



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Claudia McLeod

v

Project 88 TPF Pty Ltd T/A Pink Flamingo Spiegelclub
(U2023/1057)

Sierra Louie

v

Project 88 TPF Pty Ltd T/A Pink Flamingo Spiegelclub
(U2023/1119)

COMMISSIONER CRAWFORD

SYDNEY, 11 OCTOBER 2023

Application for relief from unfair dismissal – dismissals unfair – compensation ordered

BACKGROUND

[1] These cases concern unfair dismissal applications filed by Claudia McLeod (**Ms McLeod**) and Sierra Louie (**Ms Louie**) following their dismissals by Project 88 TPF Pty Ltd T/A Pink Flamingo Spiegelclub (**Project 88**).

[2] Project 88 operates the Pink Flamingo Speigelclub entertainment venue at Broadbeach in Queensland. Ms McLeod was employed in a full-time Box Office and Administration role¹ and the *Live Performance Award 2020* applied to her employment.² Ms Louie was employed as a part-time Wait Staff Team Member/Bartender³ and the *Hospitality Industry (General) Award 2020* applied to her employment.⁴

[3] Ms McLeod⁵ and Ms Louie⁶ were both summarily dismissed effective 3 February 2023 on the grounds of alleged serious misconduct arising from the alleged distribution of confidential personal financial information of another employee, Drew Holden (**Ms Holden**).

[4] Ms McLeod filed an unfair dismissal application on 10 February 2023.⁷ Ms Louie filed an unfair dismissal application on 13 February 2023.⁸ Both applications were filed within 21 days of the dismissal taking effect in accordance with the standard time limit in s.394(2) of the *Fair Work Act 2009* (Cth) (**FW Act**).

ALLOCATION

[5] The applications were allocated to Commissioner Spencer. Commissioner Spencer took several steps in relation to the applications including:

- Issuing directions for the filing of material;⁹
- Determining that the applications would be heard together via Teams on 28 June 2023 and 29 June 2023;¹⁰
- Granting permission for both parties to be legally represented at the hearings.¹¹ Ms McLeod and Ms Louie were represented by Mr Dircks from Just Relations. Project 88 was represented by Mr Clarke of counsel, instructed by MKW Legal.
- Arranged for the preparation of a Digital Court Book (**DCB**) that was provided to the parties ahead of the hearings; and
- Conducting hearings on 28 and 29 June 2023 and then heard oral closing submissions on 24 July 2023.¹²

[6] The applications were subsequently allocated to me to determine on 28 September 2023. The case files indicate the credibility of various witnesses was raised as an issue by the parties. That caused me some concern in relation to deciding the applications without having the benefit of viewing the witnesses give evidence. However, it ultimately became clear that I could comfortably reach decisions in relation to both applications by reference to largely uncontested evidence.

EVIDENCE

[7] The applications were heard together, and the evidence was admitted jointly in relation to both applications.¹³

[8] An agreed statement of facts was filed by the parties.¹⁴

Applicants' evidence

Ms McLeod

[9] Ms McLeod provided the following evidence:

- Witness statement by Ms McLeod dated 29 March 2023.¹⁵ This contained the following attachments:
 - CM 1: Payslip for the period of 19 July 2021 to 25 July 2021.¹⁶
 - CMS: Employment contract dated 14 August 2020.¹⁷
 - PF 1: Termination letter dated 4 February 2023.¹⁸

The statement was marked **Exhibit #1**.

- Auxiliary statement from Ms McLeod dated 29 April 2023.¹⁹ The statement was marked **Exhibit #2**.

[10] Project 88 objected to several parts of both of Ms McLeod's statements.²⁰ Commissioner Spencer dismissed the objections and admitted all of the statements,²¹ except for paragraphs [38] to [40] of the statement dated 29 March 2023.²² Commissioner Spencer indicated the basis for each objection would be noted and considered when assessing the weight attributed to the relevant evidence.²³ I have done so.

[11] Ms McLeod was cross-examined by Mr Clarke.

Ms Louie

[12] Ms Louie provided the following evidence:

- Witness statement by Ms Louie dated 29 March 2023.²⁴ This contained the following attachments:
 - SL 1: Payslip for the pay period 30 January 2023 to 5 February 2023.²⁵
 - SL 2: Employment contract dated 15 October 2021.²⁶
 - SL 3: Screenshots of messages concerning cocktail drinks under the name "Mel melissamelkocak".²⁷
 - SL 4: Screenshots of messages from a group titled "Mommies and me" concerning a photo of three people.²⁸
 - SL 5: Screenshot of messages concerning employment arrangements under the name "melissa ko ko".²⁹
 - PF 2: Termination letter dated 3 February 2023.³⁰

The statement was marked **Exhibit #3**.

- Auxiliary statement by Ms Louie dated 29 April 2023.³¹ This has a payslip attached for the pay period of 17 April 2023 to 23 April 2023.³² The payslip is from Ms Louie's new job. The statement was marked **Exhibit #4**.

[13] Project 88 objected to several parts of both of Ms Louie's statements.³³ Commissioner Spencer dismissed the objections and admitted the statements.³⁴ Commissioner Spencer indicated the basis for each objection would be noted and considered when assessing the weight attributed to the relevant evidence.³⁵ I have done so.

[14] Ms Louie was cross-examined by Mr Clarke.

Melissa Kocac

[15] Ms Kocac is a former employee of Project 88 who was involved in message exchanges with Ms Louie which were relied upon by Project 88 to dismiss Ms Louie and Ms McLeod. Ms Kocac provided a witness statement dated 29 March 2023.³⁶ Project 88 objected to the tendering of Ms Kocac's statement in full on the basis of relevance.³⁷ Commissioner Spencer dismissed the objections.³⁸ Project 88 did not require Ms Kocac for cross-examination, regardless of whether Commissioner Spencer decided to admit the statement.³⁹

[16] It does not appear from the transcript that Ms Kocac's statement was marked as an exhibit. However, given its inclusion in the digital court book and Commissioner Spencer's email to the parties dated 13 July 2023 which clearly stated Project 88's objection to its admission was not granted, I am satisfied it is evidence in the proceedings.

Interview transcripts

[17] The case file indicates Ms McLeod and Ms Louie sought copies of the full transcripts of their dismissal meetings on 3 February 2023 and a copy of the audio file for the meetings, following the end of the hearings on 28 and 29 June 2023. Project 88 provided the full transcripts on 4 July 2023 and the audio files on 7 July 2023.

[18] The transcript confirms that this material was tendered during the hearing of closing submissions on 24 July 2023. The full transcript and audio file for Ms Louie's meeting was marked **Exhibit #10.1**⁴⁰ and the full transcript and audio file for Ms McLeod's meeting was marked **Exhibit #11.1**.⁴¹

Project 88's evidence

Peter Snee

[19] Mr Snee is the CEO of Project 88. Mr Snee provided two witness statements, one in response to Ms McLeod's application and a separate one in response to Ms Louie's application.

[20] In relation to Ms McLeod's application, Mr Snee provided a witness statement dated 26 April 2023.⁴² This statement contained the following attachments:

- PS 1: Ms McLeod's employment contract.⁴³
- PS 2: Screenshot of messages concerning employment arrangements under the name "melissa ko ko".⁴⁴
- PS 3: Transcript extract of a meeting between Ms Louie, Mr Snee, Tony Rigas, Louise Huxson⁴⁵ and Zarne Livingston at 3:30pm on 3 February 2023.⁴⁶
- PS 4: Transcript extract of a meeting between Ms McLeod, Mr Snee, Mr Rigas and Ms Huxson at 4pm on 3 February 2023.⁴⁷
- PS 5: Ms McLeod's termination letter dated 4 February 2023.⁴⁸

- PS 6: Transcript extract of a meeting between Ms Holden, Mr Snee and Mr Rigas at 11am on 14 February 2023.⁴⁹
- PS 7: Email from Ms Holden to Mr Snee dated 15 February 2023 stating: “I didn’t give authority for Claudia to be in conversation regarding any of my details”.⁵⁰

The statement was marked **Exhibit #5**.

[21] In relation to Ms Louie’s application, Mr Snee provided a witness statement dated 26 April 2026.⁵¹ This statement contained the following attachments:

- PS 1: Ms Louie’s employment contract.⁵²
- PS 2: Screenshots of messages concerning cocktail drinks under the name “Mel melissamelkocak”⁵³, screenshots of messages from a group titled “Mommies and me” concerning a photo of three people,⁵⁴ and screenshot of messages concerning employment arrangements under the name “melissa ko ko”.⁵⁵
- PS 3: Transcript extract of a meeting between Ms Louie, Mr Snee, Tony Rigas, Louise Huxson and Zarne Livingston at 3:30pm on 3 February 2023.⁵⁶
- PS 4: Ms Louie’s termination letter dated 3 February 2023.⁵⁷
- PS 5: Transcript extract of a meeting between Ms Holden, Mr Snee and Mr Rigas at 11am on 14 February 2023.⁵⁸
- PS 6: Email from Ms Holden to Mr Snee dated 15 February 2023 stating: “I didn’t give authority for Claudia to be in conversation regarding any of my details”.⁵⁹
- PS 7: Additional transcript extract of a meeting between Ms Louie, Mr Snee, Tony Rigas, Louise Huxson and Zarne Livingston at 3:30pm on 3 February 2023.⁶⁰

The statement was marked **Exhibit #6**.

[22] Mr Snee was cross-examined by Mr Dircks.

[23] As identified above, Ms McLeod and Ms Louie sought full transcripts and audio files for their dismissal meetings on 3 February 2023 after the end of the hearings on 28 and 29 June 2023. They also sought the same material in relation to the meeting held with Ms Holden on 15 February 2023. Mr Snee provided a statutory declaration dated 7 July 2023 which stated this material did not exist in relation to the meeting with Ms Holden. The declaration was marked **Exhibit #12**. Mr Snee was not cross-examined on this declaration.

Drew Holden

[24] Ms Holden is employed by Project 88. Ms Holden provided two witness statements, one in response to Ms McLeod’s application and one in response to Ms Louie’s application.

[25] In relation to Ms McLeod's application, Ms Holden provided a witness statement dated 26 April 2023.⁶¹ This statement contained the following attachments:

- DH 1: Email from Ms Holden to Mr Snee dated 15 February 2023 stating: "I didn't give authority for Claudia to be in conversation regarding any of my details".⁶²
- DH 2: Ms Holden's full-time employment contract with Project 88 in the role of Guest Services Manager.⁶³

The statement was marked **Exhibit #7**.

[26] In relation to Ms Louie's application, Ms Holden provided a witness statement dated 26 April 2023.⁶⁴ This statement contained the following attachments:

- DH 1: Email from Ms Holden to Mr Snee dated 15 February 2023 stating: "I didn't give authority for Claudia to be in conversation regarding any of my details".⁶⁵
- DH 2: Ms Holden's full-time employment contract with Project 88 in the role of Guest Services Manager.⁶⁶

The statement was marked **Exhibit #8**.

[27] Ms Holden was cross-examined by Mr Dircks.

SUBMISSIONS

Ms McLeod and Ms Louie

[28] Ms McLeod and Ms Louie's submissions, as per Project 88's material, were initially filed separately for the two applications, but had merged into one by the time the matters were heard jointly on 28 and 29 June 2023 and 24 July 2023. Ms McLeod and Ms Louie relied on the following written submissions in support of their applications:

- Ms McLeod's outline of submissions dated 29 March 2023.⁶⁷
- Ms Louie's outline of submissions dated 29 March 2023.⁶⁸
- Ms McLeod's outline of submissions in reply dated 29 April 2023.⁶⁹
- Ms Louie's outline of submissions in reply dated 29 April 2023.⁷⁰
- Joint submissions concerning s.183 of the *Corporations Act 2001* (Cth) (**Corporations Act**) dated 28 July 2023.

[29] Mr Dircks also made oral closing submissions during the hearing on 24 July 2023.

Project 88

[30] Project 88 relied on the following submissions in opposing the applications:

- Outline of submissions in relation to Ms McLeod’s application dated 26 April 2023.⁷¹
- Outline of submissions in relation to Ms Louie’s application dated 26 April 2023.⁷²
- Further submissions concerning s.183 of the Corporations Act and contractual obligations dated 26 July 2023.

[31] Mr Clarke also provided oral closing submissions during the hearing on 24 July 2023.

[32] I have reviewed and considered all the evidence and submissions filed by the parties.

CONSIDERATION - PRELIMINARY MATTERS

When can the Commission order a remedy for unfair dismissal?

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

- (a) Ms McLeod and/or Ms Louie were protected from unfair dismissal at the time of being dismissed; and
- (b) Ms McLeod and/or Ms Louie have been unfairly dismissed.

[34] Both limbs must be satisfied. I am therefore required to consider whether Ms McLeod and Ms Louie were protected from unfair dismissal at the time of being dismissed and, if I am satisfied that they were so protected, whether they have been unfairly dismissed.

When is a person protected from unfair dismissal?

[35] 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?

[36] 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;
- (b) the dismissal was harsh, unjust or unreasonable;
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Were Ms McLeod and Ms Louie dismissed?

[37] There was no dispute and I find that Ms McLeod and Ms Louie's employment with Project 88 terminated at the initiative of Project 88 effective 3 February 2023.

[38] I am therefore satisfied that Ms McLeod and Ms Louie have been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[39] Under s.396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

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

[40] It is not dispute and I find that Ms McLeod and Ms Louie:

- Filed their applications within the relevant 21-day periods. Ms McLeod's application was filed seven days after her dismissal. Ms Louie's application was filed 10 days after her dismissal.
- Had completed the minimum employment periods. Ms McLeod's employment period was 17 August 2020⁷³ until 3 February 2023. Ms Louie's employment period was 18 August 2020⁷⁴ to 3 February 2023. Both employees had employment periods of slightly over two years and five months.

- Were covered by modern awards. The statement of agreed facts confirms the *Live Performance Award 2020* applied to Ms McLeod's employment with Project 88 and the *Hospitality Industry (General) Award 2020* applied to Ms Louie's employment with Project 88.⁷⁵
- Earned well below the high-income threshold at the time of their dismissal.⁷⁶

[41] Further, Project 88 indicated it had around 104 employees at the time of dismissal and was not a small business employer. Project 88 did not argue the dismissals were a case of genuine redundancy and they were clearly not.⁷⁷

[42] Having been satisfied regarding each of the initial matters, I am required to consider the merits of Ms McLeod and Ms Louie's applications.

CONSIDERATION - WERE THE DISMISSALS HARSH, UNJUST OR UNREASONABLE?

[43] 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.

[44] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.⁷⁸

[45] I set out my consideration of each factor below but will first summarise what I consider be the most significant evidence.

Findings regarding evidence

[46] I have reviewed all the filed material and the transcripts for the three days of hearing.

[47] Although there were significant factual contests in these cases, I consider the most important evidence is either not contested, was not undermined in cross-examination, or is contained in documentary evidence. The following is the evidence I am referring to in this regard.

Dinner

[48] The statement of agreed facts confirms Ms McLeod, Ms Holden and Gabrielle Scotson (**Ms Scotson**) had a social dinner together on Tuesday, 31 January 2023.⁷⁹ Ms McLeod and Ms Holden were friends at this time.⁸⁰

Disclosure of Ms Holden's new salary rate

[49] Ms Scotson disclosed Ms Holden's new salary rate for the Guest Service Manager position to Ms McLeod on Thursday, 2 February 2023.⁸¹

[50] Ms McLeod was not aware that Ms Holden did not authorise Ms Scotson to discuss her salary rate.⁸²

[51] Ms Scotson resigned effective 2 February 2023 and hence was not subjected to any disciplinary action for her disclosure.⁸³

[52] Ms McLeod never viewed Ms Holden's contract for the Guest Service Manager position.⁸⁴

[53] Ms McLeod disclosed the salary rate to Ms Louie on 2 February 2023.⁸⁵

[54] Ms Louie sent a private message to Ms Kocac on 2 February 2023 which referred to the salary rate.⁸⁶

Project 88's accessing of the messages

[55] Ms Huxson accessed Ms Kocac's private social media accounts using her former work phone and viewed her private messages with Ms Louie and others. This is how Project 88 became aware of Ms Louie's messages and secured her admission regarding Ms McLeod's disclosure.⁸⁷

Ms McLeod and Ms Louie did not deliberately disclose confidential information

[56] Neither Ms McLeod⁸⁸ or Ms Louie⁸⁹ understood that Ms Holden's salary rate may be confidential information.

Ms McLeod and Ms Louie were given no notice regarding the subject of the meetings on 3 February 2023

[57] The transcripts of the meetings with Ms McLeod and Ms Louie on 3 February 2023 demonstrate Ms Louie and Ms McLeod had no idea what was about to be raised against them.⁹⁰

Ms Louie was given incorrect information during the meeting on 3 February 2023

[58] The transcript of the meeting with Ms Louie on 3 February 2023 records Mr Snee stating:

“So I have to tell you that we have been sent some screenshots of conversations that have been happening on social media that we need to address...”

... we’ve been sent them...”

Those statements were not correct. Ms Huxson accessed the private social media messages from Ms Kocac’s former work phone⁹¹ without her consent.⁹²

Both employees were given inaccurate information during their termination meetings

[59] Mr Snee stated during the meeting with Ms Louie on 3 February 2023: “this is a criminal offence to disclose confidential financial information”. Ms Huxson also stated: “You have committed a criminal offence”.⁹³

[60] Mr Snee stated to Ms McLeod during the meeting on 3 February 2023: “Are you aware it’s a criminal offence to distribute private, confidential information about another employee?”⁹⁴

[61] There was no basis whatsoever for Project 88’s representatives to be suggesting either Ms Louie or Ms McLeod had committed a criminal offence on 3 February 2023. Further, they made no attempt to identify which criminal offence had been committed by Ms Louie or Ms McLeod, despite making the statements in such unequivocal terms.⁹⁵

Neither employee was offered the opportunity to have a support person present

[62] It is clear from the audio recording and transcript of the meetings on 3 February 2023 that Ms McLeod and Ms Louie were not provided with an opportunity to bring a support person to the meeting. They had no idea what the meeting was about until after it started.

Valid reason

[63] In order to be a valid reason, the reason for the dismissal should be “sound, defensible or well founded”⁹⁶ and should not be “capricious, fanciful, spiteful or prejudiced.”⁹⁷ 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.⁹⁸

[64] Where a dismissal relates to an employee’s conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁹⁹ 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.¹⁰⁰

Reasons for dismissal

[65] The reason identified for Ms McLeod’s dismissal was “distributing confidential personal financial information of another employee”. The termination letter stated: “this action was wilful and deliberate behaviour by you that is inconsistent with the continuation of your contract of employment”.¹⁰¹

[66] The reason identified for Ms Louie’s dismissal was “distributing confidential personal financial information of another employee. This privileged information was sent to other current employees and ex-employees of The Pink Flamingo”. The termination letter stated: “this action was wilful and deliberate behaviour by you that is inconsistent with the continuation of your contract of employment”.¹⁰²

Findings – valid reason

Ms McLeod

[67] I accept on the balance of probabilities that Ms McLeod breached the confidential information clause of her contract of employment dated 14 August 2020 when she informed Ms Louie of Ms Holden’s new salary rate on 2 February 2023.

[68] However, I do not accept this provided a valid reason for dismissal for the following reasons:

- Ms McLeod did not engage in a ‘wilful and deliberate’¹⁰³ breach of her employment contract. Ms McLeod was under the impression Ms Holden had voluntarily informed Ms Scotson of her new salary rate.¹⁰⁴ That was not unreasonable given they were all friends and had clearly been discussing pay at least to some degree during a dinner on 31 January 2023.
- Ms McLeod did not understand that Ms Holden’s new salary rate constituted confidential information that she was not allowed to discuss.¹⁰⁵ There is no evidence that Project 88 provided training about this reasonably complicated legal issue.
- I do not consider it is arguable that Ms McLeod contravened s.183 of the Corporations Act because she was not using the information to try and gain an advantage or cause detriment to Project 88. She was simply discussing work issues with a friend.
- Project 88 only became aware of Ms McLeod’s disclosure because Ms Louie admitted Ms McLeod was her source for the information during a meeting on 3 February 2023. However, Ms Louie made that admission after Mr Snee gave her incorrect evidence

about how the messages were received.¹⁰⁶ Given Ms Louie was ambushed in the meeting on 3 February 2023, in that she was not provided with notice about what would be discussed at the meeting and was not provided with an opportunity to bring a support person,¹⁰⁷ I consider Ms Louie's admission implicating Ms McLeod is compromised and should be afforded less weight than would usually be the case in terms of establishing a valid reason. If a proper process had been followed, Ms Louie may have obtained legal advice prior to making any admissions and may have objected to Project 88 relying on the messages given the substantial issues associated with how the messages were accessed.

- I do not consider Ms McLeod's conduct in telling Ms Louie about her friend, Ms Holden's, new salary rate, which had been disclosed to her by Ms Scotson, to be sufficiently serious to provide a valid reason for dismissal. Although Ms McLeod seemingly accepted the pay secrecy provisions recently inserted into the FW Act¹⁰⁸ were not technically triggered by her disclosure, I consider they are a relevant background matter when assessing whether Ms McLeod's disclosure constitutes a valid reason for dismissal.

Ms Louie

[69] Although the confidential information provisions in Ms Louie's employment contract are not as extensive as those appearing in Ms McLeod's contract, I accept on the balance of probabilities that Ms Louie breached those provisions when she sent Ms Kocac a message containing Ms Holden's new salary rate on 2 February 2023.

[70] However, I do not accept this provided a valid reason for dismissal for the following reasons:

- Ms Louie did not engage in a "wilful and deliberate"¹⁰⁹ breach of her employment contract. Ms Louie was under the impression Ms Holden had voluntarily informed Ms Scotson and/or Ms McLeod of her new salary rate.¹¹⁰ That was not unreasonable given they were all friends.
- Ms Louie did not understand that Ms Holden's new salary rate constituted confidential information that she was not allowed to discuss.¹¹¹ There is no evidence that Project 88 provided training about this reasonably complicated legal issue.
- I do not consider it is arguable that Ms Louie contravened s.183 of the Corporations Act because she was not using the information to try and gain an advantage or cause detriment to Project 88. She was simply messaging a friend and former co-worker about work issues.
- Project 88 only became aware of Ms Louie's messages because Ms Huxson viewed private messages on social media between Ms Louie and Ms Kocac.¹¹² It should go without saying that Ms Huxson's conduct is far more serious than that of either Ms McLeod or Ms Louie. Further, Mr Snee gave false information to Ms Louie about how the messages were received during the meeting on 3 February 2023.¹¹³ This

understandably led Ms Louie to initially think her friend Ms Kocac had disclosed the messages. All of this constitutes a terrible way to treat a young employee.

- Ms Louie was ambushed in the meeting on 3 February 2023. Ms Louie was not provided with notice about what would be discussed at the meeting and was not provided with an opportunity to bring a support person.¹¹⁴ As a result, I consider Ms Louie’s admissions during the meeting are compromised and should be afforded less weight than would usually be the case in terms of establishing a valid reason. If a proper process had been followed, Ms Louie may have obtained legal advice prior to making any admissions and may have objected to Project 88 relying on the messages given the substantial issues associated with how the messages were accessed. Ms Louie was denied any opportunity to raise these issues because of the process followed by Project 88.
- I do not consider Ms Louie’s conduct in telling an ex-employee on a private social media message about Ms Holden’s new salary rate to be sufficiently serious to provide a valid reason for dismissal. Although Ms Louie seemingly accepted the pay secrecy provisions recently inserted into the FW Act¹¹⁵ were not technically triggered by her disclosure, I consider they are a relevant background matter when assessing whether Ms McLeod’s disclosure constitutes a valid reason for dismissal.

Conclusion – valid reason

[71] I find that there was not a valid reason for dismissal in relation to Ms McLeod or Ms Louie.

[72] The way Project 88’s representatives presented the severity of what had occurred during the meetings on 3 February 2023 made it seem like Ms McLeod and Ms Louie had broken into Project 88’s equivalent to a “Watergate complex”, stolen key intellectual property secrets and posted them on WikiLeaks. However, all they had done was privately discuss the salary rate of a friend, and the salary rate was quite unremarkable.

[73] In saying that, I suspect what has happened is Mr Rigas and Ms Huxson (who is Mr Rigas’ partner)¹¹⁶ have taken extreme offence at what Ms Louie was saying privately about Mr Rigas and about some Project 88 promotions. I can certainly understand that. However, calm heads needed to prevail, particularly given how the information was accessed. A business employing over 100 employees should not have acted the way Project 88 did on 3 February 2023.

Were Ms McLeod and Ms Louie notified of the reason for dismissal?

[74] Proper consideration of s.387(b) requires a finding to be made as to whether Ms McLeod and Ms Louie were “notified of that reason”. Contextually, the reference to “that reason” is the valid reason found to exist under s.387(a).¹¹⁷

[75] As I am not satisfied that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.¹¹⁸

[76] However, if I had found there was a valid reason for dismissal, I would have found that Ms McLeod and Ms Louie were not notified of the reason for their dismissals.

[77] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,¹¹⁹ and in explicit¹²⁰ and plain and clear terms.¹²¹

[78] Ms Louie was ambushed by four senior Project 88 managers on 3 February 2023. She had no idea the meeting was about a disciplinary issue before it started. Ms Louie was given false information during the meeting. Ms Louie was handed a pre-prepared termination letter during the meeting.¹²² This does not constitute being notified of a reason for dismissal as contemplated by s.387(b) of the FW Act.

[79] Ms McLeod was ambushed by three senior Project 88 managers on 3 February 2023. She had no idea the meeting was about a disciplinary issue before it started. Ms McLeod was not provided with a full picture regarding how she had been implicated by Ms Louie and how Project 88 had become aware of Ms Louie's conduct. Ms McLeod was informed about her dismissal during the meeting, there was no pause where the Project 88 managers discussed what punishment should be imposed and she did not receive her written termination letter until the next day.¹²³ This does not constitute being notified of a reason for dismissal as contemplated by s.387(b) of the FW Act.

Were Ms McLeod and Ms Louie given an opportunity to respond to any valid reason related to their conduct?

[80] As I have not found that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.¹²⁴

[81] However, if I had found there was a valid reason for dismissal, I would have found that Ms McLeod and Ms Louie were not given an opportunity to respond to the reason for their dismissals.

[82] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.¹²⁵

[83] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.¹²⁶ Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.¹²⁷

[84] Ms McLeod and Ms Louie were both ambushed at the meetings on 3 February 2023. They had no idea what the meetings were about and had no proper opportunity to respond to what was presented to them. Although the transcript does reveal Mr McLeod and Ms Louie being asked to respond during the meetings, I do not accept this constitutes an adequate opportunity to respond given how the meetings were conducted and the situation they were confronted with. The audio and transcript of the interviews reveals Ms McLeod and Ms Louie

both became understandably upset during what must have been a very confronting process with three or four senior managers. Ms Louie was given false information about a critical fact during her dismissal meeting. What occurred during the meetings on 3 February 2023 does not constitute an opportunity to respond as contemplated by s.387(c) of the FW Act for Ms Louie or Ms McLeod.¹²⁸

[85] The denial of an opportunity to respond also had substantial consequences in these cases. If Ms Louie was aware that Project 88 was relying upon private messages Ms Huxson accessed from Ms Kocac's former work phone prior to being dismissed, she would have had an opportunity to seek advice and likely contest whether Project 88 could rely upon the messages. This in turn may have meant that Ms Louie would not have identified Ms McLeod as her source and no action could have been taken against Ms McLeod.

Did Project 88 unreasonably refuse to allow Ms McLeod and Ms Louie to have a support person present to assist at discussions relating to the dismissal?

[86] I find Project 88 unreasonably refused to allow Ms McLeod and Ms Louie to have a support person present at the meetings on 3 February 2023. Ms McLeod and Ms Louie were both unaware the meetings were to discuss a disciplinary issue until the meetings started. They could therefore not have conceivably arranged for a support person to be present. It is clear from the audio and transcript that no opportunity was provided during the meetings.¹²⁹

Were Ms McLeod and Ms Louie warned about unsatisfactory performance before the dismissal?

[87] As the dismissals related to alleged serious misconduct rather than unsatisfactory performance, this factor is not relevant.

To what degree would the size of Project 88's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[88] Project 88 employs around 104 people. It is clearly a large enough enterprise to implement proper procedures in effecting dismissals. In saying that, I would not consider the procedures followed by Project 88 to be acceptable for any sized business.

To what degree would the absence of dedicated human resource management specialists or expertise in Project 88's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[89] I accept the lack of dedicated human resource management specialists or expertise in Project 88's enterprise, at least insofar as none were present during the meetings on 3 February 2023, impacted on the deficient procedures that were followed. However, this does not excuse providing false information to employees at dismissal meetings.

What other matters are relevant?

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

[91] I consider all relevant matters have been captured by the above criterions. I do not think factors such as length of service or age are overly relevant to these cases.

Is the Commission satisfied that the dismissal of Ms McLeod and Ms Louie was harsh, unjust or unreasonable?

[92] I have made findings in relation to each matter specified in s.387. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.¹³⁰

Ms McLeod

[93] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Ms McLeod was harsh, unjust and unreasonable. Ms McLeod's conduct was not sufficient seriously to provide a valid reason for dismissal. I consider this makes the dismissal unjust and unreasonable. If I had found there was a valid reason for dismissal, I would have found the dismissal to be unjust and unreasonable because Ms McLeod was not notified of the reason for dismissal or provided with an opportunity to respond. The procedural deficiencies were extreme. If I had found there was a valid reason for dismissal, I would have found the dismissal was harsh because it was clearly a disproportionate response to the gravity of the misconduct.

Ms Louie

[94] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Ms Louie was harsh, unjust and unreasonable. Ms Louie's conduct was not sufficient seriously to provide a valid reason for dismissal. I consider this makes the dismissal unjust and unreasonable. If I had found there was a valid reason for dismissal, I would have found the dismissal to be unjust and unreasonable because Ms Louie was not notified of the reason for dismissal or provided with an opportunity to respond. The procedural deficiencies were extreme. If I had found there was a valid reason for dismissal, I would have found the dismissal was harsh because it was clearly a disproportionate response to the gravity of the misconduct.

CONCLUSION

Ms McLeod

[95] I am satisfied that Ms McLeod was unfairly dismissed within the meaning of s.385 of the FW Act.

Ms Louie

[96] I am satisfied that Ms McLeod was unfairly dismissed within the meaning of s.385 of the FW Act.

REMEDY

[97] Being satisfied that Ms McLeod and Ms Louie:

- made applications for orders granting remedies under s.394;
- were persons protected from unfair dismissal; and
- were unfairly dismissed within the meaning of s.385 of the FW Act,

I may, subject to the FW Act, order their reinstatement, or the payment of compensation.

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

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

Is reinstatement inappropriate?

[99] Ms McLeod and Ms Louie do not seek reinstatement. I can completely understand that in the circumstances of these cases. I consider that reinstatement is inappropriate in both cases.

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

[100] Having found that reinstatement is 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...”¹³¹

[101] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.¹³²

[102] As discussed below, Ms McLeod and Ms Louie have suffered financial loss in circumstances where I have found their dismissals were harsh, unjust and unreasonable. In all the circumstances, I consider that an order for payment of compensation is appropriate in both cases.

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

[103] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation in lieu of reinstatement including:

- (a) the effect of the order on the viability of Project 88’s enterprise;
- (b) length of service;

- (c) the remuneration that Ms McLeod and Ms Louie would have received, or would have been likely to receive, if they had not been dismissed;
- (d) the efforts of Ms McLeod and Ms Louie to mitigate their loss;
- (e) the amount of any remuneration earned by Ms McLeod and Ms Louie 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 Ms McLeod and Ms Louie 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.

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

Effect of the order on the viability of Project 88's enterprise

[105] I have no evidence about Project 88's financial position. However, it is a large business with around 104 employees. I am satisfied that an order for compensation would not have any significant effect on Project 88's viability in both cases.

Length of service

[106] Ms McLeod and Ms Louie were both employed for around 2 years and 5 months. I consider length of service to be a neutral factor in both cases.

Remuneration that Ms McLeod and Ms Louie would have received, or would have been likely to receive, if they had not been dismissed

[107] As stated by a majority of the Full Court of the Federal Court, “[i]n determining the remuneration that the employee 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.”¹³³

Ms McLeod

[108] There is evidence that Ms McLeod was somewhat disgruntled with her job at Project 88.¹³⁴ The evidence suggests she had told her friend, Ms Louie, she intended to leave in early March 2023, this is reflected in Ms Louie's message to Ms Kocac.¹³⁵ However, Ms McLeod clarified in cross-examination that she had not made a final decision¹³⁶ and there is no evidence

she had another job. In the circumstances, I consider Ms McLeod would have remained employed for a further six months which equates to 3 August 2023.

[109] I calculate the remuneration Ms McLeod would have been likely to receive from 3 February 2023 to 3 August 2023 in her role with Project 88 to be \$29,640, plus superannuation.

Ms Louie

[110] Unlike Ms McLeod, there is no significant evidence that suggests Ms Louie was disgruntled with her job. She was asked at the start of the meeting on 3 February 2023 about her job and she said: "I love my job".¹³⁷ However, the messages with Ms Kocac do suggest some minor degree of disgruntlement towards the ownership or management. In the circumstances, I consider Ms Louie would have remained employed for a further 18 months which equates to 3 August 2024.

[111] I calculate the remuneration Ms Louie would have been likely to receive from 3 February 2023 to 3 August 2024 in her role with Project 88 as \$48,701.64 plus superannuation.

Efforts to mitigate the loss

[112] Ms McLeod and Ms Louie must provide evidence that they have taken reasonable steps to minimise the impact of their dismissals.¹³⁸ What is reasonable depends on the circumstances of the case.¹³⁹

Ms McLeod

[113] Ms McLeod found another job commencing 8 May 2023.

[114] There is no evidence concerning steps taken by Ms McLeod to find alternative work prior to 8 May 2023. I consider a deduction of 5% is appropriate given this lack of evidence.

Ms Louie

[115] Ms Louie found another job in late February 2023.

[116] I do not consider any deduction should be made in relation to Ms Louie.

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

Ms McLeod

[117] Ms McLeod indicated she commenced a new job on 8 May 2023 and is paid \$26 per hour for around 30 hours per week. That equates to \$780 gross per week. Given I have determined Ms McLeod would only have remained employed until 3 August 2023, I calculate that she would have earned \$10,140 during this period.

Ms Louie

[118] Ms Louie stated she commenced in a different role in late February 2023 and provided a payslip for the period of 17 April 2023 to 23 April 2023 which showed year-to-date gross earnings of \$4,301.51. Given that's a period of around nine weeks, I calculate Ms Louie is earning around \$477.95 per week. Assuming a compensation order is made on 11 October 2023, Ms Louie's earnings during that roughly 33-week period would be around \$15,772.35.

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

Ms McLeod

[119] I do not consider this is relevant for Ms McLeod given my assessment that she only would have remained employed until 3 August 2023.

Ms Louie

[120] I calculate Ms Louie would earn around \$955.90 in a 14-day period between the making of an order for compensation and the actual compensation.

Other relevant matters

[121] I do not consider there are any other relevant matters.

Compensation – how is the amount to be calculated?

[122] As noted by the Full Bench, “[t]he well-established approach to the assessment of compensation under s.392 of the FW Act... is to apply the “Sprigg formula” derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul’s Licensed Festival Supermarket (Sprigg)*.¹⁴⁰ This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.¹⁴¹”¹⁴²

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

Step 1: Estimate the remuneration the employee 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. Workers’ compensation payments are deducted but not social security payments. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered.

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.

Ms McLeod

Step 1

[124] I have estimated that Ms McLeod would have remained employed by Project 88 until 3 August 2023. This is the “anticipated period of employment”.¹⁴³

[125] The remuneration Ms McLeod would have received, or would have been likely to have received, from her dismissal on 3 February 2023 until 3 August 2023 is \$29,640 plus superannuation.

Step 2

[126] Only monies earned since termination for the anticipated period of employment are to be deducted.¹⁴⁴ I calculate Ms McLeod has earned \$10,140 during the anticipated period of employment. That leaves an amount of \$19,500 plus superannuation.

[127] For the reasons outlined above, I have applied a 5% deduction because Ms McLeod did not find another job until 8 May 2023 and did not provide evidence regarding her attempts to find another job. That leaves a figure of \$18,525.00 plus superannuation.

Step 3

[128] I now need to consider the impact of contingencies on the amounts likely to be earned by Ms McLeod for the remainder of the anticipated period of employment.¹⁴⁵

[129] Given Ms McLeod’s anticipated period of employment has ended, no deduction is appropriate.

Step 4

[130] I have considered the impact of taxation but have elected to settle a gross amount of \$18,525.00 plus superannuation and leave taxation for determination.

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

Ms McLeod

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

[132] Although I found Ms McLeod committed a minor breach of her employment contract, I do not consider any amount of deduction appropriate in the circumstances of this case.

Compensation – how does the compensation cap apply?

[133] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

- (a) the amount worked out under s.392(6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

[134] Section 392(6) of the FW Act provides:

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

(a) the total amount of remuneration:

- (i) received by the person; or
- (ii) to which the person was entitled;

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

[135] The amount of \$18,525.00 plus superannuation is lower than the total remuneration Ms McLeod received in the 26 weeks immediately before dismissal.

Is the level of compensation appropriate?

[136] 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.”¹⁴⁶

[137] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

Ms Louie

Step 1

[138] I have estimated that Ms Louie would have remained employed by Project 88 until 3 August 2024. This is the “anticipated period of employment”.¹⁴⁷

[139] The remuneration Ms McLeod would have received, or would have been likely to have received, from her dismissal on 3 February 2023 until 3 August 2024 is \$48,701.64 plus superannuation.

Step 2

[140] Only monies earned since termination for the anticipated period of employment are to be deducted.¹⁴⁸ I calculate Ms Louie has earned \$15,772.35 to 11 October 2023 and will earn a further \$955.90 between the making of the order and the payment of compensation. That leaves an amount of \$31,973.39 plus superannuation.

Step 3

[141] I now need to consider the impact of contingencies on the amounts likely to be earned by Ms Louie for the remainder of the anticipated period of employment.¹⁴⁹

[142] I calculate Ms Louie will earn a further \$19,118.00 in the 40 weeks from 25 October 2023 to around 3 August 2024. That leaves an amount of \$12,855.39 plus superannuation.

Step 4

[143] I have considered the impact of taxation but have elected to settle a gross amount of \$12,855.39 plus superannuation and leave taxation for determination.

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

[144] If I am satisfied that misconduct of Ms Louie contributed to the employer's decision to dismiss, I am obliged by s.392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[145] Although I found Ms Louie committed a minor breach of her employment contract, I do not consider any amount of deduction appropriate in the circumstances of this case.

Compensation – how does the compensation cap apply?

[146] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

- (a) the amount worked out under s.392(6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

[147] Section 392(6) of the FW Act provides:

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

(a) the total amount of remuneration:

- (i) received by the person; or
- (ii) to which the person was entitled;

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

[148] The amount of \$12,855.39 plus superannuation is lower than the total remuneration Ms Louie received in the 26 weeks immediately before dismissal.

Is the level of compensation appropriate?

[149] 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.”¹⁵⁰

[150] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

COMPENSATION ORDERS

[151] Given my findings above, I will make orders that Project 88 must pay:

1. Ms McLeod \$18,525.00 less taxation as required by law, plus superannuation of \$2,037.75 to be paid into Ms McLeod’s nominated fund, with both payments to be made within 14 days of the date of this decision.
2. Ms Louie \$12,855.39 less taxation as required by law, plus superannuation of \$1,414.09 to be paid into Ms Louie’s nominated fund, with both payments to be made within 14 days of the date of this decision.



COMMISSIONER

Appearances:

Mr Dircks from Just Relations on behalf of the Applicants.

Mr Clarke of counsel instructed by MKW Legal on behalf of the Respondent.

Hearing details:

Via Teams 28, 29 June and 24 July 2023.

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¹ Employment contract, DCB page 50.

² Statement of Agreed Facts, DCB page 215.

- ³ Employment contract, DCB page 64.
- ⁴ Statement of Agreed Facts, DCB page 215.
- ⁵ Termination letter, DCB page 58.
- ⁶ Termination letter, DCB page 71.
- ⁷ Form F2, DCB page 5.
- ⁸ Form F2, DCB page 13.
- ⁹ DCB page 217 to 230.
- ¹⁰ Email from Commissioner Spencer's Chambers to the parties on 4 May 2023.
- ¹¹ Reflected by Transcript PN10 to PN15.
- ¹² Transcript has been sourced for all three hearing days.
- ¹³ Transcript PN344, PN731, PN1129 to PN1131, PN1770, PN1777, PN2713, PN2717 and PN 2719.
- ¹⁴ DCB page 215.
- ¹⁵ DCB page 45.
- ¹⁶ DCB page 49.
- ¹⁷ DCB page 50.
- ¹⁸ DCB page 58.
- ¹⁹ DCB page 79.
- ²⁰ Email to the Chambers of Commissioner Spencer dated 28 June 2023.
- ²¹ Email from Commissioner Spencer's Chambers to the parties on 13 July 2023.
- ²² Transcript at PN2556.
- ²³ Email from Commissioner Spencer's Chambers to the parties on 13 July 2023.
- ²⁴ DCB page 59.
- ²⁵ DCB page 63.
- ²⁶ DCB page 64.
- ²⁷ DCB page 68.
- ²⁸ DCB page 69.
- ²⁹ DCB page 70.
- ³⁰ DCB page 71.
- ³¹ DCB page 93.
- ³² DCB page 96.
- ³³ Email to the Chambers of Commissioner Spencer dated 28 June 2023.
- ³⁴ Email from Commissioner Spencer's Chambers to the parties on 13 July 2023.
- ³⁵ Email from Commissioner Spencer's Chambers to the parties on 13 July 2023.
- ³⁶ DCB page 72.
- ³⁷ Email to the Chambers of Commissioner Spencer dated 28 June 2023.
- ³⁸ Email from Commissioner Spencer's Chambers to the parties on 13 July 2023.
- ³⁹ Transcript PN34 and PN55.
- ⁴⁰ Transcript at PN2727.
- ⁴¹ Transcript at PN2727.
- ⁴² DCB page 163.
- ⁴³ DCB page 168.
- ⁴⁴ DCB page 176.
- ⁴⁵ The surname is identified as Huxham and Hudson in the material. It appears Mr Dircks clarified Huxson is the correct spelling in closing submissions: Transcript PN2762.

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- ⁴⁶ DCB page 177.
- ⁴⁷ DCB page 178.
- ⁴⁸ DCB page 179.
- ⁴⁹ DCB page 180.
- ⁵⁰ DCB page 181.
- ⁵¹ DCB page 192.
- ⁵² DCB page 195.
- ⁵³ DCB page 200.
- ⁵⁴ DCB page 201.
- ⁵⁵ DCB page 202.
- ⁵⁶ DCB page 203.
- ⁵⁷ DCB page 204.
- ⁵⁸ DCB page 205.
- ⁵⁹ DCB page 206.
- ⁶⁰ DCB page 207.
- ⁶¹ DCB page 182.
- ⁶² DCB page 184.
- ⁶³ DCB page 185.
- ⁶⁴ DCB page 208.
- ⁶⁵ DCB page 210.
- ⁶⁶ DCB page 211.
- ⁶⁷ DCB page 21.
- ⁶⁸ DCB page 33.
- ⁶⁹ DCB page 75.
- ⁷⁰ DCB page 89.
- ⁷¹ DCB page 161.
- ⁷² DCB page 190.
- ⁷³ Employment contract, DCB page 50.
- ⁷⁴ Employer F3 response, DCB page 130.
- ⁷⁵ DCB page 215.
- ⁷⁶ Ms McLeod was paid \$59,280 plus superannuation (DCB page 45) and Ms Louie \$624.38 per week plus superannuation (DCB page 59).
- ⁷⁷ Form F3s, DCB 104 and page 131.
- ⁷⁸ *Sayer v Melsteel Pty Ltd* [\[2011\] FWA 7498](#), [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRC FB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].
- ⁷⁹ DCB page 215.
- ⁸⁰ Ms McLeod stated Ms Holden is her mate during the meeting on 3 February 2023, Exhibit A11.1. This is also confirmed at Transcript PN473.
- ⁸¹ Transcript of meeting with Ms McLeod on 3 February 2023, Exhibit #11.1, Ms McLeod's Statement at [15] - Exhibit #1 - DCB page 46, Ms McLeod's Auxiliary Statement at [6] - Exhibit #2 - DCB page 79, Transcript PN584, PN589 and Mr Snee's Statement in Ms Louie's case at [10] - Exhibit #6 - DCB page 10.
- ⁸² Ms McLeod's Auxiliary Statement at [7], [10], [11], [13] - Exhibit #2 - DCB page 79, Transcript PN517, PN545 and PN584.
- ⁸³ Statement of Agreed Facts at [5], DCB page 215.
- ⁸⁴ Transcript PN374.

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- ⁸⁵ Transcript of meeting with Ms Louie on 3 February 2023 – Exhibit #10.1, Ms McLeod’s Statement at [17] – Exhibit #1 – DCB page 46, Transcript at PN634, Ms Louie’s Statement at [20] – Exhibit #3 – DCB page 60.
- ⁸⁶ Various places – e.g. Attachment SL 5 to Ms Louie’s statement - Exhibit #3 – DCB page 70.
- ⁸⁷ Ms Kocak’s Statement – DCB page 72 and 73, Form F3 for Ms McLeod’s application – DCB page 113, Form F3 for Ms Louie’s application - DCB page 137, Transcript at PN1162, PN1187, PN1188, PN1194 to PN1203, PN1300, PN1301, PN1302, PN1350, PN1353, PN1368 and PN1377.
- ⁸⁸ Transcript of meeting with Ms McLeod on 3 February 2023, Exhibit #11.1, Ms McLeod’s Auxiliary Statement at [7], [11], [12], [13] – Exhibit #2 – DCB pages 79 and 80, Transcript PN517, PN545, PN568.
- ⁸⁹ Transcript of meeting with Ms Louie on 3 February 2023 – Exhibit #10.1, Ms Louie’s Auxiliary Statement at [6] and [7] – Exhibit #4 – DCB page 93, Transcript at PN783, PN786, PN796 and PN798.
- ⁹⁰ Exhibit #10.1 and Exhibit #11.1.
- ⁹¹ Ms Kocak’s Statement – DCB page 72 and 73, Form F3 for Ms McLeod’s application – DCB page 113, Form F3 for Ms Louie’s application - DCB page 137, Transcript at PN1162, PN1187, PN1188, PN1194 to PN1203, PN1300, PN1301, PN1302, PN1350, PN1353, PN1368 and PN1377.
- ⁹² Ms Kocak’s Statement at [13] – DCB page 73.
- ⁹³ Exhibit #10.1.
- ⁹⁴ Exhibit #11.1.
- ⁹⁵ Exhibit #10.1 and Exhibit #11.1.
- ⁹⁶ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- ⁹⁷ *Ibid.*
- ⁹⁸ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ⁹⁹ *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- ¹⁰⁰ *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- ¹⁰¹ Attachment PF 1 to Ms McLeod’s Statement – Exhibit #1 – DCB page 58.
- ¹⁰² Attachment PF 2 to Ms Louie’s Statement – Exhibit #3 – DCB page 71.
- ¹⁰³ Attachment PF 1 to Ms McLeod’s Statement – Exhibit #1 – DCB page 58.
- ¹⁰⁴ Ms McLeod’s Auxiliary Statement at [7], [10], [11], [13] – Exhibit #2 – DCB page 79, Transcript PN517, PN545 and PN584.
- ¹⁰⁵ Transcript of meeting with Ms McLeod on 3 February 2023, Exhibit #11.1, Ms McLeod’s Auxiliary Statement at [7], [11], [12], [13] – Exhibit #2 – DCB pages 79 and 80, Transcript PN517, PN545, PN568.
- ¹⁰⁶ Ms Kocak’s Statement – DCB page 72 and 73, Form F3 for Ms McLeod’s application – DCB page 113, Form F3 for Ms Louie’s application - DCB page 137, Transcript at PN1162, PN1187, PN1188, PN1194 to PN1203, PN1300, PN1301, PN1302, PN1350, PN1353, PN1368 and PN1377.
- ¹⁰⁷ Exhibit #10.1 and Exhibit #11.1.
- ¹⁰⁸ Sections 333B, 333C and 333D of the FW Act.
- ¹⁰⁹ Attachment PF 2 of Ms Louie’s Statement – Exhibit #3 - DCB page 71.
- ¹¹⁰ Ms Louie’s Auxiliary Statement at [6] – Exhibit #4 – DCB page 93.
- ¹¹¹ Transcript of meeting with Ms Louie on 3 February 2023 – Exhibit #10.1, Ms Louie’s Auxiliary Statement at [6] and [7] – Exhibit #4 – DCB page 93, Transcript at PN783, PN786, PN796 and PN798.
- ¹¹² Ms Kocak’s Statement – DCB page 72 and 73, Form F3 for Ms McLeod’s application – DCB page 113, Form F3 for Ms Louie’s application - DCB page 137, Transcript at PN1162, PN1187, PN1188, PN1194 to PN1203, PN1300, PN1301, PN1302, PN1350, PN1353, PN1368 and PN1377.
- ¹¹³ Exhibit #10.1.
- ¹¹⁴ Exhibit #10.1.
- ¹¹⁵ Sections 333B, 333C and 333D of the FW Act.
- ¹¹⁶ Transcript PN1279.
- ¹¹⁷ *Bartlett v Ingleburn Bus Services Pty Ltd* [\[2020\] FWCFB 6429](#), [19]; *Reseigh v Stegbar Pty Ltd* [\[2020\] FWCFB 533](#), [55].

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- ¹¹⁸ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFCB 762](#), [46]-[49].
- ¹¹⁹ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.
- ¹²⁰ *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).
- ¹²¹ *Ibid.*
- ¹²² Exhibit #10.1.
- ¹²³ Exhibit #11.1.
- ¹²⁴ *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFCB 762](#), [46]-[49].
- ¹²⁵ *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFCB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- ¹²⁶ *RMIT v Asher* (2010) 194 IR 1, 14-15.
- ¹²⁷ *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- ¹²⁸ Exhibit #10.1 and Exhibit #11.1.
- ¹²⁹ Exhibit #10.1 and Exhibit #11.1.
- ¹³⁰ *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].
- ¹³¹ *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFCB 7198](#), [9].
- ¹³² *Vennix v Mayfield Childcare Ltd* [\[2020\] FWCFCB 550](#), [20]; *Jeffrey v IBM Australia Ltd* [\[2015\] FWCFCB 4171](#), [5]-[7].
- ¹³³ *He v Lewin* [2004] FCAFC 161, [58].
- ¹³⁴ Ms McLeod's Auxiliary Statement at [20] – Exhibit #2 – DCB page 80 and Mr Snee's Statement in Ms McLeod's case at [26] – Exhibit #5 – DCB page 166.
- ¹³⁵ Attachment SL 5 to Ms Louie's Statement – Exhibit #3 – DCB page 70.
- ¹³⁶ Transcript at PN467 and PN468.
- ¹³⁷ Exhibit #10.1.
- ¹³⁸ *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* [PR908053](#) (AIRCFCB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].
- ¹³⁹ *Biviano v Suji Kim Collection* [PR915963](#) (AIRCFCB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.
- ¹⁴⁰ (1998) 88 IR 21.
- ¹⁴¹ [\[2013\] FWCFCB 431](#).
- ¹⁴² *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [\[2016\] FWCFCB 7206](#), [16].
- ¹⁴³ *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].
- ¹⁴⁴ *Ibid.*
- ¹⁴⁵ *Enhance Systems Pty Ltd v Cox* [PR910779](#) (AIRCFCB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].
- ¹⁴⁶ *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [\[2016\] FWCFCB 7206](#), [17].
- ¹⁴⁷ *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFCB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].
- ¹⁴⁸ *Ibid.*
- ¹⁴⁹ *Enhance Systems Pty Ltd v Cox* [PR910779](#) (AIRCFCB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].
- ¹⁵⁰ *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [\[2016\] FWCFCB 7206](#), [17].