance of her actions with respect to the safe operation of the aircraft. Mr Mudaliar directed Ms Cohrs to invite the Applicant to a meeting on 11 November 2021.<sup>67</sup>

[75] At 2:09pm on 9 November 2021, Ms Cohrs sent an email to the Applicant directing her to attend a meeting on Thursday 11 November 2021 with Ms Cohrs and Mr Mudaliar.<sup>68</sup> The email stated:

*Dear Corin,*

*You are required to attend a meeting at the Lederer Office this Thursday at 9.00am with myself and Avi to discuss a number of serious issues relating to the events of last week, specifically on the 1<sup>st</sup> and 2<sup>nd</sup> November whereby you failed to follow lawful direction given to you by your manager and secondly whereby you breached safety regulations by not having the adequate required minimum rest period before a flight.*

*Your attendance at this meeting is mandatory, you can bring a support person if you like.*

*As a result of the meeting disciplinary action may be taken.*

*Regards  
Jenna*

[76] At 8:41pm on 10 November 2021, the Applicant sent an email in reply confirming her attendance as follows:

*Good Evening Jenna*



*Hope you are well, I will see you tomorrow morning.*

*Kind Regards*

*Corin*

### **Meeting on 11 November 2021**

[77] On 11 November 2021, the Applicant attended the meeting with Ms Cohrs and Mr Mudaliar. The Applicant did not have a support person with her.<sup>69</sup>

[78] At the commencement the meeting, the Applicant made a request to record the meeting which was refused.<sup>70</sup>

[79] The meeting then proceeded with Mr Mudaliar advising the Applicant that the purpose was to discuss the events which occurred in Los Angeles. Ms Cohrs then stated:

*You did not move hotels when I asked you to do so when I made a decision to ensure the crew complied with the rest requirements. As a result, the three pilots lost confidence in your ability and we did not know you would be able to respond to a safety issue.*<sup>71</sup>

[80] The Applicant then said words to the effect of “*Oh is that it? Is that really all you have.*”<sup>72</sup>

[81] While the Respondent suggested this demonstrated a lack of appreciation by the Applicant as to the seriousness of the matter, under cross examination the Applicant stated that the above statement was in the context that she was anticipating a larger number of issues based on the wording of the email directing her to attend the meeting which referred to a *number of serious issues*.<sup>73</sup>

[82] Ms Cohrs then proceeded to explain the seriousness of the issues. After some further discussions regarding the events in Los Angeles, Mr Mudaliar observed that the Applicant was upset with Ms Cohrs and asked Ms Cohrs to leave the room.<sup>74</sup>

[83] While there was some dispute between Mr Mudaliar and the Applicant regarding what was said between them in the remainder of the meeting, having regard to all the evidence, I find:

- Overall, the meeting went for somewhere between 60-90 minutes;<sup>75</sup>
- That the Applicant raised concerns that Ms Cohrs was bullying her;<sup>76</sup>
- That the Applicant stated that she did not do anything wrong in Los Angeles and had she followed Ms Cohrs direction it would have impacted her sleep;<sup>77</sup>
- That the Applicant stated and if that wasn't good enough for the Respondent, she would get her lawyers to provide more of a response;<sup>78</sup>

- Mr Mudaliar formed the view that the Applicant did not appreciate the seriousness of the issues raised or the safety requirement and that the Applicant had not provided him with any assurance that similar conduct would not occur in the future;<sup>79</sup> and
- Mr Mudaliar then stepped outside to have a telephone discussion with Mr Golinski, before returning to the meeting room to inform the Applicant that *“based on what you are saying, I have no choice but to make the decision that I am about to make which is to terminate your employment because of the seriousness of the situation.”*<sup>80</sup>

[84] What followed was a brief discussion concerning some form of financial package, to which Mr Mudaliar advised the Applicant that he did not have authority and would come back to her about that.<sup>81</sup>

[85] Later that day and into the next day, Mr Mudaliar and Mr Golinski attempted to contact the Applicant, however these attempts were unsuccessful as the Applicant was still using a mobile telephone that was provided by the Respondent, which was deactivated by the Respondent on 11 November 2021.

[86] On 12 November 2021, the Applicant received written confirmation that she was summarily dismissed from her employment.<sup>82</sup>

### **Report from Safety Standup**

[87] On 12 January 2022, Ms Cohrs received a report from Mr Walter Kraujalis, the President of Safety Standup, who provides contract safety services to the Respondent.<sup>83</sup> This report was based on the Hazard Incident Report lodged by Ms Cohrs on 8 November 2021 which he received automatically when it was uploaded in FD Manager.<sup>84</sup> In his report, Mr Kraujalis states *“during the course of the flight [the Applicant] stated she had been awake for 37 hours.”* Mr Kraujalis forms the view that this admission by the Applicant is a breach of the Flight Operations Manual and is worthy of termination of employment.

[88] In response to a question from the Commission, Ms Cohrs accepted that the report by Mr Kraujalis was incorrect in that it refers to the Applicant making the statement during the flight.<sup>85</sup> Accordingly, I place no weight on the report by Mr Kraujalis.

### **Summary of the Applicant’s Submissions**

[89] The Applicant denies that she engaged in any misconduct as alleged by way of a refusal by her to change hotels in Los Angeles on 1 November 2021, and further denies that prior to the return flight to Sydney she had not had an appropriate rest break.

[90] The Applicant denies that she was in any way not able to discharge her duties as required on the flight from Los Angeles to Sydney.

[91] The Applicant referred to the term ‘reasonable direction’ as defined in her contract of employment and submitted that the direction to move hotels was not a reasonable direction in the circumstances, and to do so would have compromised her health and safety.

[92] The Applicant submitted that while she was never shown or trained on the Flight Operations Manual, the table set out in section 3.8.4.3 applies to “flightcrew” and “pilots” and does not apply to flight attendants.

[93] The Applicant submitted she is seeking reinstatement to her former position or another position within the Lederer Group such as working on Crystal Lady, or in the alternative, an order for compensation.

### **Summary of the Respondent’s Submissions**

[94] The Respondent submitted that the matter involves the failure of an aviation industry employee to follow directions of the chief pilot and to follow policies which are in place to ensure the safety of a flight, its crew, and its passengers.

[95] The Respondent submitted that there can be no doubt that a failure to comply with operational standards and safety standards can be a valid reason for dismissal.

[96] The Respondent submitted that there can be no contest that the direction to change hotels was not a lawful and reasonable direction.

[97] The Respondent submitted with reference to relevant authorities, what is reasonable is a question of fact and balance and it is not relevant that a better direction may exist.

[98] The Respondent submitted that the direction to move hotels and the failure to comply with the Flight Operations Manual each constituted an independent valid reason for the Applicant’s dismissal.

[99] The Respondent submitted that the Applicant has simply refused to accept that she did anything wrong.

[100] In relation to the other matters set out under s.387 of the FW Act, the Respondent submitted that the Applicant was notified of the valid reason, given an opportunity to respond and there was no unreasonable refusal by the Respondent to allow the Applicant to have a support person present.

[101] The Respondent submitted that reinstatement was inappropriate on the basis that Ms Cohrs could not have confidence that the Applicant will follow directions in future.

### **Has the Applicant been dismissed?**

[102] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[103] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

- (a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or
- (b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[104] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[105] There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

[106] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

### **Initial matters**

[107] Section 396 of the FW Act requires the Commission to decide the four initial matters before considering the merits of the application.

- (a) Whether the application was made within the period required in s.394(2);
- (b) Whether the Applicant is a person protected from unfair dismissal;
- (c) Whether the dismissal was consistent with the Small Business Fair Dismissal Code; and
- (d) Whether the Applicant's dismissal was a case of genuine redundancy.

[108] There is no dispute between the parties, and I am satisfied on the evidence that:

- (a) the application was made within the period required in s.394(2);
- (b) the Applicant is a person protected from unfair dismissal; and
- (c) the Applicant's dismissal was not a case of genuine redundancy.

### **Small Business Employer / Small Business Fair Dismissal Code**

[109] The Respondent initially submitted that it employed three employees at the time of the Applicant's dismissal and that the Applicant's dismissal was consistent with the small business fair dismissal code.<sup>86</sup>

[110] In its Form F3 Employer Response, the Respondent indicated that it had 35 employees at the time the Applicant was dismissed. During the proceedings, and in response to a question from the Commission, Mr Mudaliar confirmed that while the Respondent had less than 15 employees, it is part of the Lederer Group which through various related (or associated) entities employs 'a couple of hundred' employees.<sup>87</sup>

[111] In closing submissions, the Respondent, quite properly, abandoned its jurisdictional objection that it was a small business employer and that the Applicant's dismissal was consistent with the small business fair dismissal code.<sup>88</sup>

[112] Accordingly, I find that the Respondent is not a small business employer. It follows that the small business fair dismissal code did not apply to the Applicant's dismissal.

**Was the dismissal harsh, unjust or unreasonable?**

[113] 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 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.

[114] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>89</sup>

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

**Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?**

[116] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"<sup>90</sup> and should not be "capricious, fanciful, spiteful or prejudiced."<sup>91</sup> However,

the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>92</sup>

[117] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>93</sup> "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."<sup>94</sup>

[118] As set out above, the letter of termination states that the Applicant was dismissed for failing to follow a lawful and reasonable direction to move to a different hotel in Los Angeles, and failing to comply with the requirement for flight and duty rest and attending for a flight potentially fatigued.

[119] The Respondent submitted that each of those matters was a lawful and reasonable direction and each independently constitutes a valid reason for the Applicant's dismissal.

[120] In *Construction, Forestry, Maritime, Mining and Energy Union v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal*<sup>95</sup> (**Mt Arthur Coal**) a Full Bench of the Commission considered the duty to obey lawful and reasonable directions. A helpful summary of this analysis was set out by Deputy President Saunders in *Gregory John Casper v New Horizons*<sup>96</sup>, as follows:

[28] In the absence of a contrary intention, there is a term implied into all contracts of employment to the effect that employees must follow the lawful and reasonable directions of their employer.

[29] A lawful direction is one which falls within the scope of the employee's employment. An employee is not obliged to obey a direction which goes beyond the nature of the work the employee has contracted to perform, although an employee is expected to obey instructions which are incidental to that work.

[30] A direction which endangers an employee's life or health, or which the employee reasonably believes endangers his or her life, will not be a lawful order, unless the nature of the work is itself inherently dangerous, in which case the employee has contracted to undertake the risk. Further, the direction must be lawful in the sense that it must not direct the employee to do something that would be unlawful, such as driving an unregistered or unroadworthy vehicle.

[31] The reasonableness of a direction given to an employee is a question of fact and must be judged objectively having regard to all the circumstances, including the nature of the particular employment, the established usages affecting the employment, the common practices that exist, the general provisions of any instrument governing the relationship, and whether the employer has complied with any relevant consultation obligations. It is not necessary to show that the direction in question is the preferable or most appropriate course of action or in accordance with 'best practice' or in the best interests of the parties. There may be a range of options open to an employer within the bounds of reasonableness.

[32] A direction lacking an evident or intelligible justification will not be reasonable, but that is not the only basis on which unreasonableness can be established. All the circumstances must be considered.<sup>97</sup>

(footnotes omitted)

[121] There was no exclusion of this common law term in the Applicant's contract of employment. However, as stated earlier, there was an express term requiring her to follow reasonable and lawful instructions. A 'reasonable instruction' is defined in the contract as "*one that you are physically able to do, will not threaten your health or safety and is reasonable in the circumstances.*"<sup>98</sup>

### **Direction to move hotels**

[122] There is nothing illegal or unlawful regarding directing employees to stay at particular accommodation and I am satisfied that the direction to move hotels fell within the scope of the Applicant's employment and was therefore lawful.<sup>99</sup>

[123] Turning to the question of reasonableness, I am not satisfied that the direction was reasonable having regard to the matters set out at [58] to [65] and the following circumstances:

- Ms Cohrs would have been aware of the volume and type of supplies and items (including perishable items) that the Applicant was required to coordinate for the return flight. Indeed, Ms Cohrs queried whether two hours would be enough time for the Applicant to pack up her room;
- Assuming it would take two hours (although it is unknown whether it would have taken a longer or shorter period), to pack up her room, the Applicant would have been moving hotels at approximately 8:00pm and would still be required to set-up the new room at the Dream Hotel before purchasing supermarket supplies very late into evening or on the day of departure, when she would otherwise rest;
- Irrespective of whether the Applicant had changed hotel rooms or not earlier in the day, in refusing to follow the direction, the Applicant advised Ms Cohrs that she wanted to maximise her sleep that evening at the Thompson Hotel. In this respect, the rationale for Applicant's refusal was consistent with the Respondent's Fatigue Management Plan principles which directs personnel to maximise the use of sleep opportunities.<sup>100</sup>

[124] In my view, and having regard to all of the evidence before me, the Applicant refused to change hotels because to do so would have compromised her sleep the night before departure

[125] Accordingly, I find the direction to the Applicant to move from the Thompson Hotel to the Dream Hotel on 1 November 2021, while lawful, was not reasonable.

### **Failing to comply with Flight Operations Manual re: flight, duty and rest policies**

[126] I accept the Respondent's submissions that the Applicant was trained in, and had access to the Flight Operations Manual, and that the matters set out in the Flight Operations Manual, including the flight, duty, and rest time policies are generally lawful and reasonable directions, relevant to the persons (or positions) to whom they are directed.

[127] Indeed, policies and procedures that go to safety and fatigue management in the aviation industry (whether commercial or private aviation) are critically important and serious matters.

[128] However, in the matter before me, the issue is whether the Applicant failed to comply with the Respondent's Flight Operations Manual to have a minimum (and uninterrupted) rest period of 12-hours between 5:00am and 5:00pm on 2 November 2021 in Los Angeles.

[129] The Respondent contends that the Flight Operations Manual requires the Applicant to do so and her actions in leaving the Thompson Hotel to go to the Tartine Bakery, Bristol Farms and Il Pastaio during the middle of the day, and when she departed the Thompson Hotel prior to 5:00pm to collect catering from Spagos, were actions in breach of a lawful and reasonable direction to comply with the requirement in the Flight Operations Manual.

[130] For the reasons that follow, the Respondent's contention cannot be accepted.

[131] First, the 12-hour minimum rest period does not apply to a flight attendant. The tables set out in sections 3.8.4.2 and 3.8.4.3 of the Flight Operations Manual designate which members of the "flightcrew" the minimum rest periods apply to. The term "flightcrew" is defined as Pilot crewmembers, and the table places the requirement on "two pilots".

[132] Second, during the proceedings, when asked by the Commission whether the 12-hour minimum rest period applied to a flight attendant, Mr Mudaliar responded "*Commissioner, I can't definitively answer that question, sorry.*"<sup>101</sup>

[133] Third, at paragraph [11] of his witness statement, Mr Mudaliar stated that when he received the Hazard Incident Report filed by Ms Cohrs on 8 November 2021, he formed the view that the Applicant's reported actions suggested a serious breach of safety protocols. During the proceedings, Mr Mudaliar was asked by the Commission to identify the safety protocols he was referring to. In response to confirmed the safety protocols he was referring to was the direction of the chief pilot and not a provision of the Flight Operations Manual.<sup>102</sup>

[134] Fourth, the Respondent has not otherwise established through direct evidence that the Applicant was required to comply with the 12-hour minimum rest period, or that it was implied or inferred by custom and practice. While it is apparent that the Applicant did attempt to get maximum rest on the day of departure, the Respondent has not identified the specific direction that applies to the Applicant.

[135] Furthermore, even if I had found that a 12-hour minimum rest period applied to the Applicant, I would not have found the direction was reasonable where the Applicant's conduct in departing the Thompson Hotel was to collect restaurant meals specifically requested by Mrs Lederer, and fresh food items such as fruit juices, pastries, and deli cuts. These items must be picked up on the day of departure by the flight attendant if they cannot be delivered.



[136] Accordingly, I find that the Applicant's actions were consistent with her duties and were 'common practice'<sup>103</sup> and any suggestion that the Applicant was not acting in accordance with her duties is straining credulity beyond breaking point.

### **Conclusion – Valid Reason**

[137] For the reasons set out above, I find that there was no valid reason for the Applicant's dismissal.

### **Was the Applicant notified of the valid reason?**

[138] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).<sup>104</sup>

[139] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.<sup>105</sup>

### **Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?**

[140] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.<sup>106</sup>

### **Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?**

[141] In all the circumstances, I find there was not any unreasonable refusal by the Respondent to allow the Applicant to have a support person present to assist in discussions relating to her dismissal. I regard this factor as a neutral consideration.

### **Was the Applicant warned about unsatisfactory performance before the dismissal?**

[142] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

### **To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[143] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact. This factor weights neutrally in my consideration.

### **To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?**

[144] It is not in dispute, and I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise. This factor weights neutrally in my consideration.

**What other matters are relevant?**

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

[146] Neither party made any submissions in relation to this factor, and I have not taken any other matter into consideration.

**Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?**

[147] I have made findings in relation to each matter specified in s.387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>107</sup>

[148] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was harsh, unjust and unreasonable.

[149] In coming to this decision, I have taken into account all of the evidence and submissions of the parties. The fact that an issue is not mentioned in this decision does not mean that it has not been taken into account. I have also had regard to the object stated at s.381(2) of the FW Act to ensure that a "fair go all round" is accorded.

**Conclusion**

[150] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the FW Act.

**Remedy**

[151] Being satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the FW Act, I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[152] Under s.390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

- (a) I am satisfied that reinstatement of the Applicant is inappropriate; and
- (b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

**Is reinstatement of the Applicant inappropriate?**

[153] The Applicant seeks the remedy of reinstatement to her former position or another position within the Lederer Group, such as working on Crystal Lady.

[154] The Respondent opposes reinstatement on the basis that Ms Cohrs could not have confidence that the Applicant will follow directions in future.

[155] In *Nguyen v Vietnamese Community in Australia*<sup>108</sup>, a Full Bench of the Commission stated the following in relation to reinstatement:

[9] The question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one. No party in the proceedings at first instance suggested that his Honour exercise his discretion not to order a remedy at all. Indeed the Respondent was not opposed to an appropriate amount of compensation being awarded. It is implicit from his Honour's decision that he concluded that a remedy was appropriate in the circumstances, the issue became the form of the remedy.

[10] Subsection 390(3) underscores the primacy of reinstatement as a remedy for an unfair dismissal as the discretion to order a remedy of compensation may only be exercised if the Commission is satisfied that reinstatement is 'inappropriate'. Further, one of the objects of Part 3-2 of Chapter 3, in which the unfair dismissal provisions appear, is "to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement". We would observe that to describe reinstatement as the 'primary remedy', is to simply recognise that reinstatement is the first, perhaps even the foremost, remedy under the Act. The relevant question in determining whether to grant the remedy of reinstatement of an employee in relation to a dismissal that is found to have been 'unfair' is whether reinstatement is appropriate in the particular case.

...

[15] In *Australia Meat Holdings Pty Ltd v McLauchlan* a Full Bench of the AIRC gave consideration to the differences in the provisions of the IR Act and the WR Act and concluded that "a consideration of appropriateness of reinstatement involves the assessment of a broader range of factors than practicability . . . [I]n considering whether to order the reinstatement the Commission is not confined to an assessment of the practicability of such an order are that must decide whether such an order is appropriate". We agree with this observation.

[16] We now turn to the relevant question concerning the appropriateness of reinstatement.

[17] Reinstatement might be *inappropriate* in a whole range of circumstances, for example if such an order would be futile such as where reinstatement of an employee would almost certainly lead to a further termination of the employee's employment because the employer has since discovered that the employee engaged in an act of serious misconduct which was only discovered after the employee's termination or if the employer no longer conducts a business into which the employee may be reappointed. The fact that the employer has filled the position previously occupied by the dismissed employee would rarely, of itself, justify a conclusion that reinstatement

was not appropriate. As a Full Bench of the AIRC observed in *Smith v Moore Paragon Australia Ltd*,:

“It will often, if not typically, be the case that the position occupied by an applicant for relief under s.170CE of the Act will, at the time the application is arbitrated, either no longer exist or no longer be vacant. In our view that bare fact would rarely, on its own, justify a conclusion that an order for reinstatement was not ‘appropriate’. To adopt such an approach would tend to defeat the remedial purpose of the legislation.”

[156] While I have given careful consideration to the issue of reinstatement, throughout the proceedings, it was clear to me that the relationship between the Applicant and Ms Cohrs and Mr Mudaliar has irretrievably broken down. Accordingly, I have decided that reinstatement is inappropriate.

**Is an order for payment of compensation appropriate in all the circumstances of the case?**

[157] Where reinstatement is found to be inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, “[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one...”<sup>109</sup>

[158] Having regard to all the circumstances of the case, I consider that an order for payment of compensation to the Applicant is appropriate. However, there is insufficient material before me addressing the matters relevant to the calculation of compensation.<sup>110</sup>

[159] Accordingly, the matter will be listed for mention and directions in relation to the issue of compensation.



**COMMISSIONER**

*Appearances:*

Ms C Davoren, the Applicant.

Mr G Fredericks of counsel for the Respondent.

*Hearing details:*

2022.

Sydney (via Microsoft Teams video-link):

8, 9 June, 6, 19 July.

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<sup>1</sup> Transcript PN3007.

<sup>2</sup> Exhibit R6 at [5].

<sup>3</sup> Exhibit A1 at [3]; Exhibit R6 at [8].

<sup>4</sup> Exhibit R6 at [8]; Exhibit A14 at p1.6.

<sup>5</sup> Exhibit A1 at [5], Annexure A.

<sup>6</sup> Exhibit A1, Annexure A.

<sup>7</sup> Exhibit A14 at p1.6-1.7.

<sup>8</sup> Exhibit A14 at p2.4.

<sup>9</sup> Exhibit A14 at p3.17-3.19.

<sup>10</sup> Exhibit A14 at p(iii).

<sup>11</sup> Exhibit A14 at p(i), (iv) and 1.2.

<sup>12</sup> Exhibit A1 at [23]-[24].

<sup>13</sup> Exhibit R6 at [19]-[20].

<sup>14</sup> Exhibit A1 at [25]; Exhibit R6 at [19].

<sup>15</sup> Exhibit A7.

<sup>16</sup> Exhibit R6 at [19].

<sup>17</sup> Exhibit R6 at [19]-[21]; Transcript at PN163.

<sup>18</sup> Exhibit R6 at [22].

<sup>19</sup> Exhibit A9; Exhibit R6, Annexure C.

<sup>20</sup> Exhibit R6 at [23].

<sup>21</sup> Exhibit R6 at [24]-[25].

<sup>22</sup> Exhibit A9; Exhibit R6, Annexure C.

<sup>23</sup> Exhibit A9; Exhibit R6, Annexure C.

<sup>24</sup> Exhibit R2.

<sup>25</sup> Exhibit R6 at [27]

<sup>26</sup> Exhibit R6 at [28].

<sup>27</sup> Exhibit A9.

<sup>28</sup> Exhibit A12.

<sup>29</sup> Exhibit A9.

<sup>30</sup> Exhibit A10; Exhibit R6 at [33].

<sup>31</sup> Exhibit A10; Exhibit R6 at [33].

<sup>32</sup> Exhibit R5; Transcript at PN1075.

<sup>33</sup> Exhibit A9; Exhibit R6, Annexure C.

<sup>34</sup> Exhibit R6 at [39]; Exhibit R17 at [6]-[7].

<sup>35</sup> Exhibit R1.

<sup>36</sup> Exhibit R16.

<sup>37</sup> Exhibit R6 at [32]; Transcript at PN265.

<sup>38</sup> Exhibit R6 at [20].

- <sup>39</sup> Exhibit R6 at [24].
- <sup>40</sup> Exhibit R6 at [40], Annexure D; Exhibit A11.
- <sup>41</sup> Exhibit R6 at [21].
- <sup>42</sup> Exhibit R2.
- <sup>43</sup> Exhibit A11.
- <sup>44</sup> Exhibit A3; Exhibit R17, Annexure D.
- <sup>45</sup> Exhibit A3; Exhibit R17, Annexure D.
- <sup>46</sup> Exhibit R17, Annexure D.
- <sup>47</sup> Exhibit R6, Annexure C; Exhibit A3.
- <sup>48</sup> Transcript at PN1952; Exhibit A2 at [30].
- <sup>49</sup> Exhibit A1 at [62].
- <sup>50</sup> Transcript at PN171-PN173; PN187-PN188; PN257-PN258.
- <sup>51</sup> Transcript at PN249-PN251.
- <sup>52</sup> Transcript at PN187.
- <sup>53</sup> Transcript at PN266, PN269; PN1075; PN1093.
- <sup>54</sup> Transcript at PN1075.
- <sup>55</sup> Exhibit R5.
- <sup>56</sup> Transcript at PN2002-PN2009.
- <sup>57</sup> Transcript at PN2442.
- <sup>58</sup> Exhibit A14 at p1.7.
- <sup>59</sup> Exhibit R6 at [45].
- <sup>60</sup> Transcript at PN1803.
- <sup>61</sup> Transcript at PN1790-PN1794.
- <sup>62</sup> Exhibit R6 at [20].
- <sup>63</sup> Exhibit R17 at [9].
- <sup>64</sup> Exhibit R17 at [10].
- <sup>65</sup> Exhibit R4.
- <sup>66</sup> Exhibit R6 at [46], Annexure F.
- <sup>67</sup> Exhibit R17 at [11]-[12].
- <sup>68</sup> Exhibit R6 at [47], Annexure G.
- <sup>69</sup> Exhibit A1 at [14]; Exhibit R17 at [14].
- <sup>70</sup> Exhibit R17 at [14].
- <sup>71</sup> Exhibit R17 at [16].
- <sup>72</sup> Exhibit R17 at [16].
- <sup>73</sup> Transcript at PN567-PN572.
- <sup>74</sup> Exhibit R17 at [19].
- <sup>75</sup> Transcript at PN586, PN2556-PN2557.
- <sup>76</sup> Exhibit R17 at [20]-[22]; Exhibit A2 at [60].
- <sup>77</sup> Exhibit A2 at [61].
- <sup>78</sup> Exhibit A2 at [60]; Exhibit R17 at [23].
- <sup>79</sup> Exhibit R17 at [24]-[25].
- <sup>80</sup> Exhibit R17 at [27]-[28].
- <sup>81</sup> Exhibit R17 at [28].
- <sup>82</sup> Exhibit A1 at [8], Annexure B.

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<sup>83</sup> Exhibit R6 at [58].

<sup>84</sup> Transcript at PN1961.

<sup>85</sup> Transcript at PN1990.

<sup>86</sup> Respondent's Outline of Submissions at [31]-[34] (Hearing Book at p.35).

<sup>87</sup> Transcript at PN3002-PN3004, PN3021-3027.

<sup>88</sup> Transcript at PN3605-PN3608.

<sup>89</sup> *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [69].

<sup>90</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.

<sup>93</sup> *Edwards v Justice Giudice* [1999] FCA 1836 at [7].

<sup>94</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRC FB, Ross VP, Williams SDP, Hingley C, 17 March 2000) at [23]-[24].

<sup>95</sup> [\[2021\] FWC FB 6059](#) at [64]-[81].

<sup>96</sup> [\[2022\] FWC 1269](#)

<sup>97</sup> *Ibid* at [28]-[32].

<sup>98</sup> Exhibit A1, Annexure A.

<sup>99</sup> Mt Arthur Coal at [85].

<sup>100</sup> See Exhibit A14, Section 2.1.7.

<sup>101</sup> Transcript at PN2712-PN2714.

<sup>102</sup> Transcript at PN3011-PN3020.

<sup>103</sup> See Transcript at PN2442

<sup>104</sup> *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWC FB 6429](#) at [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWC FB 533](#) at [55].

<sup>105</sup> *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRC FB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWC FB 762](#) at [46]-[49].

<sup>106</sup> *Ibid.*

<sup>107</sup> *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](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002) at [92]; *Edwards v Justice Giudice* [1999] FCA 1836 at [6]-[7].

<sup>108</sup> [\[2014\] FWC FB 7198](#) at [9]-[10]; [15]-[17].

<sup>109</sup> *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWC FB 7198](#) at [9].

<sup>110</sup> Transcript at PN3127-PN3128.